Enactment of No-Fault Divorce Law in New York

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SUMMARY: On August 15, 2010, Governor David Patterson signed into law New York's long-awaited no-fault divorce bill (L.2010, ch. 384). The bill was approved by the New York Senate on June 15, 2010 and by the state Assembly on July 1, 2010. The bill adds an additional ground to the existing divorce law, DRL § 170.

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ARTICLE: On August 15, 2010, Governor David Patterson signed into law New York's long-awaited no-fault divorce bill (L.2010, ch. 384). The bill was approved by the New York Senate on June 15, 2010 and by the state Assembly on July 1, 2010. The bill adds an additional ground to the existing divorce law, DRL § 170, to allow parties to seek a judgment of divorce when "the relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath."

In announcing the signing of the legislation, Governor Paterson commented that "[f]inally, New York has brought its divorce laws into the twenty-first century." Until now, New York was the only state without a no-fault option as a ground for divorce.

The no-fault ground for divorce adds to the already existing grounds for divorce in New York, which include cruel and inhuman treatment (DRL § 170(1)), abandonment (DRL § 170(2)), imprisonment (DRL § 170(3)), adultery (DRL § 170(4)), conversion based on a separation judgment (DRL § 170(5)) and conversion based on a separation agreement (DRL § 170(6)).

DRL § 170(7), the newly-enacted no-fault section, provides that a judgment of divorce may not be granted "unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce."

Two companion bills to the no-fault bill (L.2010, ch. 329 and L.2010, ch. 371), address the issues of temporary maintenance during the pendency of a divorce and interim counsel fees. Chapter 371 amends DRL § 236(B) to set forth a formula and list of factors governing temporary maintenance awards, and to amend the factors to be considered by the

court in awarding post-divorce maintenance. Chapter 329 amends DRL §§ 237 and 238 to create a rebuttable presumption that the court award interim counsel fees to the non-monied spouse during matrimonial actions, a practice often followed by courts, but not previously addressed specifically by statute.

The above-cited DRL amendments go into effect on October 12, 2010 and apply to matrimonial actions commenced on or after that date. Practitioners, judges and parties to divorce actions should anticipate a major change in how matrimonial actions are handled statewide. These long-anticipated and significant amendments to New York State's divorce and support laws are expected to engender emerging legal issues in case law decisions, further statutory amendments and revisions to the New York Code of Rules and Regulations. We will continue to monitor all such developments to ensure you have all the content necessary to effectively practice under these major changes.

Text of Affected Statutes

(Marked to Show Amendments)

Material that was added by the 2010 Legislation is italicized.

Material that was deleted by the 2010 Legislation appears with a line through it.

Domestic Relations Law

Domestic Relations Law § 170. Action for divorce

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

(2) The abandonment of the plaintiff by the defendant for a period of one or more years.

(3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.

(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and

acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

(7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

Domestic Relations Law § 236. Special controlling provisions; prior actions or proceedings; new actions or proceedings

Except as otherwise expressly provided in this section, the provisions of part A shall be controlling with respect to any action or proceeding commenced prior to the date on which the provisions of this section as amended become effective and the provisions of part B shall be controlling with respect to any action or proceeding commenced on or after such effective date. Any reference to this section or the provisions hereof in any action, proceeding, judgment, order, rule or agreement shall be deemed and construed to refer to either the provisions of part A or part B respectively and exclusively, determined as provided in this paragraph any inconsistent provision of law notwithstanding.

PART A

PRIOR ACTIONS OR PROCEEDINGS

Alimony, temporary and permanent.

1. Alimony. In any action or proceeding brought (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, the court may direct either spouse to provide suitably for the support of the other as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of each spouse to be self supporting, the circumstances of the case and of the respective parties. Such direction may require the payment of a sum or sums of money either directly to either spouse or to third persons for real and personal property and services furnished to either spouse, or for the rental of or mortgage amortization or interest payments, insurance, taxes, repairs or other carrying charges on premises occupied by either spouse, or for both payments to either spouse and to such third persons. Such direction shall be effective as of the date of the application therefor, and any retroactive amount of alimony due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary alimony which has been paid. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by either spouse (1) by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to either spouse in an action in which jurisdiction over the person of the other spouse was not obtained, or (2) by reason of the misconduct of the other spouse, unless such misconduct would itself constitute grounds for separation or divorce, or (3) by reason of a failure of proof of the grounds of either spouse's action or counterclaim. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to either spouse under this section with any amount payable to either spouse under section two hundred forty of this chapter. Upon the application of either spouse, upon such notice to the other party and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or by final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any

judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this chapter, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such support nunc pro tunc based on newly discovered evidence.

2. Compulsory financial disclosure. In all matrimonial actions and proceedings commenced on or after September first, nineteen hundred seventy-five in supreme court in which alimony, maintenance or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed by each party, within ten days after joinder of issue, in the court in which the procedure is pending. As used in this section, the term net worth shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

PART B

NEW ACTIONS OR PROCEEDINGS

Maintenance and distributive award.

1. Definitions. Whenever used in this part, the following terms shall have the respective meanings hereinafter set forth or indicated:

a. The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivision *subdivisions five-a and* six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph (b) of subdivision nine of section two hundred thirty-six of this part or section two hundred forty-eight of this chapter.

b. The term "distributive award" shall mean payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable either in a lump sum or over a period of time in fixed amounts. Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code.

c. The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

d. The term separate property shall mean:

(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;

(2) compensation for personal injuries;

(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;

(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

e. The term "custodial parent" shall mean a parent to whom custody of a child or children is granted by a valid agreement between the parties or by an order or decree of a court.

f. The term "child support" shall mean a sum paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

2. Matrimonial actions.

a. Except as provided in subdivision five of this part, the provisions of this part shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, commenced on and after the effective date of this part. Any application which seeks a modification of a judgment, order or decree made in an action commenced prior to the effective date of this part shall be heard and determined in accordance with the provisions of part A of this section.

b. With respect to matrimonial actions which commence on or after the effective date of this paragraph, the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this paragraph. The automatic orders shall be binding upon the plaintiff in a matrimonial action immediately upon the filing of the summons, or summons and complaint, and upon the defendant immediately upon the service of the automatic orders with the summons. The automatic orders shall remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows:

(1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

3. Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

4. Compulsory financial disclosure.

a. In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed with the clerk of the court by each party, within ten days after joinder of issue, in the court in which the proceeding is pending. As used in this part, the term "net worth" shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. All such sworn statements of net worth shall be accompanied by a current and representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns. In addition, both parties shall provide information relating to any and all group health plans available to them for the provision of care or other medical benefits by insurance or otherwise for the benefit of the child or children for whom support is sought, including all such information as may be required to be included in a qualified medical child support order as defined in section six hundred nine of the employee retirement income security act of 1974 including, but not limited to: (i) the name and last known mailing address of each party and of each dependent to be covered by the order; (ii) the identification and a description of each group health plan available for the benefit or coverage of the disclosing party and the child or children for whom support is sought; (iii) a detailed description of the type of coverage available from each group health plan for the potential benefit of each such dependent; (iv) the identification of the plan administrator for each such group health plan and the address of such administrator; (v) the identification numbers for each such group health plan; and (vi) such other information as may be required by the court. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

b. As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the

parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.

5. Disposition of property in certain matrimonial actions.

a. Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.

b. Separate property shall remain such.

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) the loss of health insurance benefits upon dissolution of the marriage;

(6) any award of maintenance under subdivision six of this part;

(7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(8) the liquid or non-liquid character of all marital property;

(9) the probable future financial circumstances of each party;

(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(11) the tax consequences to each party;

(12) the wasteful dissipation of assets by either spouse;

(13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(14) any other factor which the court shall expressly find to be just and proper.

e. In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity

between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

f. In addition to the disposition of property as set forth above, the court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty-four of this chapter, without regard to the form of ownership of such property.

g. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

h. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

5-a. Temporary maintenance awards. A. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.

(4) "Income" shall mean:

(a) Income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act; and

(b) Income from income producing property to be distributed pursuant to subdivision five of this part.

(5) "Income cap" shall mean up to and including five hundred thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand twelve and every two years thereafter, the payor's annual income amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (cpi-u) as published by the united states department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(6) "Guideline amount of temporary maintenance" shall mean the sum derived by the application of paragraph c of this subdivision.

(7) "Guideline duration" shall mean the durational period determined by the application of paragraph d of this subdivision.

(8) "Presumptive award" shall mean the guideline amount of the temporary maintenance award for the guideline duration prior to the court's application of any adjustment factors as provided in subparagraph one of paragraph e of this subdivision.

(9) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

c. The court shall determine the guideline amount of temporary maintenance in accordance with the provisions of this paragraph after determining the income of the parties:

(1) Where the payor's income is up to and including the income cap:

(a) The court shall subtract twenty percent of the income of the payee from thirty percent of the income up to the income cap of the payor.

(b) The court shall then multiply the sum of the payor's income up to and including the income cap and all of the payee's income by forty percent.

(c) The court shall subtract the income of the payee from the amount derived from clause (b) of this subparagraph.

(d) The guideline amount of temporary maintenance shall be the lower of the amounts determined by clauses (a) and (c) of this subparagraph; if the amount determined by clause (c) of this subparagraph is less than or equal to zero, the guideline amount shall be zero dollars.

(2) Where the income of the payor exceeds the income cap:

(a) The court shall determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to and including the income cap according to subparagraph one of this paragraph, and, for the payor's income in excess of the income cap, the court shall determine any additional guideline amount of temporary maintenance through consideration of the following factors:

(i) the length of the marriage;

(ii) the substantial differences in the incomes of the parties;

(iii) the standard of living of the parties established during the marriage;

(iv) the age and health of the parties;

(v) the present and future earning capacity of the parties;

(vi) the need of one party to incur education or training expenses;

(vii) the wasteful dissipation of marital property;

(viii) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(ix) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(x) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(xi) the availability and cost of medical insurance for the parties;

(xii) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;

(xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;

(xv) the tax consequences to each party;

(xvi) marital property subject to distribution pursuant to subdivision five of this part;

(xvii) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

(xviii) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(xix) any other factor which the court shall expressly find to be just and proper.

(b) in any decision made pursuant to this subparagraph, the court shall set forth the factors it considered and the reasons for its decision. Such written order may not be waived by either party or counsel.

(3) notwithstanding the provisions of this paragraph, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the presumptive amount of the guideline amount of temporary maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.

d. The court shall determine the guideline duration of temporary maintenance by considering the length of the marriage. Temporary maintenance shall terminate upon the issuance of the final award of maintenance or the death of either party, whichever occurs first.

e. (1) the court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award of temporary maintenance accordingly based upon consideration of the following factors:

(a) the standard of living of the parties established during the marriage;

(b) the age and health of the parties;

(c) the earning capacity of the parties;

(d) the need of one party to incur education or training expenses;

(e) the wasteful dissipation of marital property;

(f) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(g) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(h) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(i) the availability and cost of medical insurance for the parties;

(j) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;

(k) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(l) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;

(m) the tax consequences to each party;

(n) marital property subject to distribution pursuant to subdivision five of this part;

(o) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

(p) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(q) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the presumptive award of temporary maintenance is unjust or inappropriate and the court adjusts the presumptive award of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written order, the amount of the unadjusted presumptive award of temporary maintenance, the factors it considered, and the reasons that the court adjusted the presumptive award of temporary maintenance. Such written order shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the unrepresented party or parties have been informed of the presumptive award of temporary maintenance.

f. A validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced after the effective date of this subdivision presented to the court for incorporation in an order shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the presumptive award provided for therein results in the correct amount of temporary maintenance. In the event that such agreement or stipulation deviates from the presumptive award of temporary maintenance, the agreement or stipulation must specify the amount that such presumptive award of temporary maintenance would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the presumptive award of temporary maintenance provided such agreements or stipulations comply with the provisions of this subdivision. The court shall, however, retain discretion with respect to temporary, and post-divorce maintenance awards pursuant to this section. Any court order incorporating a validly executed agreement or stipulation which deviates from the presumptive award of temporary maintenance shall set forth the court's reasons for such deviation.

g. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

h. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

i. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in this subdivision.

6. Maintenance. *Post-divorce maintenance awards.*

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

(2) the duration *length* of the marriage *and ;*

(3) the age and health of both parties;

(3) *(4)* the present and future earning capacity of both parties;

(4) *(5) the need of one party to incur education or training expenses;*

(6) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(7) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

(5) *(9)* reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

(6) *(10)* the presence of children of the marriage in the respective homes of the parties;

(7) *(11) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;*

(12) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;

(14) the tax consequences to each party;

(8) *(15) the equitable distribution of marital property;*

(16) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(9) *(17)* the wasteful dissipation of marital property by either spouse;

(10) any (*18) the* transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(11) *(19)* the loss of health insurance benefits upon dissolution of the marriage, *and the availability and cost of medical insurance for the parties*; and

(12) *(20)* any other factor which the court shall expressly find to be just and proper.

b. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph (b) *b* of subdivision nine of section two hundred thirty-six of this part or section two hundred forty-eight of this chapter.

d. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision.

6-a. Law revision commission study. A. The legislature hereby finds and declares it to be the policy of the state that it is necessary to achieve equitable outcomes when families divorce and it is important to ensure that the economic consequences of a divorce are fairly shared by divorcing couples. Serious concerns have been raised that the implementation of New York State's maintenance laws have not resulted in equitable results. Maintenance is often not granted and where it is granted, the results are inconsistent and unpredictable. This raises serious concerns about the ability of our current maintenance laws to achieve equitable and fair outcomes.

The legislature further finds a comprehensive review of the provisions of our state's maintenance laws should be

undertaken. It has been thirty years since the legislature significantly reformed our state's divorce laws by enacting equitable distribution of marital property and introduced the concept of maintenance to replace alimony. Concerns that the implementation of our maintenance laws have not resulted in equitable results compel the need for a review of these laws.

b. The law revision commission is hereby directed to:

(1) review and assess the economic consequences of divorce on the parties;

(2) review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities, and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple; and

(3) make recommendations to the legislature, including such proposed revisions of such laws as it determines necessary to achieve these goals and objectives.

c. The law revision commission shall make a preliminary report to the legislature and the governor of its findings, conclusions, and any recommendations not later than nine months from the effective date of this subdivision, and a final report of its findings, conclusions and recommendations not later than December thirty-first, two thousand eleven.

7. Child support.

a. In any matrimonial action, or in an independent action for child support, the court as provided in section two hundred forty of this chapter shall order either or both parents to pay temporary child support or child support without requiring a showing of immediate or emergency need. The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of either or both parents may be unavailable. Where such information is available, the court may make an order for temporary child support pursuant to section two hundred forty of this article. Such order shall, except as provided for herein, be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support. The court shall not consider the misconduct of either party but shall make its award for child support pursuant to section two hundred forty of this article.

b. Notwithstanding any other provision of law, any written application or motion to the court for the establishment of a child support obligation for persons not in receipt of family assistance must contain either a request for child

support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section five thousand two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought. Unless the party receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

c. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

d. Any child support order made by the court in any proceeding under the provisions of this section shall include, on its face, a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order upon a showing of:

(i) a substantial change in circumstances; or

(ii) that three years have passed since the order was entered, last modified or adjusted; or

(iii) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out of subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply.

8. Special relief in matrimonial actions.

a. In any matrimonial action the court may order a party to purchase, maintain or assign a policy of insurance providing benefits for health and hospital care and related services for either spouse or children of the marriage not to exceed such period of time as such party shall be obligated to provide maintenance, child support or make payments of a distributive award. The court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of the spouse's duty to provide maintenance, child support or a distributive award. A copy of such order shall be served, by registered mail, on the home office of the insurer specifying the name and mailing address of the spouse or children, provided that failure to so serve the insurer shall not affect the validity of the order.

b. In any action where the court has ordered temporary maintenance, maintenance, distributive award or child support, the court may direct that a payment be made directly to the other spouse or a third person for real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse, or for both payments to the other spouse and to such third persons. Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by the other spouse.

c. Any order or judgment made as in this section provided may combine any amount payable to either spouse under this section with any amount payable to such spouse as child support or under section two hundred forty of this chapter.

9. Enforcement and modification of orders and judgments in matrimonial actions.

a. All orders or judgments entered in matrimonial actions shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules, or in any other manner provided by law. Orders or judgments for child support, alimony and maintenance shall also be enforceable pursuant to article fifty-two of the civil practice law and rules upon a debtor's default as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of the civil practice law and rules. The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of the civil practice law and rules. For the purposes of enforcement of child support orders or combined spousal and child support orders pursuant to section five thousand two hundred forty-one of the civil practice law and rules, a "default" shall be deemed to include amounts arising from retroactive support. The court may, and if a party shall fail or refuse to pay maintenance, distributive award or child support the court shall, upon notice and an opportunity to the defaulting party to be heard, require the party to furnish a surety, or the sequestering and sale of assets for the purpose of enforcing any award for maintenance, distributive award or child support and for the payment of reasonable and necessary attorney's fees and disbursements.

b. *(1)* Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to section two hundred forty of this article, including financial hardship. Where, after the effective date of this part, a separation agreement remains in force no modification of a prior order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. Provided, however, that no modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support. The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to section two hundred forty-four of this chapter *article*. No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision. Such modification may increase maintenance or child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of maintenance, or child support due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. Any retroactive amount of child support due shall be support arrears/past due support. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two

hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.

(2) (i) The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.

(ii) In addition, unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where:

(a) Three years have passed since the order was entered, last modified or adjusted; or

(b) There has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience.

(iii) No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support. Such modification may increase child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of child support due shall, except as provided for in this subparagraph, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. Any retroactive amount of child support due shall be support arrears/past due support. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an immediate execution for support enforcement as provided for by this chapter, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support.

c. Notwithstanding any other provision of law, any written application or motion to the court for the modification or enforcement of a child support or combined maintenance and child support order for persons not in receipt of family assistance must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section five thousand two hundred forty-two of the

civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party ordered to pay child support to the other party. Unless the party receiving child support or combined maintenance and child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

d. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

Editor's Note: The above statutory changes to DRL § 236 include those made by L.2010, ch. 182, the "Low Income Support Obligation and Performance Improvement Act", relating to child support, in addition to changes made by L.2010, ch. 329 and L.2010, ch. 371.

Domestic Relations Law § 237. Counsel fees and expenses

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, or (5) *to obtain maintenance or distribution of property following a foreign judgment of divorce, or (6)* to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse or, where an action for annulment is maintained after the death of a spouse, may direct the person or persons maintaining the action, to pay such sum or sums of money *counsel fees and fees and expenses of experts* directly to the attorney of the other spouse to enable that spouse *the other party* to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment; provided, however, such direction shall be made prior to final judgment where it is shown that such order is required to enable the petitioning party to properly proceed *There shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses*. Any applications for counsel fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding. *Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.*

(b) Upon any application to *enforce,* annul or modify an order or judgment for alimony, *maintenance, distributive award, distribution of marital property* or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty *of this article* provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay such sum or sums of money for the prosecution or the defense of *counsel fees and fees*

and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. With respect to any such application or proceeding, such direction may be made in the order or judgment by which the particular application or proceeding is finally determined, or by one or more orders from time to time before the final order or judgment, or by both such order or orders and the final order or judgment *There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement, between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses*. Any applications for counsel fees and expenses may be maintained by the attorney for either spouse in counsel's own name in the same proceeding. Representation by an attorney pursuant to paragraph (b) of subdivision nine of section one hundred eleven-b of the social services law shall not preclude an award of counsel fees to an applicant which would otherwise be allowed under this section. *Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.*

(c) In any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to the attorney representing the petitioner.

(d) The term "expenses" as used in subdivisions (a) and (b) of this section shall include, but shall not be limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses that the court may determine to be necessary to enable a spouse to carry on or defend an action or proceeding under this section. In determining the appropriateness and necessity of fees, the court shall consider:

1. The nature of the marital property involved;

2. The difficulties involved, if any, in identifying and evaluating the marital property;

3. The services rendered and an estimate of the time involved; and

4. The applicant's financial status.

Domestic Relations Law § 238. Expenses in enforcement *and modification* proceedings

In any action or proceeding to compel the payment of any sum of money required to be paid by *enforce or modify any provision of* a judgment or order entered in an action for divorce, separation, annulment or, declaration of nullity of a void marriage, *declaration of validity or nullity of a judgement of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, or an injunction restraining the prosecution in any other jurisdiction of an action for a divorce*, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six *of this article*, the court may in its discretion require either party to pay the expenses of the other in bringing, carrying on, or defending such action or proceeding *counsel fees and fees and expenses of experts directly to the attorney of the other party to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse*. In any such action or proceeding, applications for counsel fees and expenses may be maintained by the attorney

for the respective parties in counsel's own name and in counsel's own behalf. *In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceeding and their representative attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.*

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2 of 42 DOCUMENTS

When a Same Sex Partner is a "Parent" Required to Pay Child Support

2010 Emerging Issues 5333

When a Same Sex Partner is a "Parent" Required to Pay Child Support

By Ellen B. Holtzman and Meryl R. Neuren

September 30, 2010

SUMMARY: This Emerging Issues Analysis analyzes (1) whether Family Court has subject matter jurisdiction to adjudicate whether a former same sex partner who has no biological or adoptive ties to a child should be chargeable with paying support and (2) whether this former same sex partner should be ordered to pay child support based on the implied promise-equitable estoppel doctrine.

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ARTICLE: When a Same Sex Partner is a "Parent" Required to Pay Child Support

Does Family Court have subject matter jurisdiction to adjudicate whether a former same sex partner, who has no biological or adoptive ties to a child, should be chargeable with paying support? Should this former same sex partner be ordered to pay child support based on the implied promise-equitable estoppel doctrine? In Matter of H.M. v E.T., a case of first impression in New York State, the Court of Appeals determined the first issue in the affirmative *14 NY3d 521, 930 NE 2d 206, 904 NYS2d 285 (2010)* and sent the second issue back to the Appellate Division Second Department to address. The Second Department held that the implied promise-equitable estoppel doctrine can be applied to this case *906 NYS2d 85 (2nd Dept. 2010).*

The facts alleged by the biological mother H.M., which are deemed to be true at this stage of the litigation, are of particular import here as they highlight the agreed upon plans of H.M. and E.T. to conceive and raise a child together and demonstrate the depth of their relationship:

- H.M. and E.T. cohabited together in a five year five month same sex monogamous relationship from August 1989 through January 1995.
- H.M. and E.T. together devised a plan to conceive and raise a child. They discussed methods of conception and child rearing practices. They discussed such topics as whether this child would be raised as a sibling of E.T.'s children from a prior relationship and what the child would call each parent.
- E.T. performed the artificial insemination on H.M. in 1993 on their bed.
- E.T. was present when H.M. gave birth to a son on September 20, 1994. E.T. cut the umbilical cord and welcomed the child into the world.
- E.T. shared the costs associated with this conception and birth.
- Pursuant to a verbal agreement between the parties, during their five year five month relationship H.M. stayed home

to watch E.T.'s children from a prior marriage while E.T. completed her chiropractic studies. After E.T. became a chiropractor, H.M. was to return to school to obtain a degree in social work.

- Both E.T. and H.M. participated in the care of this son (hereafter referred to as "Ryan M").
- E.T. abruptly ended the relationship with H.M. in January 1995 (four months after the birth of Ryan M). The parties made an unsuccessful attempt to reconcile in 1997.
- E.T. continued, *albeit* at unspecified times, to provide gifts and monetary contributions for the child's care. However, E.T. flatly refused H.M.'s repeated requests for child support.

THE ISSUE OF SUBJECT MATTER JURISDICTION

The Court of Appeals held that under New York law Family Court Act Article 4 confers jurisdiction because it charges "the parents of a child" under the age of 21 years with support. *14 NY3d 521, 930 NE 2d 206, 904 NYS2d 285 (2010).* The Family Court does have jurisdiction to determine an individual's support obligation regardless of gender. The Court of Appeals reasons:

Thus, because Family Court unquestionably has the subject matter jurisdiction to ascertain the support obligations of a female parent, Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent. *14 NY3d at 527.*

In other words, in a same sex female scenario such as in this case, subject matter jurisdiction is conferred on the Family Court simply because the issue is one of child support. Thereafter, the issue of whether a female partner is a child's parent can be determined.

The Court of Appeals zeroes in on New York State underlying public policy which requires individuals, regardless of gender, to be financially responsible for their children.

The Court of Appeals further reasons that if Family Court has concurrent jurisdiction with the Supreme Court over child support matters and the Supreme Court would have jurisdiction over this case then Family Court should have jurisdiction too.

In so holding, the Court of Appeals reversed the Second Department. The Second Department had followed the reasoning of the Support Magistrate, in her dismissal of the petition, by focusing on the plain language of Article 5 of the Family Court Act, which clearly and unambiguously provides only for "paternity proceedings" (adjudication of a male's fatherhood of a child) *65 AD3d 119, 881 NYS2d 113 (2nd Dept. 2009).* n1 The Second Department, upholding the Support Magistrate, reasoned that Family Court Act Article 5 does not have any provision dealing with an action between a birth mother and her former same sex partner's parentage of a child. The Second Department, like the Support Magistrate, further noted that the Family Court is a court of limited subject matter jurisdiction and even though equitable considerations might lead to a conclusion that E.T. be found a parent of the child chargeable with support, granting equitable relief is outside the purview of Family Court. The Second Department noted that H.M. is not without a remedy. She can seek redress in the Supreme Court.

Justice Smith's concurrence in the Court of Appeal's decision advocates that since public policy fosters legitimacy of children, a "bright-line" rule should be applied in cases where a child is conceived through artificial insemination (ADI) by one member of the same sex couple living together, with the knowledge and consent of the other. In these cases, as matter of law, in the absence of extraordinary circumstances, the child should be recognized as the offspring of both parents. Justice Smith recognizes the limitations of his opinion by stating that this "bright- line" rule is only applicable to lesbian couples because ADI is not possible for male couples. n2

THE ISSUE OF EQUITABLE ESTOPPEL AND IMPLIED CONTRACT

The Court of Appeals remits the case back to the Second Department "for consideration of questions raised but not determined on appeal to that court"; to wit, the issue of the application of the doctrine of equitable estoppel/implied

contract. *14 NY3d 521, 528.*

On remittance, the Second Department unanimously holds that the equitable estoppel doctrine can be applied to this situation because: a) the doctrine of equitable estoppel has long been invoked to require a putative father to pay support, b) the best interests of the child are the paramount concern, c) if it is in the best interests of the child to apply the principles of equitable estoppel then is should be applied , and d) the court has used both the concepts of equitable estoppel and implied contracts to hold a party responsible to pay child support pursuant to Family Court Act Article 4 in the absence of a biological or adoption conception where parties agree to adopt or cause conception through artificial insemination and where the child is conceived in reliance upon the partner's promise to support the child. *906 NYS2d 85 (2nd Dept 2010).*

In rendering its decision the Second Department affirms the Family Court Judge's decision (which it had originally reversed) rendered after H.M. filed objections from the Support Magistrate's dismissal. The Family Court did not become immersed in the literal language of Family Court Act Article 5 and reasoned that the doctrine of equitable estoppel and implied contract can be used in the best interests of the child to establish E.T. as a *de facto* parent chargeable with support of Ryan M. n3 *16 Misc3d 1136A, 851 NYS2d 58 (Fam Ct. Rockland Cty 2007).*

On this basis, the Second Department concludes that sufficient allegations have been raised by H.M.'s petition to warrant a hearing in Family Court on the issue of whether E.T. should be equitably estopped from denying her responsibility to support Ryan M.

AFTERMATH

The Court of Appeals' and Second Department's decisions reaffirm the basic precept that it is the best interests of a child that prevail. These decisions implicitly uphold the principle that it is not in the best interests of children to be brought into the world and then abandoned financially but rather that it is in the best interest of a child to begin life with two parents, both of whom have an obligation to support the child, no matter what happens to their relationship with each other after the birth of the child.

So where do we go from here? What happens when the same sex couple are males since ADI is not an option? When dealing with same sex couples, is Article 5 not invoked at all and if so doesn't that make a distinction between heterosexual and same sex couples? Isn't it unfair to provide a forum to determine if a same sex partner without biological or adoptive ties to a child must pay child support, yet to deny that same sex partner a forum in which to have the rights of custody and/or parenting time with the child determined? n4 These seemingly diametrically positions will, undoubtedly, result in more litigation.

Return to Text

n1 In 2006 H.M. (a Canadian citizen) filed an application in Canada, where she has been residing with her parents and Ryan M. since the parties separation, seeking a declaration of parentage and order of child support from E.T., a resident of Rockland County, New York. Pursuant to the Uniform Interstate Family Support Act (hereinafter referred to as "UIFSA"), the application was transferred to Family Court Rockland County.

n2 The dissent maintains that the majority's interpretation of "parent" under the Family Court Article 4 is too broad. Its interpretation is inconsistent with the definition of "parent" in Black's Law Dictionary as a

biological, adoptive, a child's putative blood parent who acknowledges paternity, or an individual/agency that is the guardian of the of the child by judicial decree. The dissent agrees with the Second Department's Family Court Act Article 5 analysis.

n3 The Family Court sent the case back to the Support Magistrate for a hearing. After a hearing, the Support Magistrate issued an order dated March 25,2008 concluding that E.T. was estopped from denying her responsibility for support of Ryan M., adjudicated her a parent of Ryan M. for purposes of child support and in an order dated February 9, 2009, set E.T.'s monthly child support obligation and an amount for arrears.

n4 *See* Debra H. v. Janice R. 14 NY3d.576, 930 *NE2d 184, 904 NYS2d 263 (2010); Matter of Alison D. v. Virginia M. 155 AD2d 11, 552 NYS2d 321* aff'd *77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 (1991).*

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Heinle and La Vita on Gill v. Office of Personnel Management

2010 Emerging Issues 5318

Heinle and La Vita on Gill v. Office of Personnel Management: the downfall of DOMA?

By Teresa M. Harkins La Vita and Calvin Heinle

September 23, 2010

SUMMARY: This Emerging Issues Analysis analyzes the District Court's ruling in Gill v. Office of Personnel Management. The author addresses the impact that this decision, out of the United States District Court in Massachusetts, may have on the future of the Defense of Marriage Act (DOMA). Ultimately the author concludes that the future depends upon how the case progresses through the appeals process.

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ARTICLE: In 2009, Gay and Lesbian Advocates and Defenders ("GLAD") filed suit in the United States District Court in Massachusetts challenging the constitutionality of Section 3 of the Defense of Marriage Act n1 ("DOMA") on behalf of various petitioners. The Department of Justice ("DOJ") defended the action on behalf of the government.

The case was ultimately tried before Judge Joseph Tauro, who has served on the United States District Court since his appointment to the bench by President Richard M. Nixon in 1972. GLAD represented petitioners n2 whose same-sex marriages were recognized as valid in their home states, including Massachusetts, but were denied recognition at the federal level. The petitioners argued that Section 3 of DOMA violated the Equal Protection clause of the Constitution in denying their marriages equal recognition under the law. Underlying the claims were the denial of federal benefits to these same-sex couples (or widows of a same-sex marriage) that were otherwise available to members of opposite sex marriages.

After hearing and consideration, the Honorable Judge Joseph Tauro held in Gill v. Office of Personnel Management n3 that Section 3 of DOMA, as applied to the Plaintiffs in that case, violated core principles of equal protection secured in the Fifth Amendment of the United States Constitution. n4 In reaching this momentous conclusion, the Court declined to apply a strict scrutiny review of DOMA as requested by the Plaintiffs. n5 Instead, the Court conducted a rational basis analysis, a standard of constitutional review wherein a law is upheld if it bears a rational relationship to a legitimate government interest. n6 A law will not pass a rational basis review if the government's classifications are arbitrary or irrational, n7 or if the government's objectives do not comport with its treatment of other similarly-situated groups of persons in relevant respects. n8

To determine the existence of a legitimate government interest in the enactment and preservation of DOMA, the Court reviewed in detail the purpose and legislative history of that statute. n9 The Court touched upon and struck as

inadequate each of the initial interests which Congress sought to address by enacting DOMA. n10 Next, the Court addressed each of the government's current justifications for DOMA, including the alleged need for a "uniform" definition of marriage. n11

Relying on the adage that "domestic relations is the exclusive province of the states," n12 the Court embarked on a review of this country's treatment of marriage, n13 analogizing the current debate over same-sex marriage to the debate over interracial marriage which ended in 1967. n14 The Court correctly pointed out that the enactment of DOMA was the first and only time the legislative branch of the federal government interceded into the realm of state domestic relations authority n15 by passing legislation to mandate a uniform definition for the term "marriage." n16 In striking down the government's alleged legitimate interests, the Court noted that in providing federal benefits based on marital status, "the federal government [] recognizes any heterosexual marriage, which a couple has validly entered pursuant to the laws of the state that issued the license." n17 Therefore, the federal government had clearly already accepted that married couples are a similarly-situated class of persons. n18 DOMA complicated this simple concept by taking the class of similarly-situated married persons and dividing it in two, one group whose marriages were valid for federal purpose and one group whose marriages were not valid. n19 The Court explained that "to further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning." n20 Ultimately, the Court was convinced that the government's stated goals in justifying DOMA bore no rational relationship to any legitimate government interest, n21 and found that "DOMA fails to pass constitutional muster even under the highly deferential rational basis test." n22

As for the impact of DOMA on federal benefits implicated in this case, n23 including various health benefits based on federal employment, n24 multiple Social Security benefits, n25 and the ability to file joint federal income tax returns, n26 the Court determined that DOMA "denied to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy." n27 In the end, it was the Court's opinion that DOMA was enacted to disadvantage same-sex couples, a group of which Congress disapproved, and that "the Constitution clearly will not permit" n28 such an action.

In sum, the Court in Gill v. Office of Personnel Management held that Section 3 of DOMA, as applied to the Plaintiffs, violates principles of equal protection. n29 This conclusion was reached after the Court's extensive rational basis analysis of the constitutionality of DOMA, wherein the Court found that the government's stated goals in justifying DOMA bore no rational relationship to any legitimate government interest in the preservation of that statute. n30

Judge Tauro's decision issued on July 8, 2010, and formal judgment was entered on August 12, 2008. In an Amended Judgment entered on August 17, 2010, the Court, *inter alia*, allowed the Plaintiffs' Motion for Summary Judgment, declared the rights of each Plaintiff and awarded them costs, and ordered each of the Defendants to perform certain tasks in light of the Court's decision. n31 However, the DOJ filed a motion to stay the Judgment pending appeal, to which GLAD did not object, and on August 17, 2010 the Court entered an Order to stay the Judgment. n32 As such, the ruling in Gill v. OPM has not yet gone into effect. The DOJ has sixty (60) days following the Amended Judgment in which to file an appeal in the United States Court of Appeals for the First Circuit. n33

The decision of whether to appeal the Gill v. OPM ruling rests upon the DOJ and the Obama administration, who must carefully weigh the pros and cons of any such appeal. At the time of publication of this article, it is unknown whether the DOJ will file an appeal. President Obama has been vocal in his support for the repeal of DOMA, n34 and with mid-term elections looming only six weeks away, practitioners can expect dialogue - if not action - on DOMA as the clock ticks on the DOJ's window for appeal. If the ruling is not appealed, the Judgment will take effect at the expiration of the sixty (60) day appeal period, and Section 3 of DOMA will be unenforceable in Massachusetts. n35 If the ruling is appealed and upheld by the First Circuit, it will have precedential value in all the states within the jurisdiction of the First Circuit. n36 Whether these cases will eventually reach the Supreme Court is uncertain, but all practitioners should be aware that Gill v. OPM and its companion case have the potential to drastically change American law as we know it.

Return to Text

n1 *1 U.S.C. § 7.* "[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."

n2 Biographical information obtained generally from www.glad.org and *Gill v. Office of Personnel Management, 699 F. Supp. 2d 374, 2010 U.S. Dist. LEXIS 67874* (D.Mass. July 8, 2010).

n3 See *Gill v. Office of Personnel Management, 699 F. Supp. 2d 374, 2010 U.S. Dist. LEXIS 67874* (D.Mass. July 8, 2010), decided on the same day as companion case Massachusetts v. United States HHS, No. 09-cv-11156-*JLT, 2010 U.S. Dist. LEXIS 67927* (D.Mass. July 8, 2010) (brought by Martha Coakley, the Attorney General of Massachusetts, as a challenge to the constitutionality of DOMA as violating of the Tenth Amendment; held, DOMA is unconstitutional by operation of the Tenth Amendment and the Spending Clause).

n4 *Gill, supra at 377,* citing *Bolling v. Sharpe, 347 U.S. 497, 499 (1954),* which explains that the Fifth Amendment's Due Process Clause contains and Equal Protection component by way of the Fourteenth Amendment. See also *Gill, supra at 387.*

n5 *Gill, supra at 387.*

n6 *Gill, supra at 386,* citing *Romer v. Evans, 517 U.S. 620, 631 (1996)* (internal citations omitted).

n7 *Gill, supra at 388,* citing *City of Cleburne v. Cleburne Living Ctr., 472 U.S. 432, 447 (1985).*

n8 *Gill, supra at 388,* citing *Bd. Of Trs. Of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001)* (internal citations omitted).

n9 *Gill, supra at 377-379.*

n10 *Gill, supra at 388-390.* These interests include: 1) encouraging procreation, 2) defending traditional heterosexual marriage, 3) defending morality, and 4) preserving scarce government resources.

n11 *Gill, supra at 391.* The government's other stated interests in defending DOMA were to: 1) preserve the "status quo" pending resolution of the debate over same-sex marriage, 2) provide nationwide consistency in the distribution of federal benefits, and 3) ease the administrative burden to federal agencies in dealing with varying state definitions of marriage. See generally *Gill, supra.*

n12 *Gill, supra at 391,* citing *Elk Grove United Sch. Dist. V. Newdow, 542 U.S. 1, 12 (2004)* (internal citations omitted).

n13 *Gill, supra at 391-392.*

n14 *Gill, supra at 392,* citing *Loving v. Virginia, 388 U.S. 1 (1967).*

n15 *Gill, supra at 391,* citing companion case Massachusetts v. United States HHS, No. 09-cv-11156-*JLT, 2010 U.S. Dist. LEXIS 67927* (D.Mass. July 8, 2010).

n16 *Gill, supra at 392.*

n17 *Gill, supra at 394.*

n18 *Gill, supra at 395.*

n19 *Gill, supra at 395.*

n20 *Gill, supra at 396.*

n21 *Gill, supra at 390.*

n22 *Gill, supra at 387.*

n23 These programs represent some of the 1,138 different federal laws which grant benefits, protections, rights or responsibilities to persons based on marital status. See *Gill, supra at 379* and *Gill, supra at 395.*

n24 Specifically, benefits conferred under the Federal Employees Health Benefits Program, the Federal Employees Dental and Vision Insurance Program, and the Flexible Spending Arrangement Program. See *Gill, supra at 380-381*.

n25 Including Social Security Retirement Benefits and Social Security Survivor Benefits, such as Lump-Sum Death Benefits and Widower's Insurance benefits. See *Gill, supra at 382-383.*

n26 *Gill, supra at 383.*

n27 *Gill, supra at 394.*

n28 *Gill, supra at 396.*

n29 *Gill, supra at 387.*

n30 *Gill, supra at 390.*

n31 Gill v. Office of Personnel Management, No. 09-cv-10309-JLT, (D.Mass. August 17, 2010) (Tauro, J.).

n32 Lesbian/Gay Law Notes, p. 136 (Prof. Art Leonard et al., September 2010 ed., Lesbian and Gay Law Association Foundation of Greater New York 2010).

n33 Id.

n34 http://www.barackobama.com/pdf/lgbt.pdf (as of September 19, 2010).

n35 Lesbian/Gay Law Notes, supra at 136.

n36 Id at 137.

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Information referenced herein is provided for educational purposes only. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

4 of 42 DOCUMENTS

Perry v. Schwarzenneger Resurrects Right of Marriage for Same-Sex Couples

2010 Emerging Issues 5273

Perry v. Schwarzenneger Resurrects Right of Marriage for Same-Sex Couples

By Diana Richmond Esq.

August 19, 2010

SUMMARY: In December 2010, the 9th Circuit Court of Appeals will decide whether same-sex couples can marry in California. The U.S. District Court ruled it unconstitutional to deny same-sex couples the same right to marry as opposite-sex couples. The 9th circuit has specifically asked that the issue of standing of the proponents of the initiative be addressed. Meanwhile a stay prevents marriage in California for same-sex couples.

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ARTICLE: California's Proposition 8, limiting marriage to opposite-sex couples, violates both the Due Process and Equal Protection clauses of the U.S. Constitution, ruled U.S. District Court Judge Vaughn Walker on August 4, 2010. Relying on an extensive factual record laid by the plaintiff same-sex couples who wished to marry, a limited factual presentation by the Proponents of Proposition 8, and no defense or evidence propounded by the defendant California state officials, the trial court issued 80 detailed factual findings in addition to its legal conclusions. The court found no rational basis for upholding the limitation on marriage to opposite-sex couples.

The trial court found that Plaintiffs had demonstrated by "overwhelming evidence" that Proposition 8 violated their constitutional rights, perpetuating a stigma against gays and lesbians. Evidence at trial of the Proposition campaign television and print ads was used successfully to demonstrate that the Proponents sought to perpetuate stereotypes that same-sex relationships are inferior to opposite-sex relationships.

While it was widely anticipated that the trial court's ruling would simply be a lead-up to an inevitable appeal to the U.S. Supreme Court, several factors now cast that future in doubt. The defendant officials of the State of California declined to mount a defense at trial and opposed the imposition of a stay of enforcement of the trial court injunction. In its order denying a stay beyond August 18, 2010, the trial judge expressed doubt as to whether the Proponents had standing to take an appeal. The proponents' intervention in the trial court did not confer standing to appeal, and the trial court cited *Arizonans for Official English (1997) 520 U.S. 43, 67*, in which the U.S. high court expressed "grave doubts" that initiative proponents had independent standing to defend the constitutionality of an initiative. (The Arizona case, like this one, entailed an affected plaintiff, a State that declined to defend the initiative, and political proponents defending the initiative. The U.S. Supreme Court mooted the case as having no case or controversy when the plaintiff left her state employment.)

On August 16, 2010, a three-justice panel of the Ninth Circuit Court of Appeals (Justices Edward Leavy, Michael Daly Hawkins and Sidney R. Thomas) granted a stay pending the appeal and expedited briefing and hearing schedule. The appeal will be calendared during the week of December 6, 2010 in San Francisco. The Proponents were directed by the Ninth Circuit to address the issue of why their appeal should not be dismissed for lack of standing under Arizonans for Official English.

History of the Marriage Controversy in California

Recent efforts for same-sex couples to gain the right to marry began in February 2004, when San Francisco Mayor Gavin Newsom instructed county officials to issue marriage license to same-sex couples. A month later, the California Supreme Court nullified those licenses and ruled that county officials lacked the authority to change state law. *Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055, 95 P3d 459.* There followed several lawsuits challenging the constitutionality of the California Family Code provisions limiting marriage to opposite-sex couples, which lawsuits were coordinated, tried and appealed to the state Supreme Court, resulting in the ruling that the state statute violated the equal protection provisions of the *California Constitution. In re Marriage Cases (2008) 43 Cal.4th 757, 189 P3d 384.* The voter initiative known as Proposition 8 sought to change the state constitution to limit marriage to opposite-sex couples. It passed in November 2008 with 52% of the popular vote. Between June 17, 2008 and the enactment of Proposition 8 in early November 2008, some 18,000 marriage licenses were issued to same-sex couples. Thereafter, opponents of Proposition 8 challenged its constitutionality under the state constitution; the California Supreme Court ruled that Proposition 8 was constitutionally valid but upheld the validity of the 18,000 marriages performed prior to its enactment.

Unlike all of the prior litigation, the Perry case was premised on a challenge under the U.S. Constitution, both as a violation of the fundamental right of marriage under the Due Process Clause of the Fourteenth Amendment and as a violation of equal protection under the Fourteenth Amendment. Plaintiffs' counsel were David Boies and Theodore Olson (former U.S. Solicitor General), U.S. Supreme Court veterans who had famously squared off against each other in *Bush v. Gore (2000) 531 U.S. 98.*

Legal Conclusions by the Trial Court

The trial court's rulings rest heavily on the extensive factual record laid by the Plaintiffs. Although an initiative measure adopted by the voters "deserves great respect," the trial court stated the voters' determinations must "find at least some support in evidence."

This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation, and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives. (slip opinion, page 24)

All parties conceded that marriage is a fundamental right under the Due Process Clause, but Proponents argued that Plaintiffs sought recognition of a new right - same-sex marriage - not marriage as it is traditionally understood. Proponents defended the marriage limitation on the ground that "responsible procreation is really at the heart of society's interest in regulating marriage." (slip opinion, p. 10) The trial court debunked the connection between marriage and procreation by citation to several U.S. Supreme Court decisions. The state's rationale for marriage is that it creates stable households, found the court. In its examination of the tradition of marriage, the trial court found that marriage has evolved (citing both the end of racial limitations on marriage and the end of gender inequality in marriage laws). "The exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.... Today, gender is not relevant to the state in determining spouses' obligations to each other and to their dependents." (slip opinion, p. 113) The court found the parties' committed relationships were consistent with the

"core of the history, tradition and practice of marriage in the United States." (slip opinion, p. 113) The court focused on the nature of the marriage relationship and the responsibilities arising from it rather than on the gender of the participants. It also found that domestic partnerships "exist solely to differentiate same-sex unions from marriages" and that such partnerships confer inferior cultural status on domestic partners. (slip opinion, p. 116) Because neither the state nor the Proponents could demonstrate even a rational basis, much less the required compelling state interest for denying a fundamental right, Proposition 8 violates the Due Process Clause.

Applying the Equal Protection Clause of the Fourteenth Amendment, the court found that Proposition 8 discriminates both on the basis of sex and on the basis of sexual orientation, and that strict scrutiny is the appropriate standard of review to apply to sexual orientation classifications. However, Proposition 8 fails under any standard of review, the court ruled. Again, tradition alone cannot form a rational basis for a law, and limiting marriage to between a man and a woman perpetuates gender role definitions that the state of California has otherwise eliminated. "Proposition 8 harms the state's interest in equality." (slip opinion, p. 124) The defense that children were better reared by opposite-sex parents than by same-sex parents was disposed of by citation to the expert testimony at trial that there is no appreciable difference and the fact that California law treats same-sex parents the same as opposite-sex parents. The court found that the evidence showed "beyond debate" that permitting marriage by same-sex couples would have at least a neutral, if not positive, effect on the institution of marriage and would benefit the state.

What Happens Next

It is conceivable but unlikely that the State will appeal the decision, because it did not mount any defense at trial. It is entirely possible that the Ninth Circuit will rule that Proponents lack standing to appeal, a ruling that Proponents could seek the U.S. Supreme Court to reverse. If the Ninth Circuit so rules and the high court declines to take the case, it is possible that the trial court ruling will stand without any appellate court's ruling on the constitutional merits. If the Ninth Circuit does not rule on the constitutional merits, it would appear less likely that the U.S. Supreme Court will accept the case.

The popular understanding had been from the beginning that the U.S. Supreme Court would take the case. If it does so, it will necessarily rule on the standing of Proponents and likely rule on both the Due Process and Equal Protection issues. In the Arizonans for English case, the U.S. high court stated that federal courts are not well-equipped to rule on a state statute's constitutionality without a controlling interpretation of the meaning of the statute by the state courts. That condition exists here, both in Marriage Cases and in Strauss v. Horton, cited above. If the U.S. Supreme Court meets the constitutional issues head on, it will do so in a case with very strong factual evidence and findings supporting the trial court decision (due partly to the thoroughness of the Plaintiffs and partly to the Proponents' late decision not to call most of their intended witnesses). Perhaps the Supreme Court may find some way not to invoke the federal constitution and relegate marriage to the provinces of each state.

However, if the Supreme Court rules the marriage limitation violates the U.S. Constitution, change would occur across the country. Each state would need to allow same-sex couples to marry. Both prongs of the federal Defense of Marriage Act would fall; both that allowing each state to decide who gets to marry and the provision that limits a panoply of federal benefits for married people only to a marriage between a man and a woman. It is also possible that one or more cases challenging the Defense of Marriage Act will reach the U.S. Supreme Court before Perry does, and that another ruling might render unnecessary taking the Perry case.

Practical Consequences for California

The granting or denial of a stay by the higher federal courts will determine whether and when same-sex couples in California can again marry. If a stay is not granted but the case proceeds on appeal, it is possible that such marriages would be invalidated by the appellate courts. Counsel representing same-sex couples on marriage should advise on this possible invalidity. The California Family Code is unclear as to whether couples can be both spouses and domestic

partners (see §297(b)(2)), and couples may want to make the safer choice pending a definitive ruling. Premarital agreements that provide for the contingency of marriage invalidity may be warranted.

If Proposition 8 is ultimately invalid, California will no longer have any reason to provide domestic partnerships, and it should phase them out by setting a date by which no new registration will be granted. Persons who are registered domestic partners should be allowed to retain their status, but many will choose to marry instead.

The largest potential consequence for California same-sex partners is whether the Defense of Marriage Act falls. If it does, same-sex couples will for the first time have available to them the myriad of federal benefits that favor married couples across the nation.

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Diana Richmond is an Editorial Consultant to and author of Chapter 3, California Domestic Partner Rights and Responsibilities Act, in California Family Law Practice and Procedure, Second Edition, and an Editorial Consultant to Matthew Bender's California Family Law Monthly. In In Re Marriage Cases, she submitted an amicus brief for American Academy of Matrimonial Lawyers, Northern California Chapter of the American Academy of Matrimonial Lawyers and California District of the American Academy of Pediatrics on behalf of Plaintiffs and Respondents.

5 of 42 DOCUMENTS

Challenge to Prop 8

2009 Emerging Issues 3743

Richmond on California Supreme Court Ruling on Prop 8

By Diana Richmond

June 11, 2009

SUMMARY: This challenge to Proposition 8 presents profoundly difficult questions of constitutional structure that go far beyond the specific issue of the validity of same-sex marriage in California. Who is the final authority on an issue of equal protection? The Court upheld the right of the people to reverse the state supreme court, prospectively eliminated same-sex marriage and upheld the validity of 18,000 marriages performed prior to its enactment.

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ARTICLE: Proposition 8

Strauss v. Horton, more commonly referred to as the Prop 8 challenge, is the third case in which the California Supreme Court has been called upon to rule on the validity of same-sex marriages. However, this case presents profoundly difficult questions of constitutional structure that go far beyond the specific issue of the validity of same-sex marriage in California. The basic conundrum is: who is the final authority on an issue of equal protection? In many instances a voter initiative may eliminate a constitutional right declared by the California Supreme Court. In this densely reasoned decision, the California Supreme Court upheld the right of the people to reverse the state's high court by a voter initiative amendment-unless the amendment so fundamentally alters the structure of California's constitution as to be a "revision" rather than an "amendment." Because the Court found Proposition 8 to be an amendment rather than a revision, it upheld Proposition 8 and prospectively eliminated the rights of same-sex partners to marry in California. The Court also upheld the validity of the 18,000 marriages performed prior to the enactment of Proposition 8 on November 4, 2008.

In justifying its decision that the amendment has a "limited effect" only on the status and nomenclature of marriage (and not the substantive rights of property, parenting and the like) the majority of the Court contradicted its decision in *In re Marriage Cases* that upheld the right of marriage per se as constitutionally required under the privacy, due process and equal protection clauses of the California Constitution. Only Justice Moreno in his dissent stated that "denying gays and lesbians the right to marry, by wrenching minority rights away from judicial protection and subjecting them instead to a majority vote, attacks the very core of the equal protection principle."

The Supreme Court carefully and thoroughly analyzed the history of the initiative process in California. The California Constitution was amended in 1911 to grant the people the right to amend it by voter initiative. The

amendment was part of a Progressive movement arising out of a popular belief that moneyed interests such as the Southern Pacific Railroad controlled not only elected public officials and state legislators but also the state's judges. In language reminiscent of the "Power to the People" vernacular of the 1960s and '70s, the California Constitution reads: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const., art. II, §1.) The people may amend the Constitution by a majority of the electorate after the signatures of eight percent of the number of persons who voted in the last gubernatorial election have qualified it for the ballot. A revision, by contrast, must be initiated by the legislature, by a two-thirds vote, either by submitting to the electorate the question of whether to call for a Constitutional Convention or by submitting the proposed revision to the electorate.

Over many years, the California Supreme Court has decided several times what constitutes an amendment rather than a revision. The decisions are described at length in the majority opinion and appear to be consistent with each other. A revision is an enactment that makes far-reaching changes in the nature of our basic government plan. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208.* The test is both quantitative (e.g., how many constitutional provisions are affected?) and qualitative. Notably, in terms of the rights at stake, the state high court upheld the people's right to amend the state constitution to reinstate the death penalty after the court had found the death penalty was unconstitutional as cruel and unusual punishment. *People v. Frierson (1979) 25 Cal. 3d 142.* The defendant in *Frierson* failed in his effort to have the California Supreme Court declare the voter initiative a revision rather than an amendment. Early in the oral argument in the Proposition 8 case, Justice Kennard asked counsel for the challengers how this court could consider the right to marry to be more substantial than the right to live-which signaled the huge obstacle posed by existing precedent in the challenge to Proposition 8.

As the majority opinion notes, Proposition 8 is not the first time the California Constitution has been altered by a constitutional amendment approved by the voters in a matter that reduces the rights of a minority group that has been the subject of past discrimination. The petitioners sought an interpretation from this Court that the initiative process could be used to extend a constitutional right to a disfavored group but not to repeal that right through the initiative process. The Court declined to adopt this departure from its prior precedent, making it clear that change to the initiative system-if change were to be sought-must come from somewhere other than this Supreme Court. Justice Moreno, in his dissent, noted that the equal protection clause is by its very nature "countermajoritarian" and to allow rights to be withdrawn by a popular majority "usurps the judiciary's special constitutional role as protector of minority rights." Although the majority acknowledged that the purpose of all constitutional provisions establishing individual rights is to serve as a countermajoritarian check against the legislative and executive branches, they acknowledged the right of the people themselves to delimit individual rights. This difference is the essence of the difficulty of the case. In a concurring opinion in which she agreed with the majority's decision but not its reasoning, Justice Werdegar noted the majority's definition of "revision" "avoids the daunting task of reconciling with our constitutional tradition a voter initiative clearly motivated at least in part by group bias."

The right to amend the state constitution by voter initiative arose at a time in history when the people did not trust the integrity of the legislature, executive branch or judiciary. Those times are not these times, but conceivably such times could return. As the majority opinion describes, not all states allow their constitutions to be amended by voter initiative. Two states-Massachusetts and Mississippi-permit voter initiative amendments, but prohibit those that could modify the rights set forth in the state constitution's bill of rights. The Massachusetts model would protect a state's constitution from voter infringements on the reversal of a judicial decision, religion, freedom of the press, freedom of speech, the right of access to the courts, the right to trial by jury, protection from unreasonable searches and the right of peaceable assembly, for several examples. It would require a constitutional amendment to create such limits to voter initiative rights in California-or to protect equal protection from evisceration by popular vote.

A troublesome aspect of the decision is its attempt to minimize the effect of Proposition 8. The Court interprets the scope of the amendment as limiting use of the designation of "marriage," "but it does not purport to alter or affect the more general holding in *In re Marriage Cases* .." that same-sex couples may "establish an officially recognized family relationship." This statement guts much of the Court's decision in *In re Marriage Cases* that the core of the deprivation

was of the respect and recognition accorded the status of marriage itself. The other substantive rights were already present in the Domestic Partnership Act. When the majority asserts that same-sex couples enjoy the protection of an "officially recognized and protected family" as a matter of constitutional right, there is nothing in the opinion to suggest that the people could not also take away that constitutional right by voter initiative. Justice Werdegar observes, "For the state to meet its obligations under the equal protection clause will now be more difficult, but the obligation remains."

The Court explained that nothing in Proposition 8 alters its prior decision that discrimination on the basis of sexual orientation is a suspect classification. By relying on the principle that legislative amendments (and by extension constitutional amendments) are given prospective effect only unless it is very clearly the intent that they will apply retroactively, the Court upheld the approximately 18,000 marriages performed between its May 2008 decision in *In re Marriage Cases* and the November 4, 2008 enactment of Proposition 8. It is unclear whether marriages performed in other states during that same period of time would be accorded recognition in California; the Court explicitly declined to rule on this question.

It would appear that all same-sex couples who married in California are entitled in California to all protections and legal rights accorded other married couples. Because of Proposition 8, they might also be subjected to heightened inquiry as to the timing and legitimacy of their claims to be married in any forum in which they seek the rights of married people, such as in applying for insurance or spousal employee benefits.

In the wake of this decision, some proponents of same-sex marriage plan to introduce a new initiative amendment in 2010 to restore and protect the rights of same-sex couples to marry. Other proponents of same-sex marriage have filed a lawsuit in U.S. District Court challenging the denial of marriage on federal Equal Protection grounds. It is too early to predict the outcome of these efforts.

This opinion should spark debate on whether California should revise its initiative system-perhaps to curtail the power of initiatives to limit core individual rights such as privacy and equal protection.

PDF LINK: Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge

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Diana Richmond is an Editorial Consultant to and author of Chapter 3, California Domestic Partner Rights and Responsibilities Act, in *California Family Law Practice and Procedure, Second Edition,* and an Editorial Consultant to Matthew Bender's *California Family Law Monthly*. In *In Re Marriage Cases*, she submitted an amicus brief for American Academy of Matrimonial Lawyers, Northern California Chapter of the American Academy of Matrimonial Lawyers and California District of the American Academy of Pediatrics on behalf of Plaintiffs and Respondents.

6 of 42 DOCUMENTS

Supreme Court Enforcement of ERISAs Plan Documents Rule: Kennedy

2009 Emerging Issues 3389

Dietrich on United States Supreme Court Enforcement of ERISAs Plan Documents Rule: Kennedy v. Plan Admr for DuPont Sav. & Inv. Plan

By Mr. Raymond Dietrich Esq.

February 25, 2009

SUMMARY: The failure to complete two standard retirement plan forms deprived Mr. Kennedys heirs of his retirement benefits; instead, his former wife--who had expressly waived them in their divorce proceeding will receive them. Had plan procedures been followed, with (1) Mr. Kennedy, the plan participant, completing the beneficiary-designation form and (2) his former wife completing the disclaimer form, they would go to his estate.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: The failure to complete two standard retirement plan forms resulted in the holding by the United States Supreme Court that Mr. Kennedy's heirs do not receive his retirement benefits; rather, they go to his former wife--who had expressly waived them in their divorce proceeding. Had plan procedures been followed, with (1) Mr. Kennedy, the plan participant, completing the beneficiary-designation form and (2) his former wife completing the disclaimer form, there would have been no controversy.

The Supreme Court has set a bright-line for ERISA's plan documents rule. Under *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, __ U.S. ___, *129 S. Ct. 865, 172 L. Ed. 2d 662 (U.S. 2009),* this rule now applies to federal common law waiver of ERISA plan benefits. Previously, the Court applied the rule and other ERISA provisions to preempt state law. The *Kennedy* Court, however, rejected an ERISA preemption argument. Instead, the Court focused on the fiduciary duty ERISA imposes upon a pension plan administrator. Nevertheless, the state law preemption cases still played a significant role in the Court's reasoning. Prior decisions in *Boggs* n1 and Egelhoff n2 detailed the central goals of ERISA. Moreover, enforcement of the plan documents rule against federal common law waiver is consistent with the Court's prior state law preemption decisions.

The plan documents rule primarily refers to the fiduciary duty imposed by

ERISA § 404(a)(1)(D) upon a pension plan administrator. Under the rule, a plan administrator must discharge his duties in accordance with the documents and instruments governing the plan. No extraneous investigation is required. The plan documents rule mandates that the plan administrator follow plan procedures.

The *Kennedy* court held that ERISA imposes a statutory fiduciary duty upon the plan administrator. The duty

imposed by ERISA is the duty to act in accordance with plan procedures in determining who is entitled to beneficiary status under the plan.

Moreover, a plan administrator is required under the rule to disregard a waiver of benefits if that waiver conflicts with plan procedures. The Court also concluded that a waiver is not rendered invalid by ERISA's anti-alienation provision.

In theory, the plan documents rule is sound if you are a pension plan administrator. Under a bright-line rule, a plan administrator is able to apply clear distribution instructions without going to court. A plan administrator is also alleviated of the responsibility to consider a wide range of subjective determinations relating to a party's intent and state of mind.

In practice, the plan documents rule may have disastrous consequences for a plan participant or beneficiary. It requires a party or divorce counsel to follow plan procedures for the designation of plan beneficiaries. If a divorce attorney fails to undertake this endeavor or at least alert their client to the issue, it is the plan participant or prospective beneficiary who will likely suffer as did Mr. Kennedy and his heirs.

Statement of the Case

Holding: The *Kennedy* court held that an ERISA plan administrator is required to act in accordance with plan procedures in determining who is entitled to beneficiary status under the plan. In addition, a plan administrator should disregard a waiver of benefits by a former spouse if that waiver conflicts with plan procedures. The court also concluded that a federal common law waiver is not rendered invalid by ERISA's anti-alienation provision.

Facts and Procedural History: William Kennedy worked for E. I. DuPont de Nemours & Company and accrued retirement benefits under an ERISA-based plan, to wit: Dupont Savings and Investment Plan. Mr. Kennedy had the power to designate a beneficiary under the plan. The plan requires all authorizations and designations to be made in a manner prescribed by the plan administrator.

William Kennedy married Liv Kennedy in 1971 and designated her as the beneficiary under the savings plan in 1974. The parties divorced in 1994. Liv disclaimed any interest in William's retirement plans. William, however, did not remove Liv as beneficiary under the savings plan.

William Kennedy died in 2001. Kennedy's estate asked the Dupont savings plan administrator to distribute the funds to the estate. The plan declined. Instead, the plan released the proceeds to Liv Kennedy since she was the designated beneficiary. The participant's estate filed suit in federal district court.

The district court held for the estate. The Fifth Circuit reversed on the grounds that Liv Kennedy's waiver constituted a prohibited assignment or alienation of benefits under ERISA. This appeal followed.

Split in Circuits over Federal Common Law Waiver

ERISA fails to address the validity of a common law waiver of plan benefits. As a result, federal courts may resolve any issues by developing federal common law. A federal court, however, does not have the authority to revise the text of ERISA. *Mertins v. Hewitt Associates, 508 U.S. 248, 259 (U.S. 1993).*

Prior to *Kennedy*, there was a split among the federal courts of appeals and state supreme courts over a divorced spouse's ability to waive an interest in ERISA plan benefits without the use of a Qualified Domestic Relations Order (QDRO). The Fourth and Seventh Circuits have held that a federal common law waiver in a divorce decree does not conflict with ERISA's anti-alienation provision. *See Altobelli v. IBM, 77 F.3d 78 (4th Cir. 1996); see also Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990).* In contrast, the Third Circuit held that ERISA barred federal common law waiver of benefits. *See McGowan v. NJR Serv. Corp., 423 F.3d 241 (3d Cir. 2005).*

In *Altobelli*, the Fourth Circuit held that ERISA's anti-alienation provision does not apply to a beneficiary's waiver. The anti-alienation provisions of ERISA focus on the assignment of benefits of a participant, not the waiver of benefits by a designated beneficiary. Like *Fox Valley*, the Fourth Circuit also held that a common law waiver would not impose any additional burdens upon the plan administrator.

There is a further split over whether a waiver is valid if it inconsistent with plan documents. *See Metropolitan Life Ins. Co. v. Marsh, 119 F.3d 415 (6th Cir. 1997)* (holding that plan documents control). The *Kennedy* decision resolves the split in opinions.

Plain Meaning of ERISA Trumps Federal Common Law Waiver

The Supreme Court relied on the plain meaning of ERISA § 404(a)(1)(D) in reaching its conclusion that the plan documents rule supersedes a federal common law waiver. Importantly, ERISA § 404 imposes a fiduciary duty upon a plan administrator to discharge his duties to the plan solely in the interest of the participants and beneficiaries and in accordance with the documents and instruments governing the plan. In addition, ERISA § 202 mandates the establishment of a written plan instrument specifying the basis on which payments are to be made from the plan. ERISA § 404 and

§ 202 comprise the plan documents rule.

According to the Court, ERISA's statutory scheme is built around the reliance of the plain meaning of the written plan documents (*citing Curtiss-Wright Corp. v Schoonejongen, 514 U.S. 73, 83 (U.S. 1995)).* The plan documents are supposed to give a plan participant a clear set of instructions for making the appropriate elections, including the designation of beneficiaries. Moreover, failure to follow the plan documents rule would increase the administrative and financial burden on plan administrators.

The Court rejected the Fifth Circuit's rationale that Liv Kennedy's waiver constituted an improper assignment or alienation under the QDRO provisions of ERISA. Again, the Court relied on the plain meaning of ERISA. Black's Law Dictionary defines assign as to transfer property or some interest therein; alienate is defined as to convey title of property. Under ERISA § 206(d)(1), benefits may not be assigned nor alienated.

The Court reasoned that a QDRO by definition requires the creation of a right in an alternate payee to receive an assignment of benefits; a waiver creates no such interest. Thus, the QDRO provisions have no bearing on whether a beneficiary may waive by a non-QDRO. Therefore, Liv Kennedy did not transfer anything.

The Supreme Court also examined the law of trusts to support their statutory interpretation. The Court explained that § 206 of ERISA is much like a spend thrift trust provision that bars assignment or alienation. Importantly, a trust beneficiary does have the power to disclaim his or her interest. Common sense and common law both say that the law certainly is not so absurd to force a man to take an estate against his will. Therefore, a pension plan beneficiary has the same prerogative.

Preemption of State Law under *Boggs* and *Egelhoff*

The *Kennedy* Court relied on two state court preemption cases. Specifically, the Court looked to its prior holdings in *Boggs* and *Egelhoff*. Importantly, the Court used the underlying rationale of *Boggs* and *Egelhoff* to support its holding in *Kennedy*. According to the Court, what goes for inconsistent state law goes for a federal common law of waiver that might obscure a plan administrator's duty to act in accordance with plan documents. Therefore, the connection between waiver and state law preemption is crucial.

In *Boggs* and *Egelhoff*, the Supreme Court held that ERISA's plan documents rule preempts state law. *Boggs* enumerated the central purpose of ERISA to protect plan participants and beneficiaries. *Egelhoff* reinforced the importance of a nationally uniform plan administration of pension plans.

ERISA § 514(a) expressly preempts state law that relates to any employee benefit plan. n3 ERISA may preempt state law in one of two ways. First, ERISA may preempt a state law by application of its express preemption language of § 514(a). S*ee Egelhoff v. Egelhoff, 532 U.S. 141 (U.S. 2001).* Second, ERISA may preempt a state law under a classic-conflict preemption analysis. A state law conflicts with federal law where compliance with both is impossible or where state law stands as an obstacle to the objectives of Congress. *See Boggs v. Boggs, 520 U.S. 833 (U.S. 1997).* Most preemption litigation centers on the interpretation of ERISA's relates to language.

In *Boggs*, the Supreme Court dispensed the need to apply ERISA's express preemption language. Instead, the Court applied classic-conflict preemption analysis and concluded that the two Louisiana community property laws at issue directly conflicted with ERISA. The Louisiana law permitted the testamentary transfer of an interest in a spouse's pension plan. Therefore, the Court concluded that ERISA preempted the Louisiana law.

In *Egelhoff*, the Supreme Court did not base its decision on classic conflict preemption analysis as it did in *Boggs*. Rather, the Court relied on the express preemption language of ERISA § 514(a). The *Egelhoff* Court held that ERISA expressly preempts a Washington State statute that automatically revokes, upon divorce, any transfer or payments of nonprobate assets to a former spouse.

The *Egelhoff* Court concluded that state law relates to an ERISA plan if it has a connection with or reference to an ERISA plan (*citing Shaw v. Delta Airlines, Inc. 463 U.S. 85 (1983).* To determine if a state law has a forbidden connection a court must look to the objectives of ERISA as well as the nature of the effect the state law has on ERISA.

The Court reasoned that the Washington statute governed the payment of plan benefits, which is a central matter of ERISA plan administration. The Washington statute also had a prohibited connection with ERISA because it interfered with a nationally uniform plan administration.

Although the Court used *Boggs* and *Egelhoff* as support, it expressly rejected the ERISA relates to preemption argument. The Court reasoned that recognizing a waiver in a divorce decree would not be giving effect to state law. Rather, a waiver should be treated as a creature of federal common law. The setting in a state divorce decree would only be happenstance. Thus, a court would only be applying federal law to a document that might also have independent significance under state law.

Avoidance of Third-Party Liability

Failure to follow the plan documents rule may expose a participant's counsel to liability from prospective beneficiaries. To guard against such a claim, divorce counsel has two options. First, counsel may take it upon himself to ensure that plan procedures are followed by his client in the designation of a new beneficiary. Plan waiver procedures must also be followed. If possible, specific plan forms should be executed and incorporated by reference into the divorce decree as an exhibit.

Second, counsel may opt to place the client on notice of the *Kennedy* decision. Specifically, the client should be

notified, in writing, as to the importance of designating a new beneficiary immediately following the divorce proceeding. Notice should also be given to the client that failure to follow plan procedures may result in a loss of benefits to the client's intended beneficiaries. It is prudent to include the notice in the client's fee agreement.

Alternative Remedies Available Upon Breach of Plan Documents Rule

A declaratory action in state court may be brought directly against the recipient of the retirement funds. The declaratory action is an alternative to a § 502 ERISA action against the plan administrator. Once distributed, the pension funds are no longer entitled to ERISA protection. *Pardee v. Pardee, 112 P.3d 308 (Okla. Civ. App. 2004).* The action may be based on enforcement of the divorce decree or breach of contract if there is an applicable property settlement agreement. S*ee Sweebe v. Sweebe, 712 N.W.2d 708 (Mich. 2006)* (holding that the terms of a prior contractual agreement may prevent the named beneficiary from retaining pension plan proceeds).

Return to Text

n1 *Egelhoff v. Egelhoff, 532 U.S. 141 (U.S. 2001).*

n2 *Boggs v. Boggs, 520 U.S. 833 (U.S. 1997).*

n3 QDROs are exempt from ERISA's express preemption. ERISA § 514(b)(7)

RELATED LINKS: See Raymond S. Dietrich's Emerging Issues Analysis accompanying Kennedy v. Plan Admr for DuPont Sav. & Inv. Plan at

- 129 S. Ct. 865

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Judge David M. Gersten on Wolf v. Wolf

2009 Emerging Issues 3431

Judge David M. Gersten on Wolf v. Wolf, 979 So. 2d 1123 (Fla. 2d DCA 2008), and Interplay between Domestic Violence Court Awarding Exclusive Possession of Marital Residence and Family Court Equitably Distributing Same Residence

By Judge David Gersten

January 1, 2009

SUMMARY: *Judge David M. Gersten on Wolf v. Wolf, 979 So. 2d 1123 (Fla. 2d DCA 2008),* and the interplay between a domestic violence court injunction awarding exclusive possession of a marital residence and a family court dissolution of final judgment equitably distributing that same residence.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Background

Mary Wolf (the former wife) filed petitions for dissolution of marriage and for protection against domestic violence. After a hearing on the petition for protection, the domestic violence court entered an injunction awarding the former wife exclusive possession of the marital home.

Four years later, a family court held an adjudicatory hearing to value and distribute the marital property. The family court granted the former husband the rental value of the marital residence which the former wife exclusively possessed pursuant to the domestic violence injunction. The former wife appealed.

The Appellate Level

The former wife contended that because the domestic violence injunction was silent on rental value, the family court could not award rental value. The former wife relied on *Kelly v. Kelly, 583 So. 2d 667, 668 (Fla. 1991),* and *Goolsby v. Wiley, 547 So. 2d 227, 230 (Fla. 4th DCA 1989),* for the general principle that when one cotenant gains exclusive possession of the property by a court judgment, the other cotenant is not entitled to an award of rental value unless provided for by the judgment.

The Second District determined that *Kelly* and *Goolsby* only apply when a family court final judgment of dissolution awarded exclusive possession of the marital residence to one spouse, but was silent on the issue of rental value. Here, the former wife relied on a domestic violence injunction awarding possession of the residence.

In a final judgment of dissolution, a family court specifically addresses the disposition of assets and the financial

consequences. Therefore, in a final judgment of dissolution, the family court explicitly or implicitly considers the rental value of exclusively possessed property, and any silence on the issue means the family court found an award of rental value improper.

In contrast, a domestic violence court does not necessarily consider rental value. Instead, a domestic violence court focuses on the safety of the parties involved, and not the ultimate disposition of property. If a domestic violence injunction is silent on rental value, it does not mean that the domestic violence court implicitly found that an award was improper. The nature of a domestic violence injunction and a final judgment of dissolution are distinct, and not inter-related. Thus, the general rule concerning silence in a final judgment of dissolution is not applicable to a domestic violence injunction.

In addition, the Second District referred to two Florida Statutes that contradict the former wifes argument. First, Fla. Stat § 741.30(1) (2003) provides that dissolution orders take precedence over any inconsistent provisions in domestic violence injunctions. Second, Fla. Stat. § 61.077 (2003) states that a dissolution party is precluded from receiving any setoffs from the sale of the marital home unless specified by settlement agreement or dissolution judgment. The Second District pointed out that an injunction for protection against domestic violence is not included in the statute, and thus, the Legislature did not intend for a domestic violence injunction to preclude a setoff.

The Second District held that silence on rental value in an injunction for protection against domestic violence awarding exclusive possession of a martial residence does not preclude an award of rental value in a future final judgment of dissolution of marriage. *Wolf, 979 So. 2d at 1128.*

Practitioner Pointers

In light of *Wolf*, a family court may award rental value of the marital estate to a spouse even if a domestic violence court previously granted exclusive possession of the marital estate to the other spouse. Under Florida law, a family court may reconsider and overrule certain issues previously addressed by a domestic violence court. Therefore, practitioners representing a spouse who was not given exclusive control over the marital home must be prepared to argue that awarding rental value is proper.

Practitioners representing a spouse who was excluded from the marital estate by a domestic violence injunction should argue for one-half of the rental value during the time of exclusive possession. If the practitioner does not argue this and the family court is silent on rental value for the marital estate during the exclusive possession period, the spouse is prohibited from later receiving those rental values.

Conclusion

A family court has the authority to award a spouse the rental value of the marital residence when a domestic violence court has previously given the other spouse exclusive control of the residence. Unlike a final judgment of dissolution, silence on rental value in a domestic violence injunction does not preclude a court from later awarding the rental value during the exclusive period.

ABOUT THE AUTHOR(S):

Judge David M. Gersten is currently a judge on the Third District Court of Appeal where he was appointed in 1989. Prior to his appointment, he was in private practice from 1975 until 1980. He was elected to the Dade County Court in 1980 and elected to the Eleventh Judicial Circuit in 1982. In 1995, he was appointed as Associate Dean, Appellate Division, at the Florida College of Advanced Judicial Studies, and became a member of the Florida Court Education Council in 1996. He is the author for the *Florida Civil Practice Guide*, a multi volume set published by LexisNexis/Matthew Bender, and he is a judicial consultant for *LexisNexis Practice Guide: Florida Pretrial Civil*

Procedure.

Information referenced herein is provided for educational purposes only. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

Richmond on the Right of Same-Sex Couples to Marry

2008 Emerging Issues 2358

Diana Richmond on the Right of Same-Sex Couples to Marry: In re Marriage Cases

By Diana Richmond

June 10, 2008

SUMMARY: This historic California Supreme Court decision is as thoughtful, scholarly and well-reasoned as our finest constitutional law decisions. The author examines key rulings supporting the right to marry a person of ones choice.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: While most of the world knows that the California Supreme Court ruled it is unconstitutional to deny same-sex couples the right to marry, few may take the effort to read the 161-page opinions. This historic decision is as thoughtful, scholarly and well-reasoned as the best of the constitutional law decisions in our state or nation.

The California high court, applying only the California Constitution, made several key rulings:

1) the right to form a family relationship is a fundamental civil right part of the California Constitutions guarantees of liberty and personal autonomy;

2) discrimination on the basis of sexual orientation is a suspect category; and

3) denial of the right to marry to same-sex couples is an unconstitutional violation of the right to equal protection.

Its decision invalidated both *Family Code § 308*, limiting marriage to between a man and a woman, and § 308.5, stating that only a marriage between a man and a woman is valid and recognized in California.

A linchpin of the courts decision was defining the right at stake. When the Court of Appeal defined the right as same-sex marriage, its majority found no difficulty in stating that marriage is historically and traditionally recognized as between a man and a woman, and there was no fundamental right to same-sex marriage. The opinion of dissenting Justice Anthony Kline at the Court of Appeal defined the right as the right to marry a person of ones choice, consistent with the California Supreme Courts decision in *Perez v. Sharp (1948) 32 Cal. 2d 711* (holding unconstitutional the statute prohibiting interracial marriage). The Supreme Court found the right at stake to be the opportunity of an individual to establish with the person with whom the individual has chosen to share his or her life an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. In going further than using the word marry, the high court

addressed arguments posed by the State that it could attach a name other than marriage to the civil institution as distinct from the religious institution of marriage. Thus, even if the State of California were to redefine its officially-recognized family as something other than marriage, it could not constitutionally exclude same-sex couples from the opportunity to participate. The court explained that it was not creating a new constitutional right, but rather recognizing that the existing fundamental right to marry cannot be denied to same-sex couples.

The high court took care to explain the context of its ruling, which may limit its value as precedent to other states considering the same question. The court stated that other states might conclude, as a matter of social policy, to exclude same-sex couples from the rights and obligations of marriage. However, since California has decided as a matter of policy, enunciated in the Domestic Partnership Act (*Family Code § 297* et seq.), that registered domestic partners are entitled to all of the substantive rights and obligations of marriage, the State of California could not constitutionally deny such couples the right to marry.

The Supreme Courts discussion of the meaning and importance of marriage is likely to prove one of the most enduring and respected components of its decision. Marriage, it stated, embraces the establishment of a home, rearing children and establishment of an officially recognized family relationship. Quoting from *DeBurgh v. DeBurgh (1952) 39 Cal. 2d 858, 863,* it described the family as the center of personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another, it nurtures and develops the individual initiative that distinguishes a free people. It emphasizes the role of the family in educating and socializing children, establishing kinship and a forum for inculcating the values of authority, responsibility and duty, as well as in fostering stability, and care-taking for the young, the aged and disabled. The ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance to the individuals happiness and well-being and may be crucial to the individuals development as a person and achievement of his or her full potential. These rights, the court found, must be extended to all individuals and couples, regardless of their sexual orientation; and doing so takes away nothing from either opposite-sex couples or the institution of marriage itself.

The high court dismissed the procreation rationales of other states high courts in limiting marriage to opposite-sex couples. No state has limited the opportunity to marry only to those couples who can or will procreate. The constitutional right to marry cannot be limited only to those individuals who might produce children accidentally, it stated, in rejecting the rationale of the New York decision in *Hernandez v. Robles (2006) 855 N.E.2d 1.*

In its discussion of equal protection, the court also rejected as sophistic the argument posed by defendants that since nothing bars gay men from marrying women or lesbian women from marrying men, the state does not discriminate against them. In discussing whether sexual orientation is an immutable trait, a component of deciding whether a classification should be deemed constitutionally suspect, the court ruled that immutability is not invariably required. The most important factors for constitutional analysis are whether the persons with the characteristic have been historically subjected to prejudicial treatment and whether society now recognizes that the characteristic generally bears no relationship to the individuals ability to perform or contribute to society.

Justices Baxter, Chin and Corrigan dissented from the majority opinion authored by Chief Justice George. Justice Baxter accused the majority of abandoning the separation of powers and substituting their social policy views for that expressed by the voters. Justice Corrigan, who expressed her personal view that same-sex couples ought to be entitled to call their unions marriages, expressed the legitimate purpose of the statutes as preserving the traditional understanding of the institution. At oral argument, she had asked plaintiffs counsel: Why now? Teresa Stewart, as counsel for the City and County of San Francisco, had responded: Because we raise the constitutional challenge now.

What happens next? Because the case rested on state rather than on federal constitutional questions, it will not be appealed to the U.S. Supreme Court. A petition for rehearing has been filed by one of the defendants but is unlikely to be granted. County clerks will begin granting marriage licenses to same-sex couples on June 16, 2008. There will likely

be a flood of new marriages in California this year. In November, there will likely be a voter initiative on the ballot to enact a constitutional amendment banning marriage between same-sex couples. The precedent of *In re Marriage Cases* on other states decisions is difficult to predict but will soon be seen in Iowa, whose Supreme Court has the issue pending in *Varnum v. Brien.* In that case, the trial court found on summary judgment motion that the Iowa statutes limiting marriage to a man and a woman are unconstitutional. Iowa does not have domestic partnership or civil unions.

The California Supreme Court did not address questions relating to the existing Domestic Partnership Act. Will registered domestic partners have to dissolve their partnership in order to marry? There is nothing in the Family Code that compels them to do so. A person is eligible to marry if not already married to someone else. Domestic partnership is not a marriage. It also appears that the converse is also allowed: same-sex couples who are married (such as in Canada or Massachusetts) can register as California domestic partners if they are not married to someone else.

Will registered domestic partnership continue to exist? Unless the legislature decides to repeal it, yes; and it will serve a good purpose at least until the stability of the right to marry is secured in this state. Are opposite-sex couples going to be entitled to register as domestic partners? Given the tax and other impediments, it is difficult to imagine why they would want to do so. Further, the legal analysis would be different if opposite-sex couples were to press a constitutional challenge. The precedent set by this decision is that registered domestic partnership creates an inferior state compared to marriage: if opposite-sex couples are entitled to marry, what harm do they suffer by not being allowed to register as domestic partners?

In re Marriage Cases will set precedent in issues well beyond marriage, because of its finding that sexual orientation is a suspect classification. This decision will also likely be published in law school casebooks and taught for many years to come. It is one of the signal civil rights decisions of our time.

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Diana Richmond is an Editorial Consultant to and author of Chapter 3, California Domestic Partner Rights and Responsibilities Act, in California Family Law Practice and Procedure, Second Edition, and an Editorial Consultant to Matthew Bender's California Family Law Monthly. In In Re Marriage Cases, she submitted an amicus brief for American Academy of Matrimonial Lawyers, Northern California Chapter of the American Academy of Matrimonial Lawyers and California District of the American Academy of Pediatrics on behalf of Plaintiffs and Respondents.

9 of 42 DOCUMENTS

Martin on Seeking Jury or Bench Trial in Contested Lifetime Trust Litigation

2008 Emerging Issues 1901

Martin on Seeking Jury or Bench Trial in Contested Lifetime Trust Litigation

By Andrew L. Martin and Kelliann Kavanagh

February 12, 2008

SUMMARY: In 2003, the New York legislature amended NY SCPA § 502 to provide a jury trial in a proceeding involving a lifetime trust. Andrew L. Martin of the Surrogates Court of Nassau County, New York, discusses how the amendment settled a conflict on the issue among the states Surrogate's Courts, as well as several factors that a practitioner should consider when determining whether to proceed via a jury trial or a bench trial.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

In 2003, the legislature amended SCPA § 502 to provide a jury trial in a proceeding involving a lifetime trust, settling a disagreement among Surrogate's Courts. Although the right to a jury trial is now guaranteed, the practitioner must still decide whether success is more likely in a jury trial or a bench trial. The practitioner may decide to demand a jury in one proceeding but not the other, especially if the Will and lifetime trust were not executed close in time.

Analysis

Legislature provides right to jury trial in proceeding to determine validity of lifetime trust. By Laws 2003, Ch. 631, the legislature amended SCPA § 502 to provide a right to a jury trial in a proceeding to determine the validity of a lifetime trust where a controverted question of fact exists and a demand for a jury is duly made. The amendment was enacted on September 30, 2003 and applies to all proceedings pending or commenced on or after that date. The legal community long has sought legislative action to resolve conflict on this issue among the Surrogate's Courts. *In re Solomon*, N.Y.L.J., Sept. 9, 1997, at 28 (Surr. Ct. Kings County); *In re Stralem*, N.Y.L.J., July 14, 1997, at 37 (Surr. Ct. Nassau County); *In re Buscher*, N.Y.L.J., July 10, 1998, at 35 (Surr. Ct. Rockland County).

For example, in *In re Estate of Aronoff, 171 Misc. 2d 172 (N.Y. Misc. 1996),* executor filed a purported will for probate. Two of decedents children filed objections to the will and a jury demand. They also commenced a proceeding to set aside decedent's trust and consolidate the trust action with the probate proceeding. The court held that such consolidation did not constitute a waiver of the childrens' right to a jury trial in the probate proceeding. However, a

proceeding to set aside a trust is equitable in nature. Accordingly, there was no right to trial by jury in such a proceeding.

However, in *In re Estate of Tisdale, 171 Misc. 2d 716 (N.Y. Misc. 1997)*, distributees objected to a trust established by their deceased aunt arguing that the its terms reflected the wishes of the aunts attorney/trustee rather than those of the aunt. The attorney/trustee argued that the distributees were not entitled to a jury trial. The court concluded that: (1) the right to a jury trial depended upon the nature of the relief sought; (2) the nature of the relief requested in a proceeding to set aside a trust was the same as the relief requested in a proceeding to set aside a will; and (3) because the distributees were entitled to a jury trial in the will contest, they were entitled to a jury trial in this proceeding.

Consider five factors when deciding whether to demand jury trial. When deciding whether to demand a jury trial in a proceeding involving the validity of a lifetime trust, counsel should consider five factors, not all of which may exist in every case: (1) Having viewed your adversary's and your own witnesses at deposition, how credible do they appear? Do they appear to take the oath seriously? Are they sickly, needy, or otherwise likely to arouse the sympathy of the jury? Are any of them convicted criminals? (2) Will the facts of the case likely interest or bore a jury? (3) Do the facts lend themselves to an inference of undue influence that might not only interest a jury but incite the jurors to want to see justice. For example, does an attending nurse or overbearing relative receive the bulk of the estate to the exclusion of other relatives who are more natural objects of the decedent's affection and bounty? (4) If the estate is large, might class envy exist between the jurors and the parties, militating in favor of a bench trial? (5) Are the attorneys themselves likely to influence a jury, either favorably or unfavorably?

For further discussion of the issue, see 1-18 LexisNexis AnswerGuide New York Surrogate's Court § 18.06: Obtaining Jury Trial; 1-18 LexisNexis AnswerGuide New York Surrogate's Court § 18.07: Waiving Jury Trial; 1-18 LexisNexis AnswerGuide New York Surrogate's Court § 18.08: Submitting Issues to Advisory Jury; 1-2 *Warren's Heaton on Surrogate's Court Practice § 2.24*: Power to Direct and Conduct Trial by Jury; 3-42 *Warren's Heaton on Surrogate's Court Practice § 42.09*: Contested Trust Litigation; 114 Warren's Heaton on Surrogate's Court Practice Ch. 114: Trial by Jury.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

Barnosky on Determining Who Must and Who May Be Cited

2008 Emerging Issues 1905

Barnosky on Determining Who Must and Who May Be Cited

By John J. Barnosky and Kelliann Kavanagh

February 12, 2008

SUMMARY: New York has "solemn form" probate, meaning that all persons who would have standing to object to a will must be given notice of the probate proceeding. John J. Barnosky, a New York attorney with expertise in trust and estate law, discusses the specific classes of persons that must be served with notice, as well as some persons that need not be served, and the use of vertical virtual representation.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

New York has "solemn form" probate, meaning that all persons who would have standing to object to a will must be given notice of the probate proceeding. Although SCPA § 1403 defines who must be cited, the practitioner should serve any person who may have an interest and could arguably contest the will in the future. As improper citation is a jurisdictional issue, extreme care must be taken to insure that all required persons are served with citation.

Analysis

Serve all necessary parties. SCPA § 1403 lists those persons to whom process must issue. Service on these persons is jurisdictional. If, for any reason, the court does not obtain personal jurisdiction over a necessary party, the decree does not bind that party and that party may be entitled to move to vacate the decree.

In *In re Estates of Brush, 46 Misc. 2d 277 (N.Y. Misc. 1965),* residuary legatees under decedents will challenged a bequest which was purportedly to a charity, but actually was a gift to the executor. The challenge was an attack upon the validity of the will provision and would have been a basis for attacking this provision in the probate proceeding. The residuary legatees were not necessary parties to the probate proceeding, although in light of this challenge, they might well have been proper parties. Since these legatees were not cited in that proceeding, the decree admitting the will to probate was not *res judicata* upon any issue which the legatees might raise regarding the validity of a particular provision.

Jurisdiction may also be obtained by waiver of citation and, in fact, in most close family situations, wills are routinely admitted to probate based on the petition and filed waivers of all persons required to be cited. In some cases, it may be prudent to cite a person even if that person is willing to sign a waiver since a court, finding that the waiver signature was obtained by fraud, misrepresentation, or overreaching, may allow a person who signed a waiver to withdraw that waiver and consequently re-open a decree. *In re Millow*, N.Y.L.J., Feb. 11, 1987, at 15, col. 2 (Surr. Ct. Westchester County).

In *In re Westberg, 254 A.D. 320 (N.Y. App. Div. 1938),* petitioner sought to open a decree admitting a will to probate. The citation to the petitioner was served by publication. The court was unable to find evidence of concealment or fraud on the part of the executrix and sole beneficiary of the will in securing the decree of probate. The testimony of the subscribing witnesses established that the will was executed in the manner provided by law; there was no evidence to show lack of testamentary capacity on the part of the decedent; and the petitioner failed to show that undue influence had been exercised over the decedent or that she acted under restraint. Petitioner was not entitled to an order opening and vacating the decree.

Counsel must notify persons who would have standing to object to will. Persons who must be cited in a probate proceedings are:

1. Decedent's distributees, meaning the intestate takers pursuant to EPTL § 4-1.1;

2. Any named executor in the will offered for probate. Successor executors need not be cited unless the designated executor is under a disability;

3. Any person named in the will as a beneficiary or a fiduciary whose rights are adversely affected by any later instrument, including a codicil, offered for probate. Thus, if a person not otherwise entitled to process received a bequest of $ 50,000 under the will revoked by a later codicil, then that person must be cited. This requirement is reason to avoid codicils. If a new will is drafted instead of a codicil, the person whose legacy is revoked will most likely never know they were once a beneficiary;

4. Any beneficiary or fiduciary, under a prior will of the decedent filed in the Surrogate's Court where the propounded will is filed, who is adversely affected by the instrument offered for probate. If a beneficiary received more under a prior will on file, that beneficiary must be cited. The requirement exists only if the prior will has been filed. Mere knowledge by the petitioner of a prior will does not require citation to people adversely affected, nor is the executor under any obligation to file the prior wills. Curiously, a joint will executed by husband and wife and probated on one spouse's death is not considered a filed will and its beneficiaries are not required to be cited.

In *In re Will of Brinkmann, 21 N.Y.2d 804 (N.Y. 1968),* husband and wife executed a joint will, which was filed for probate after wife's death. A beneficiary under the joint will sought to reopen and vacate probate of a will executed by husband after wife's death. Beneficiary alleged she was a necessary party to proceeding to probate husbands will, in which she had not been cited. The court found that the joint will provided for outright devise and bequest by each spouse to the other of all property, thereby vesting ownership in survivor with right to sell or dispose of same by will or otherwise. Upon death of wife, joint will became solely her will. Beneficiary could not reopen probate proceeding of husbands later will;

5. The testator, where petition alleges that the testator is believed dead. In such case, the court will require notice to the testator by publication;

6. The State Tax Commission when the testator is a non-domiciliary testator. This allows the state to protect its interests in any estate taxes due;

7. Default takers under any power of appointment that the propounded will seeks to exercise in favor of persons other than the default takers. If decedent was the holder of a power of appointment under his mother's will, which

allowed him to appoint to any descendent, and in default of appointment, to issue *per stirpes*, and exercised that power in favor of less than the entire class, the default takers not provided for must be cited. In some cases, where the instrument granting power of appointment does not specifically so provide, it is possible that a power of appointment may be exercised without mention of it (EPTL § 10-6.1), in which case it would appear that default takers need not be cited, and;

8. Although not listed in SCPA § 1403, the Attorney General, in cases where distributees are unknown or cannot be found, must be served.

Although not required by SCPA § 1403, in some cases, the petitioner should serve any other person who may have an interest and could arguably contest the will at a later date. For example, courts have held that a residuary beneficiary has standing to raise an objection as to the appointment of an attorney/fiduciary and claim undue influence.

In *In re Estate of Weinstock, 40 N.Y.2d 1 (N.Y. 1976),* residuary beneficiaries objected to father and son attorneys acting as executors of decedents estate. Father and son attorneys prepared decedents will naming themselves as executors. Even though decedent had stated his desire to avoid fees, attorneys did not tell him that each would be entitled to full commission. The court held that there was overreaching by the attorneys and a breach of their professional responsibility to the decedent constituting constructive fraud and requiring their exclusion from serving as executors.

It has also been held that a *Weinstock* objection can be made as late as the accounting proceeding and need not be addressed on probate.

In *In re Estate of Harris, 123 Misc. 2d 247 (N.Y. Misc. 1984)*, decedent nominated his attorney and the attorney's partner as coexecutors. Beneficiaries did not object to the nominations during probate but, after a petition for an accounting and the final accounts were filed, claimed that the coexecutors negligently and unethically failed to inform decedent that they would both be entitled to commissions. The attorney coexecutor's failure to make a proper disclosure to the decedent could have constituted a form of constructive fraud sufficient to preclude his appointment. Where the claim was made against an attorney, the beneficiaries' acquiescence in probate did not bar them from raising their claim of fraud after the final accounts were filed.

In such circumstance, the attorney/fiduciary should add to the probate petition a wherefore clause with respect to his or her appointment and cite the residuary beneficiaries so the issue will be addressed up-front, rather than after the fiduciary has qualified and done all the work.

Petitioner, creditors, and those who waive citation need not be cited. The petitioner does not require citation. Jurisdiction is obtained over the petitioner by filing of the petition. Similarly, anyone who files a waiver of citation or appears in the proceeding need not be cited. A creditor need not be cited since a creditor's claim takes priority over any testamentary dispositions regardless of what will is probated or who the fiduciary is.

Vertical virtual representation is permitted. If a person required to be cited dies, process must issue to his fiduciary or, if none has been appointed, to all persons interested as distributees, or nominated fiduciary, or named as beneficiaries under any will of the deceased person filed in the court. If a necessary party is disqualified because of abandonment, *see* EPTL §§ 5-1.2, 4-1.4, the person still must be cited so the court can determine status.

Virtual Representation under SCPA § 315 applies to determine who should be cited. However, it is vertical virtual representation which will be permitted since under SCPA § 315(5); horizontal virtual representation is only permitted where the will specifically authorizes it. Until probated, however, a propounded instrument has no effect and accordingly, even if the will permits horizontal virtual representation, it will not be allowed in the probate proceeding.

In a probate proceeding in *In re Estate of Ginsburg, 115 Misc. 2d 122 (N.Y. Misc. 1982)*, proponent of the will sought horizontal virtual representation of decedents infant distributees by a party to the proceeding who had the same interest as the infants. The court found that the will expressly provided for such representation by explicit reference to SCPA § 315(5). However, the court held that the precondition to virtual representation, namely, that the will expressly provided for it, could not be met by an instrument whose validity was still subject to question by the interested persons who it was sought to deny the issuance of process to. The infant distributees were required to be served with process.

Therefore, if the proffered will adversely affected the prior will, which contained a trust providing income to A, remainder to B, and if B were not alive to B's issue, then B's issue, who may be under a disability, need not be cited as they can be virtually represented by B himself. This is vertical virtual representation. If however, the prior instrument provided income to A, remainder to B and C, who are brothers, then B could not represent C, who is under a disability, since this is horizontal virtual representation, not authorized until the will is actually admitted to probate.

For further discussion of the issue, *see* 5 NY Practice Guide: Probate & Estate Admin § 5.02: Necessary Parties to the Probate Proceeding; 1-6 NY Practice Guide: Probate & Estate Admin § 6.04: Supplemental Process; 1-6 NY Practice Guide: Probate & Estate Admin § 6.06: Who May Serve Process; 1-6 NY Practice Guide: Probate & Estate Admin § 6.09: Citation Forms; 1-7 NY Practice Guide: Probate & Estate Admin § 7.01: The Petition, Oath and Designation; 1-7 NY Practice Guide: Probate & Estate Admin § 7.02: Attesting Witnesses' Affidavits and Citation or Waiver of Issuance; 8 NY Practice Guide: Probate & Estate Admin § 8.03: Procedure for Examination of Witnesses; 8 NY Practice Guide: Probate & Estate Admin § 8.08: Proof of Lost or Destroyed Will; 1-9 NY Practice Guide: Probate & Estate Admin § 9.01: Reasons for Obtaining Preliminary Letters; 1-3 LexisNexis AnswerGuide New York Surrogate's Court § 3.07: Preparing and Serving Citation; 3-41 *Warren's Heaton on Surrogate's Court Practice § 41.05*: Persons Who Must Be Served With Citation; 3-41 *Warren's Heaton on Surrogate's Court Practice § 41.06*: Form of Citation; 11-187 *Warren's Heaton on Surrogate's Court Practice § 187.05*: Procedure for Construction of Wills.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

Barnosky on A Lost Will May Be Probated under Certain Circumstances

2008 Emerging Issues 1907

Barnosky on A Lost Will May Be Probated under Certain Circumstances

By John J. Barnosky and Kelliann Kavanagh

February 12, 2008

SUMMARY: By statute, New York allows the probate of a lost or destroyed will. In this expert commentary, John J. Barnosky, a New York attorney with expertise in trust and estate law, discusses the difficult burden of proof for the proponent of such a will and cautions that practitioners should work to ensure that their clients safeguard their original wills.

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ARTICLE: Insight

SCPA § 1407 establishes the procedure that may allow probate of a lost or destroyed will. The will's proponent must prove that (1) the testator did not revoke the will, (2) the testator executed the will, and (3) that each provision is established clearly and distinctly. Because this is a difficult process, the practitioner must ensure that clients safeguard their original will. It is best practice to deposit the original will with the attorney draftsman or keep it in a safe-deposit box or other safe place. Attorneys should always keep a photocopy of executed wills.

Analysis

Presumption of revocation is hard to overcome. It is hardest to prove that the testator did not revoke a lost or destroyed will. The law presumes that, if the decedent had the will and it cannot be located at death, the testator destroyed it with the intent to revoke. The proponent bears the burden to overcome this presumption. Courts often find that the proponent fails to meet their burden, even when there is no objection. *In re Gray*, N.Y.L.J., May 12, 1987, at 15, col. 6 (Surr. Ct. Nassau County).

For example, in *In re Will of Young, 82 Misc. 2d 871 (N.Y. Misc. 1975)*, proponent of decedents alleged will was the alternate executor named in the will. The burden or proof to establish the nonrevocation of a lost will is on the proponent. Although proponent proved that a valid will was made, he did not show that it was in existence at or after the decedent's death. Proponent failed to prove that the will was inadvertently destroyed or lost after decedents death, but

was never revoked. The presumption of revocation was not overcome.

A proponent may overcome the presumption, if the proponent can prove that an act beyond the testator's control-fire, flood-destroyed the will. A proponent can also provide testimony of disinterested persons to recent conversations in which the testator confirmed the content of the will.

Testimony or affidavits of witnesses required to prove due execution. The testimony or affidavits of the witnesses to the will is required to prove due execution. Practitioners should retain a photographic or conformed copy of the will showing witness names and addresses or it will be difficult to contact witnesses who can prove due execution.

Will proponent must prove provisions clearly and distinctly. The will proponent must prove each will provision clearly and distinctly by at least two credible witnesses or by a copy or draft of the will proved to be true and complete. Though attesting witnesses may not know the contents of a will, this requirement has been satisfied by testimony of the attorney drafter or secretary who typed the will and can identify a copy or draft or recall provisions of the will. Thus, the witnesses that prove due execution need not be the ones to prove the contents of the will. If no copy of the will is available, witnesses must remember the substance of the will, not its exact language.

In *In re Estate of Musacchio, 146 Misc. 626 (N.Y. Misc. 1933),* decedent's daughter brought a proceeding to establish an alleged lost will. Daughter produced two witnesses who swore to its contents. The witnesses testified that the lost will was made it their presence and delivered to a custodian. It was not shown that the decedent ever saw the custodian again. The court held that testimony of the two witnesses as to the substance of the will sufficed. Witnesses are not expected to give exact language. Proof that the lost will was deposited with a custodian that the decedent never saw again overcame the presumption that it was destroyed. The court ordered the probate of the alleged will as a lost will.

For further discussion of the issue, *see* 1-2 NY Practice Guide: Probate & Estate Admin § 2.03: Persons Entitled to Appointment as Voluntary Administrator; 8 NY Practice Guide: Probate & Estate Admin § 8.08: Proof of Lost or Destroyed Will; 1-9 NY Practice Guide: Probate & Estate Admin § 9.01: Reasons for Obtaining Preliminary Letters; 1-12 NY Practice Guide: Probate & Estate Admin § 12.01: When Letters of Temporary Administration May Be Granted; 1-3 LexisNexis AnswerGuide New York Surrogate's Court § 3.13: Proving Lost or Destroyed Will; 2-37 *Warren's Heaton on Surrogate's Court Practice § 37.06*: Will Must Be Filed; 3-41 Warren's Heaton on Surrogate's Court Practice Ch. 41: Probate Proceedings; 3-42 *Warren's Heaton on Surrogate's Court Practice § 42.08*: Revocation.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

Carew on Proceeding to Suspend, Modify, or Revoke Letters

2008 Emerging Issues 1894

Carew on Proceeding to Suspend, Modify, or Revoke Letters

By Colleen F. Carew and Kelliann Kavanagh

February 11, 2008

SUMMARY: New York statutes provide numerous grounds for suspension or modification of letters of administration, or removal of a fiduciary. Colleen FNew York statutes provide numerous grounds for suspension or modification of letters of administration or removal of a fiduciary. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, discusses the beneficiarys heavy burden when challenging a fiduciarys authority, as well as some factors that mitigate against making such a challenge.. Carew, a New York attorney with extensive experience in Estate and Probate matters, discusses the beneficiarys heavy burden when challenging a fiduciarys authority, as well as some factors that mitigate against making such a challenge.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

While SCPA §§ 711 and 719 provide a litany of grounds for suspension or modification of letters, or removal of a fiduciary, the beneficiary has a difficult burden to establish that the fiduciary's conduct warrants relief and should give serious consideration to the merits of an application.

Analysis

Weight is given to testator's intention. The court must give great weight to the testator's intention in nominating an executor and/or trustee, and to the statutory priority for entitlement to letters of administration. Given the statutory mandate, the court will exercise extreme caution before denying letters, and will do so only on a showing of egregious facts, such as misconduct.

Party should weigh the benefit in defending against removal. Since the cost of the fiduciary's defense to a removal proceeding may reduce the interest of the client-beneficiary, a party should weigh the benefit in seeking such relief against the potential expense. In addition, the request to remove a fiduciary is likely to delay the final distribution of estate assets. Pending a determination of a removal application, the fiduciary is not in a position to make a distribution.

Fiduciary will not be removed without clear showing of misconduct. The party seeking to remove a fiduciary has the burden of proof. The test applied in a removal proceeding is whether the conduct of the fiduciary has been enough to "endanger the estate or seriously impede its administration." *In re Ballesteros*, N.Y.L.J., June 18, 2003, at 23, col. 2 (Surr. Ct. New York County). Conclusory and unfounded allegations will not suffice.

A fiduciary will not be removed without a clear showing of misconduct.

In *In re Vermilye, 101 A.D.2d 865 (N.Y. App. Div. 1984),* Surrogates Court granted public administrator's application for letters of temporary administration and denied the preliminary letters testamentary issued to the executor. The appellate court reversed the order holding that preliminary letters testamentary had already been issued, the estate assets marshaled and reinvested, and a bond posted. Further, the evidence did not support a claim of undue influence or any other serious misconduct that would endanger the safety of the estate on the part of the executor. Mere allegations were insufficient grounds to remove the executor from his office of preliminary executor.

A common ground raised to disqualify a fiduciary is the potential or real conflict between the fiduciary and a beneficiary. However, conflict is inherent in their relationship because their interests are not the same. Thus, an allegation of conflict of interest, such as a debt owed to the estate, is not in and of itself a statutory ground for disqualification and removal.

In *In re Estate of Shephard, 249 A.D.2d 748 (N.Y. App. Div. 1998),* decedents children requested that they be granted letters of administration for their mother's estate over decedents husband whose prior filing for divorce presented a conflict of interest. Children contended that husband was unfit to serve as a fiduciary due to his alleged indebtedness to the estate and his alleged abandonment and nonsupport of decedent. The court held that husbands purported conflict of interest as an alleged debtor did not warrant the denial of letters to him. The court found that it had not been demonstrated on the record that the husband's abandonment and/or nonsupport of the mother rendered him otherwise unfit to serve as fiduciary.

Examples of situations when a fiduciary has been removed include:

1. Fiduciary refused to obey a court order (a common allegation and one easily proven). *See* SCPA §§ 2205 and 2206; *In re Iwaszkiewicz*, N.Y.L.J., Jan. 28, 2002, at 23, col. 1 (Surr. Ct. Kings County);

2. Fiduciary failed to notify the court of a change of address (a common basis for relief).

In *In re Drimmer, 97 A.D.2d 792 (N.Y. App. Div. 1983),* a contingent remainderman under a trust sought an order to compel trustee to account. The Surrogate issued an order to compel trustee to account within 90 days after service of a copy of the order. A copy was sent to trustee, by certified mail, at her last known address. It was returned marked "Moved, not forwardable". While the Surrogate refused to hold trustee in contempt without proof of personal service of the order, he did remove her as trustee. The appellate court agreed that trustee was properly removed upon her failure to notify the court of a change of address.

3. Fiduciary found to commit undue influence in a prior proceeding. *In re Kalba*, N.Y.L.J., May 15, 1997, at 33, col. 4 (Surr. Ct. Westchester County);

4. Fiduciary removed property from the State (also a basis for the bond fixation). *See* SCPA § 710; *In re Casson*, N.Y.L.J., Nov. 4, 1999, at 28, col. 4 (Surr. Ct. Westchester County); and

5. Friction between fiduciary and beneficiary interfered with proper administration of estate.

For example, in *In re Estate of Thompson, 232 A.D.2d 219 (N.Y. App. Div. 1996),* the court explained that a

testatrix generally has the right to determine who is most suitable among those legally qualified to settle her affairs, and her selection is not to be lightly discarded. However, it is well settled that the Surrogate may disqualify a person from receiving letters of administration where the friction between such person and a beneficiary or cofiduciaries is so severe as to interfere with the proper administration of the estate, and future cooperation is unlikely. The Surrogate's finding of such hostility here was amply supported by the record.

For further discussion of the issue, see 1-13 NY Practice Guide: Probate & Estate Admin § 13.11: Contested Application; 1-14 NY Practice Guide: Probate & Estate Admin § 14.02: When Letters of Administration De Bonis Non May Be Granted; 2-26 NY Practice Guide: Probate & Estate Admin § 26.01: Duty of Loyalty; 2-26 NY Practice Guide: Probate & Estate Admin § 26.04: Liability of Fiduciary; 2-40 NY Practice Guide: Probate & Estate Admin § 40.03: Compulsory Judicial Accountings; 2-41 NY Practice Guide: Probate & Estate Admin § 41.01: Nature and Purpose of Accounting; 1-14 LexisNexis AnswerGuide New York Surrogate's Court § 14.20: Considering Grounds for Suspending, Modifying or Revoking Letters; 1-2 *Warren's Heaton on Surrogate's Court Practice § 2.26*: Additional Miscellaneous Powers of Surrogate; 2-33 *Warren's Heaton on Surrogate's Court Practice § 33.10*: Suspension, Modification or Removal for Disqualification or Misconduct; 2-33 *Warren's Heaton on Surrogate's Court Practice § 33.12*: Resignation of Fiduciary.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

13 of 42 DOCUMENTS

Carew on Obtaining Letters of Temporary Administration

2008 Emerging Issues 1895

Carew on Obtaining Letters of Temporary Administration

By Colleen F. Carew and Kelliann Kavanagh

February 11, 2008

SUMMARY: When counsel faces a problem that will substantially delay administration of the estate, counsel should determine whether the facts merit appointment of a temporary administrator. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, discusses the need to show the necessity for temporary administration, as well as the circumstances under which a court would be inclined to grant temporary administration.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

When counsel faces a problem that will substantially delay administration of the estate, counsel should refer to SCPA § 901 to determine whether the facts merit appointment of a temporary administrator. Petitioner should be prepared to demonstrate to the court why appointment of a fiduciary is necessary during the period of delay. More than a general statement of the need to protect the estate may be required. For example, petitioner may show that a fiduciary is necessary to marshal assets to pay creditors and estate taxes, release an apartment, or sell securities in a fluctuating market.

Analysis

Party seeking issuance of letters of temporary administration should be prepared to demonstrate source of delay. Temporary administration is available for an estate, an absentee, or an internee. Temporary administration is used when petitioner anticipates delay in issuance of letters of administration or where a person is missing. The estate assets may be wasted or its value diminished if letters do not issue. A party seeking issuance of letters of temporary administration should be prepared to demonstrate the source of delay, and specify how the estate may be adversely affected. For example, when decedent held a large portfolio of securities, appointment of a fiduciary is imperative to liquidate assets to protect against a precipitous fall in the market. Or, if an estate is taxable, a fiduciary is necessary to obtain valuations for the estate tax return and to liquidate sufficient assets to pay the tax within nine months of decedent's death.

As a general rule, there is no need for temporary administration in a probate proceeding, as preliminary letters may issue

under SCPA § 1412. However, when the nominated fiduciary is unable to act, letters of temporary administration may be granted.

Temporary administration may be granted if court finds it is in best interest of estate. SCPA § 901 provides that temporary administration may be granted if the court finds it is in the best interest of the estate. The court has discretion to grant letters of temporary administration.

In *In re Estate of Erlanger, 136 Misc. 793 (N.Y. Misc. 1930), aff'd, 229 A.D. 778 (N.Y. App. Div. 1930),* an application was filed for appointment of an executor named in the will as the temporary administrator of decedents estate. The Surrogate must first determine whether there is any emergency requiring temporary administration. If so, the selection of the temporary administrator is within the discretion of the Surrogate. However, consideration is first given to the person selected by the maker of the will as executor of his estate. The court appointed the executor as temporary administrator.

There is no statutory priority as to the person(s) entitled to be appointed as temporary administrator. The court has discretion in determining who will be appointed. Such discretionary power does not supersede the court's duty to grant letters to a nominated executor.

In *In re Vermilye, 101 A.D.2d 865 (N.Y. App. Div. 1984),* the Surrogates Court granted the public administrator's application for letters of temporary administration and denied the preliminary letters testamentary issued to the executor. The appellate court reversed the order holding that preliminary letters testamentary had already been issued, the estate assets marshaled and reinvested and a bond posted, and the case was not a proper case for temporary administration. The court stated that courts are required to exercise the power of removal sparingly and to nullify the testator's choice only upon a clear showing of serious misconduct that endangers the safety of the estate.

Nor should SCPA § 901 be used where a fiduciary has been appointed. A party should seek appointment of a restricted or limited administrator under SCPA § 702. An example of a typical delay would be in an administration proceeding when a challenge is made to the qualification of the petitioning party, which requires a hearing. Pending a determination, the estate assets must be administered. For example, a surviving husband is alleged to have abandoned decedent by decedent's children from a first marriage. The spouse has priority to receive letters of administration. Absent a showing that the estate requires administration, the court may determine that it is in the best interest of the estate not to appoint someone whose conduct might impair the spouse's interest. The court will consider the degree to which another party is able to maintain impartiality as the administrator.

For further discussion of the issue, see 1-12 NY Practice Guide: Probate & Estate Admin § 12.01: When Letters of Temporary Administration May Be Granted; 1-16 NY Practice Guide: Probate & Estate Admin § 16.19A: Health Care Decisions for Mentally Retarded Person; 1-6 LexisNexis AnswerGuide New York Surrogate's Court § 6.03: Utilizing Temporary Administration When Issuance of Letters Is Delayed; 1-6 LexisNexis AnswerGuide New York Surrogate's Court § 6.04: Utilizing Temporary Administration for Alleged Decedents; 1-6 LexisNexis AnswerGuide New York Surrogate's Court § 6.05: Utilizing Temporary Administration for Absentees; 1-6 LexisNexis AnswerGuide New York Surrogate's Court § 6.06: Utilizing Temporary Administration for Internees; 1-2 *Warren's Heaton on Surrogate's Court Practice § 2.11*: Jurisdiction and Venue Over Estates of Domiciliaries: 1-2 *Warren's Heaton on Surrogate's Court Practice § 2.13*: Jurisdiction and Venue Over Nondomiciliary Decedent, Absentee, or Internee; 2-34 *Warren's Heaton on Surrogate's Court Practice § 34.01*: When Temporary Administration May Be Granted.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

14 of 42 DOCUMENTS

Martin on Considerations Regarding Cross Petitions for Letters of Administration

2008 Emerging Issues 1896

Martin on Considerations Regarding Cross Petitions for Letters of Administration

By Andrew L. Martin and Kelliann Kavanagh

February 11, 2008

SUMMARY: In New York, spouses and children of a decedent often file cross-petitions for letters of administration. In discussing such cross-petitions, Andrew L. Martin of the Surrogates Court of Nassau County, New York, explains the statutory, detailed order of priority for the granting of letters of administration, some circumstances when a court will exercise its discretion in appointing a representative, and when the court is likely to appoint a public administrator.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

Parties often file cross-petitions for letters of administration, especially when the decedent is survived by a spouse and the children of a prior marriage who are competing to administer the estate or, when there is no spouse, hostility exists between the children. The practitioner should be able to assess his or her client's likelihood of success at trial and fashion a posture consistent with that assessment. Under SCPA § 1001, order of priority is mandatory, favoring the spouse. When the parties have an equal claim to letters, the court will exercise its discretion in favor of the party representing the majority interest.

Analysis

SCPA 1001 priority is mandatory. SCPA 1001 contains a detailed order of priority in the court's granting of letters of administration. Absent a showing that the person with statutory priority is ineligible to receive letters, letters must issue to that person. The court has no discretion under SCPA § 1001.

In *In re Estate of Salvan, 132 A.D.2d 662 (N.Y. App. Div. 1987),* the lower court denied probate of decedents will and granted letters of administration to her daughter. The appellate court affirmed the lower court's decree regarding probate, but modified it with regard to the recipient of the letters of administration. SCPA § 1001 sets forth the priority for granting such letters, and a surviving spouse takes precedence over all others. This priority is mandatory unless the person with first priority is barred by law. Daughter argued, but no direct evidence was adduced, that surviving spouse was dishonest in money matters so that the assets of the estate would be in peril. The court granted letters of administration to the spouse.

Surviving spouse always has priority. Under SCPA § 1001, the decedent's surviving spouse has first priority to receive letters. If representing the surviving spouse, there is no need to compromise on your client's appointment unless he or she is ineligible. If you don't represent the surviving spouse and there is no real question of ineligibility, pursuing objections against the spouse or maintaining your own client's proceeding for letters will be fruitless at best and, at worst, sanctioned as frivolous conduct. *See* SCPA § 1001(1)(a); 22 NYCRR § 130-1.1.

Court will exercise discretion in favor of distributee representing majority interest when cross-petitioners have equal priority. If there is no surviving spouse willing to serve and the cross-petitioners have equal priority to issuance of letters, the court may appoint any or all of those persons. However, when persons of equal priority file cross-petitions, courts generally issue letters to that person(s) who represent the largest share of the estate. That is, if there are three children, two of whom are petitioning, the court will most likely grant letters to the child who has the support of the third child, as he or she would then represent two-thirds of the estate interests. (See *Matter of Doyle, 2006 NY Slip Op 50108U (N.Y. Misc. 2006)).* If you represent the majority interest, you are likely to prevail on your application. Conversely, if you represent the minority interest, unless there is some disqualifying characteristic in the other petitioner, it is not likely that your client will be appointed. *See* SCPA § 1001(1)(f)(I); *In re Pikoris*, N.Y.L.J. Dec. 31, 2002, at 19, col. 6 (Sur. Ct. New York County).

Court prefers negotiated settlement but will appoint public administrator if tensions are high. When neither party seeking letters has priority nor represents the majority of the estate interests, a negotiated settlement can be reached. If the parties agree to their appointment as co-administrators, the court is unlikely to interfere with that solution. Counsel should be aware that if the court is called on to consider the reasonableness of the attorneys' fees, the court will determine what one reasonable attorney's fee would be for the estate involved and apportion that fee between the attorneys. While both fiduciaries are free to retain their own counsel, the estate will not bear two full attorneys' fees.

It is not always advisable to resolve cross-petitions for letters of administration by agreeing to have the petitioners serve together. If the level of hostility is great, it is unlikely that they will be able to work together for the smooth administration of the estate. In such case, the parties might be able to agree on a third party to serve. If not, the court may appoint one of them or might appoint the Public Administrator. SCPA § 1001(8).

For instance, in *In re Estate of Mergentime, 155 Misc. 2d 502 (N.Y. Misc. 1992), aff'd, 207 A.D.2d 452 (N.Y. App. Div. 1994),* hostile coexecutors of an estate employed separate counsel to assist them in administration. The practice of retaining separate counsel tends to lead to duplication of legal services and excessive fees. A review of the affidavits of services of counsel for the coexecutors indicated that considerable time was spent in reviewing the work of other counsel. Administration of the estate was delayed for several years due to an impasse involving the purchase by the coexecutor's closely held corporation of the decedents husband's estate's minority stock interest in the corporation.

In *In re Estate of Rad, 162 Misc. 2d 229 (N.Y. Misc. 1994),* following renunciation by the nominated executor, two of decedents children sought letters of administration. One can be disqualified from acting as fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or being otherwise unfit. Disqualification is also warranted if disharmony jeopardizes the interests of beneficiaries and administration of the estate. The court disqualified the daughter for threats that she would mutilate the wife of the nominated executor if he didn't renounce, together with her hostility toward her brothers. The court denied the brother's request because of his lack of an interest in the estate, coupled with his hostility. The court issued letters of administration to the Public Administrator.

For further discussion of the issue, see 1-13 NY Practice Guide: Probate & Estate Admin § 13.07: Persons Who May Petition for Letters of Administration; 1-13 NY Practice Guide: Probate & Estate Admin § 13.10: Unopposed Application; 1-14 NY Practice Guide: Probate & Estate Admin § 14.05: Proceedings to Obtain Letters of Administration De Bonis Non; 1-4 LexisNexis AnswerGuide New York Surrogate's Court § 4.12: Appointing Administrator; 2-35 *Warren's Heaton on Surrogate's Court Practice § 35.06*: Proceedings Upon the Return of Citation.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

15 of 42 DOCUMENTS

Barnosky on Persons Who May Become a Voluntary Administrator

2008 Emerging Issues 1897

Barnosky on Persons Who May Become a Voluntary Administrator

By John J. Barnosky and Kelliann Kavanagh

February 11, 2008

SUMMARY: In New York, statutes dictate who may serve as a voluntary administrator if an estate. John J. Barnosky, a New York attorney with expertise in trust and estate law, discusses the classes of persons that can qualify to serve as voluntary administrators, which, he explains, depends upon whether a decedent dies testate or intestate.

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ARTICLE: The practitioner must use SCPA § 1303 to ascertain who may serve as a voluntary administrator. Rules depend on whether the decedent dies testate. Since only persons SCPA § 1303 lists can become a voluntary administrator, counsel should make sure that a qualified person exists before seeking small estate administration.

Analysis

If decedent dies intestate, there is priority among distributees to qualify as voluntary administrator.

If a decedent dies intestate, priority to qualify as voluntary administrator is as follows:

1. An adult surviving spouse;

2. Competent adult children;

3. Competent adult grandchildren;

4. Parents;

5. Brothers and sisters;

6. Nieces and nephews, and;

7. Aunts and uncles.

In intestacy, the voluntary administrator must be a distributee.

For example, in *In re Estate of Armstrong, 95 Misc. 2d 406 (N.Y. Misc. 1978),* decedent died intestate. Her sole distributees were her two minor children. Decedents mother sought to be appointed voluntary administratrix of the estate. In the formal administration of intestate estates, only a distributee has the right to be granted letters of administration in order to bar disappointed relatives from interfering in an estate in which they have no interests. The court held that decedent's mother could not be appointed voluntary administratrix since she was not a distributee.

In *Matter of Ortega, 2006 NY Slip Op 26456 (N.Y. Misc. 2006),* the sole distributee for one intestate estate resided abroad and had named a New York resident to serve as fiduciary in her stead. The sole distributee of the other intestate estate was deceased and the proposed fiduciary was a voluntary administrator of the distributee's estate. SCPA § 1303(a) listed only certain persons who had the right to act as voluntary administrator, and the designee of a distributee or the fiduciary of the estate of a deceased distributee were not among those listed. Neither estate qualified for voluntary administration.

If no person can serve, then the court may appoint the committee or conservator of the distributee. If no listed distributee or their legal representative qualifies, then the public administrator or chief fiscal officer of the county can serve as voluntary administrator. Where estrangement and acrimony between eligible candidates for voluntary administration exists the court may appoint the public administration or the chief fiscal officer of the county. (*Matter of DeFabbia, 2006 NY Slip Op 51641U (N.Y. Misc. 2006)).*

SCPA § 1001(5), which allows a distributee to designate a non-distributee to act as administrator, is unavailable in small estate proceedings.

If decedent dies testate, executor or alternate has first right to act as voluntary administrator. If a decedent leaves a will, the executor or alternate executor named in the will has the first right to act as voluntary administrator. The will must first be filed with the Surrogate's Court, although it need not be probated. If the named executor fails to qualify within 30 days after filing the will, then any adult person entitled to petition for Letters of Administration with the will annexed under SCPA § 1418 shall have the right to act as voluntary administrator.

For instance, in *Estate of Edna v. Baker, 146 Misc. 2d 161 (N.Y. Misc. 1989),* an assignee of an alleged creditor of an estate applied to act as voluntary administrator. The executor named in deceased's will predeceased the decedent. The assignee gave written notice to all of the decedent's distributees and legatees named in the purported will that the will had been filed in Surrogate's Court, and that upon expiration of 30 days, an application would be made by the assignee to act as voluntary administrator. This 30-day period expired and no one came forward seeking to act as voluntary administrator. The court held that the creditor was permitted to petition for probate of the will and act as voluntary administrator, and since the assignee of the creditor stood in place of the creditor, the assignee was permitted to petition for probate and act as voluntary administrator.

SCPA § 1418 gives priority to a sole beneficiary or one or more residuary beneficiaries. If there are multiple beneficiaries seeking appointment, the court tends to prefer the person having the largest interest in the estate.

For further discussion of the issue, see 1-2 NY Practice Guide: Probate & Estate Admin § 2.03: Persons Entitled to Appointment as Voluntary Administrator; 1-16 NY Practice Guide: Probate & Estate Admin § 16.04: Petition for Appointment of Guardian; 1-5 LexisNexis AnswerGuide New York Surrogate's Court § 5.04: Determining Who May Act As Voluntary Administrator; 2-37 Warren's Heaton on Surrogate's Court Practice Ch. 37: Settlement of Small Estates Without Court Administration.

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Mr. Barnosky serves on the EPTL/SCPA Advisory Committee established by the New York State Legislature to review and modernize statutes relating to trusts and estates. He is also a member of the Taxation Section of the American Bar Association and a fellow of the American College of Trusts and Estates Counsel. Since 1985, Mr. Barnosky has been the editor of the North Fork Bank Estate Review. He has also written articles published in the New York Law Journal, The Nassau Lawyer, and the Journal of the Suffolk Academy of Law. An Adjunct Professor of Law at Touro Law School from 1990-1993, Mr. Barnosky is a frequent lecturer at New York State Bar Association seminars on Trust and Estate Practice.

Mr. Barnosky is the past chair of the Estate and Trust Law Committee of the Nassau County Bar Association, as well as a current Director of the Association. He served as Chair of the 4,500 member Estate and Trust Law Section of the New York State Bar Association and was a member of the Associations Task Force on Court Reorganization.

Mr. Barnosky was named a Super Lawyer in the 2007 Metro Edition of New York Super Lawyers magazine. He was named one of the Best Trusts & Estates Lawyers in America by American Lawyer in the November 2004 issue.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

16 of 42 DOCUMENTS

Carew on Enforcing a Decree or Order of the Surrogate's Court

2008 Emerging Issues 1884

Carew on Enforcing a Decree or Order of the Surrogate's Court

By Colleen F. Carew and Kelliann Kavanagh

February 8, 2008

SUMMARY: On occasion, the losing party fails to abide by the decree or order from a New York Surrogates Court, forcing the victorious party to seek relief to enforce the judgment. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, explains the procedures for seeking enforcement of a Surrogates determination, as well the enforcement mechanisms available to a Surrogate, and includes a discussion of *Dolcater v. Manufacturers & Traders Trust Co., 25 F. Supp. 637 (D.N.Y. 1938).Dolcater v. Manufacturers & Traders Trust Co., 25 F. Supp. 637 (D.N.Y. 1938)*

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

On occasion, the losing party fails to abide by the decree or order of the Surrogate, forcing the victorious party to seek relief to enforce the judgment. Enforcement is by either execution or contempt. Reference must be made to Article 6 of the SCPA and Article 52 of the CPLR. While SCPA § 601 provides that a decree or order may be enforced by the Surrogate in any manner similar to that employed by the Supreme Court, it may only be executed in Supreme Court after first docketing a transcript as provided under SCPA § 603. Under SCPA § 603, the Surrogate's Court does not have authority to enforce a decree by execution. This difference is a trap for the unknowing.

Analysis

SCPA 601 definitions differ from CPLR. Terminology used in Surrogate's Court differs from civil practice. SCPA § 103 offers practitioners a dictionary of many terms used in practice. Omitted from section 103 are definitions for the terms decree" and order," provided under SCPA § 601.

Determination is enforced by decree or order. SCPA 601 provides the method for enforcing a determination by the Surrogate made in the form of a decree or order. A decree provides the issuing court's final determination of parties' rights, similar to a judgment in Supreme Court. An order is an interim determination made by the court for relief

incidental to that sought in the proceeding. For example, each proceeding in the Surrogate's Court is a separate proceeding determined by a decree. Where an application is made for interim relief, the court will issue an order.

Failure to comply with service of order or decree constitutes abandonment of proceeding. Absent good cause, failure to comply with service of the order or decree constitutes abandonment of the proceeding. The Uniform Rules for Surrogate's Court require that an order or decree (referred to as a judgment) be submitted, on notice, within 60 days from signing and filing of the court's decision directing settlement of an order or decree. Personal service must be made not less than five days from the date of settlement and service by mail, or, not less than 10 days from the date of settlement. A proposed counter-order or decree shall be returnable on the same date and served two days, if in person, or seven days, if by mail, from the date of settlement. *See* 22 NYCRR § 207.37.

Party should ensure order is entered on court docket and then served on all parties. Where the Surrogate issues a decision constituting the court order, a party should ensure it is entered on the court docket and then serve a copy with notice of settlement on all parties.

Valid decree is conclusive and bars subsequent proceeding seeking same or similar relief. Provided jurisdiction has been obtained over a party, a valid decree is conclusive and bars any subsequent proceeding seeking the same or similar relief. The doctrine of *res judicata* applies to decrees and orders. However, the decree is only conclusive against those persons made a party to the proceeding and affects only the relief sought. For example, in a judicial accounting proceeding, a decree is conclusive only as to matters disclosed in the account.

In *Dolcater v. Manufacturers & Traders Trust Co., 25 F. Supp. 637 (D.N.Y. 1938), app. dism'd, 106 F.2d 30 (2d Cir. 1939),* commissions payable to the executors, the special guardian, and the attorney for the executors were fixeed in a final settlement of the accounts of the executors. Plaintiff sought to recover excessive commissions on the grounds of fraud or gross negligence. New York law provides that the decree is conclusive and that a judicial settlement of an account is conclusive evidence against all parties over whom jurisdiction was obtained. However, where moneys of the estate have come into the possession of the executor through fraud, the court has jurisdiction.

Remain wary of actions and inactions of past fiduciaries. When assessing conclusiveness of a decree or order, it is imperative to consider whether any party had an obligation not addressed at the time the proceeding was determined.

Surrogate's Court may reopen decree or order in interest of justice. The Surrogate's Court may reopen a decree or order in the interest of justice to correct a mistake or, where proof establishes fraud or collusion, an unwarranted imposition.

In *In re Estate of Ziegler, 161 Misc. 2d 203 (N.Y. Misc. 1994), aff'd, 213 A.D.2d 280 (N.Y. App. Div. 1995), leave to app. den., 86 N.Y.2d 712 (N.Y. 1995),* a decree settling the account of decedent's executors could not be reopened by decedent's daughter on the ground that the decree gave her brother a controlling interest in a corporation by one share of stock. The information regarding the allocation of stock was adequately disclosed in the accounting and the decree was deemed conclusive as to this issue under res judicata. Since the allocation of stock bore no taint of self-interest and represented neither a breach of fiduciary duty nor a mistaken application of a legal principle, the decree was conclusive.

In *In re Waters, 183 A.D. 840 (N.Y. App. Div. 1918),* decedent and his brother were business partners. After decedent's death, a written agreement was reached whereby the brother continued the business. The administratrix made an accounting based upon the agreement. Said accounting was judicially approved and a distribution of decedents assets was directed pursuant to the written agreement. On appeal, the court held that the original decree settling the administratrix's accounts was improperly vacated. Neither the decree nor the agreement was obtained by fraud, nor was

there any error or mistake.

For further discussion of the issue, see 1-4 *Warren's Heaton on Surrogate's Court Practice § 4.01*: Nature of Proceedings in Surrogate's Court; 1-10 Warren's Heaton on Surrogate's Court Practice Ch. 10: Orders and Decrees; 9-111 *Warren's Heaton on Surrogate's Court Practice § 111.06*: Determination of Motion.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

17 of 42 DOCUMENTS

Carew on Procedure to Enforce a Decree for Contempt

2008 Emerging Issues 1885

Carew on Procedure to Enforce a Decree for Contempt

By Colleen F. Carew and Kelliann Kavanagh

February 8, 2008

SUMMARY: In New York, contempt is one of the mechanisms available for compelling compliance to a determination from a Surrogates Court. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, explains the procedures that must be followed when seeking an order of contempt, such as the required contents of the petition seeking contempt and service on the delinquent party.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

The procedure for obtaining contempt requires strict compliance. Many parties fail to comply with the statutory requirements, only to later discover an error and suffer the inability to obtain relief. A common error is failure personally to serve the delinquent respondent with a certified copy of the decree or order prior to moving for contempt.

Analysis

Party may seek compliance of order or decree by commencing contempt proceeding. A party may seek compliance of a Surrogate's Court order or decree by commencing a contempt proceeding under SCPA § 607 for issuance of a warrant of commitment under Judiciary Law § 772, or by demanding that the delinquent respondent show cause why the Surrogate should not punish him or her the same for contempt. Note that section SCPA § 607 incorrectly cites Judiciary § 757 as the statute setting forth the warning notice.

The petition for contempt must establish information required under SCPA §§ 304 and 606. It is critical that the party include in the order to show cause a statement indicating that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may result in a fine or imprisonment, or both. The notice must be at least eight point type and state: "WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT." *See* Judiciary Law § 756. The warning notice is jurisdictional and failure to provide it will result in denial of the relief for contempt.

For example, in *In re Estate of Devine, 126 A.D.2d 491 (N.Y. App. Div. 1987),* heirs attacked the validity of decedents will, under which the bulk of her estate was to go to a charitable foundation. The trial court entered an order directing the coexecutors to retain custody of the decedent's papers and to make them available to any persons interested in the decedent's estate. The heirs filed a contempt motion when the coexecutors failed to turn the documents over. The contempt motion failed because it did not contain the requisite warning legend pursuant to Judiciary Law § 756. The absence of such a warning was fatal since Judiciary Law § 756 requirements are jurisdictional.

Copy of order, and underlying papers, must be served on delinquent respondent or delinquent respondent's attorney. Under SCPA § 607, a copy of the order to show cause, together with a copy of the underlying papers, must be served on the delinquent respondent or the delinquent respondent's attorney. Remember that petitioner must show that a certified copy of the underlying order or decree was served on the delinquent respondent. Where the delinquent respondent is a fiduciary and the decree or order relates to an estate, the court may enforce the decree or order when petitioner failed to serve a certified copy of the underlying order or decree.

For instance, in *In re Estate of Kahr, 85 Misc. 2d 363 (N.Y. Misc. 1976),* the U.S. government sought to have an estate executor cited for contempt for failing to obey the directions of a final decree to pay taxes owed and to comply with an information subpoena. The court granted the governments petition and cited the executor for contempt based upon his long and continual history of dilatory tactics and avoidance to fulfill his duties as fiduciary in this estate. The court held that the government did not need to serve a certified copy of the decree upon the executor because he was a fiduciary and the decree related to the estate.

Kahr also noted that a stricter attitude exists toward legal representatives. However, prudence warrants service of the underlying decree by certified copy.

Court will grant delinquent respondent opportunity for purgation of contempt. On the delinquent respondent's failure to comply with the contempt order, a warrant of commitment may issue with notice to the Sheriff of the county where the action was commenced. It is rare for a Surrogate to incarcerate a party. As a general rule, the court will grant the delinquent respondent an opportunity for purgation of the contempt by complying with the underlying order or decree within a specified time period.

For further discussion of the issue, see 1-23 NY Practice Guide: Probate & Estate Admin § 23.02: Procedure Under NY CLS SCPA 2110; 2-40 NY Practice Guide: Probate & Estate Admin § 40.01: Why the Fiduciary Accounts; 2-40 NY Practice Guide: Probate & Estate Admin § 40.03: Compulsory Judicial Accountings; 2-40 NY Practice Guide: Probate & Estate Admin § 40.09: Informal Accountings; 2-40 NY Practice Guide: Probate & Estate Admin § 40.10: FORM 40-1: Official Form for Inventory of Assets; 1-10 *Warren's Heaton on Surrogate's Court Practice § 10.20*: Enforcement by Contempt; 7-97 *Warren's Heaton on Surrogate's Court Practice § 97.03*: Procedure for Compelling Accounting.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

18 of 42 DOCUMENTS

Carew on Qualified Persons Entitled to Receive Letters

2008 Emerging Issues 1886

Carew on Qualified Persons Entitled to Receive Letters

By Colleen F. Carew and Kelliann Kavanagh

February 8, 2008

SUMMARY: Rarely will a New York Surrogates Court refuse to grant letters testamentary to a person both entitled and eligible to receive letters. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, discusses the statutory criteria by which eligibility and ineligibility are determined and identifies several classes of persons that are entitled, eligible, or ineligible to receive letters testamentary, as well as instances in which a court can refuse to grant letters.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

Rarely will the court refuse to appoint a person both entitled and eligible to receive letters. SCPA § 707 identifies those persons ineligible to receive letters. Generally, it can be said that when a person is not ineligible pursuant to SCPA § 707, then they are eligible.

Analysis

Person is entitled to receive letters testamentary if nominated as executor. An estate is administered by an executor or administrator. A person is entitled to receive letters testamentary if nominated as an executor under a will, SCPA § 1414, or where no nominated executor qualifies. SCPA § 1418. A person is entitled to receive letters of administration in order of priority. SCPA § 1001.

Court may grant letters to non-domiciliary alien who agrees to serve with New York resident. The court may grant letters to a non-domiciliary alien who agrees to serve together with a New York resident. The purpose of SCPA § 707 is to ensure that the fiduciary is subject to the court's jurisdiction and is available to receive service of process by creditors or other persons interested in the estate. The resident co-fiduciary need not have an interest in the estate. As the grant of letters is discretionary, a non-domiciliary alien is not necessarily entitled to receive process in a proceeding for issuance of letters of administration. *See* SCPA § 1003. However, the practitioner should look to local practice as some courts do require service on the non-domiciliary alien. When representing a non-domiciliary alien, consider

whether to appear on the client's behalf to ensure notice of any application made by another party.

Various persons are ineligible to receive letters. Those persons ineligible to receive letters are:

1. An infant, defined under SCPA § 103(27), as any person under 18 years of age.

2. An incompetent, defined under SCPA § 103(26), as any person judicially declared incompetent to manage their affairs.

3. A felon, provided such person is convicted of a crime constituting a felony under New York law.

In *In re Estate of Thompson, 75 Misc. 2d 508 (N.Y. Misc. 1973),* the nominated executrix was found guilty of making false statements under oath in an application for an immigrant visa and for alien registration. The court held that the felony of which she was convicted was a felony under federal law and a crime of sufficient gravity to call for a sentence of up to five years imprisonment. Since New York law (as of 1965) defined a felony to mean an offense for which a sentence to a term of imprisonment in excess of one year may have been imposed, the nominated executrix was ineligible to serve as an executrix.

4. A non-domiciliary alien, unless such person seeks to serve together with a New York resident.

5. A person who does not possess qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for execution of the office. The final reason in this list is a catch-all category designed to empower the court to disqualify persons deemed unfit to serve.

For example, in *In re Estate of Weinstock, 40 N.Y.2d 1 (N.Y. 1976),* father and son attorneys prepared decedents new will naming themselves as executors. Even though decedent had stated his desire to avoid fees, attorneys did not tell him that each would be entitled to full commission. The court held that there was overreaching by the attorneys and a breach of their professional responsibility to the decedent constituting constructive fraud and requiring their exclusion from serving as executors.

In *In re Estate of Cohen, 164 Misc. 98 (N.Y. Misc. 1937),* affd, *254 A.D. 571 (N.Y. App. Div. 1938),* decedents will named his three sons as fiduciaries. Each son was convicted of a crime. The first son had been convicted in state court of the felony of forgery. The second son had been convicted in federal court of making of a false oath in a proceeding in bankruptcy. The third son was convicted of petit larceny in state court and was indicted for perjury. The court held that: first son was absolutely incompetent to act as fiduciary; second son was competent to act as fiduciary because he was convicted of a federal, as opposed to a state, offense; and third son was incompetent to act as fiduciary unless and until he was acquitted of perjury.

6. Any person, in the court's discretion, who cannot read or write the English language.

7. Any person ineligible under SCPA § 711.

Nominated as executor. The party seeking to disqualify a person from serving as fiduciary has a difficult burden to meet. The court has little discretion in this area. Absent a showing of clear ineligibility, such as a felony conviction, the court must give great weight to the person nominated as an executor, or must grant letters of administration in the order of priority established under SCPA § 1001. While the person seeking letters may be removed for any ground enumerated under SCPA § 711, most of the subdivisions are based on acts committed after letters have issued. When seeking to disqualify a party seeking letters, consider whether the person has committed an analogous act that would warrant removal if letters had issued.

Court's refusal to issue letters. While mere hostility between a proposed fiduciary and the beneficiaries is not grounds

for removal, if the court finds that the appointment of an administrator would interfere with the proper administration of an estate and cooperation in administering the estate is unlikely, the court can refuse the appointment of an otherwise eligible distributee.

For instance, in *In re Estate of Thompson, 232 A.D.2d 219 (N.Y. App. Div. 1996),* the court explained that a testatrix generally has the right to determine who is most suitable among those legally qualified to settle her affairs, and her selection is not to be lightly discarded. However, it is well settled that the Surrogate may disqualify a person from receiving letters of administration where the friction between such person and a beneficiary or cofiduciaries interferes with the proper administration of the estate, and future cooperation is unlikely. The Surrogate's finding of such hostility here was amply supported by the record.

For further discussion of the issue, see 1-4 NY Practice Guide: Probate & Estate Admin § 4.08: Types of Probate Proceedings; 5 NY Practice Guide: Probate & Estate Admin § 5.01: Who May Petition; 5 NY Practice Guide: Probate & Estate Admin § 5.02: Necessary Parties to the Probate Proceeding; 1-7 NY Practice Guide: Probate & Estate Admin § 7.01: The Petition, Oath and Designation; 1-10 NY Practice Guide: Probate & Estate Admin § 10.02: Who May Petition for Letters; 1-13 NY Practice Guide: Probate & Estate Admin § 13.02: Distributees Eligible to Receive Letters; 1-13 NY Practice Guide: Probate & Estate Admin § 13.04: Appointment of Administrator Upon Consent of All Distributees; 1-13 NY Practice Guide: Probate & Estate Admin § 13.08: Procedure for Obtaining Letters of Administration; 1-13 NY Practice Guide: Probate & Estate Admin § 13.11: Contested Application; 1-14 NY Practice Guide: Probate & Estate Admin § 14.04: To Whom Letters of Administration De Bonis Non May Be Granted; 1-14 NY Practice Guide: Probate & Estate Admin § 14.05: Proceedings to Obtain Letters of Administration De Bonis Non; 1-16 NY Practice Guide: Probate & Estate Admin § 16.09a: Standby Guardian; 1-20 NY Practice Guide: Probate & Estate Admin § 20.04: Ancillary Probate Based Upon Domiciliary Probate; 1-20 NY Practice Guide: Probate & Estate Admin § 20.05: Ancillary Letters of Administration; 1-20 NY Practice Guide: Probate & Estate Admin § 20.11: Qualifying the Ancillary Fiduciary; 1-7 LexisNexis AnswerGuide New York Surrogate's Court § 7.07: Qualifying to Receive Ancillary Letters; 1-14 LexisNexis AnswerGuide New York Surrogate's Court § 14.08: Identifying Persons Ineligible to Receive Letters; 2-33 Warren's Heaton on Surrogate's Court Practice Ch. 33: General Provisions Concerning Fiduciaries; 2-35 *Warren's Heaton on Surrogate's Court Practice § 35.02*: Who Is Entitled to Letters of Administration; 3-45 *Warren's Heaton on Surrogate's Court Practice § 45.01*: When and to Whom Letters Granted.

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19 of 42 DOCUMENTS

Carew on Persons With Standing to Object to a Fiduciary's Appointment

2008 Emerging Issues 1887

Carew on Persons With Standing to Object to a Fiduciary's Appointment

By Colleen F. Carew and Kelliann Kavanagh

February 8, 2008

SUMMARY: In New York, before letters of administration issue, any person interested in an estate may object to the appointment of a fiduciary. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, discusses the classes of persons who have or do not have the right to object, the burden of prrof on such objections, and the sufficiency of objections that are raised to the appointment of a fiduciary.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

Before letters issue, any person interested in an estate, which by a 2003 amendment includes a nominated co-fiduciary, may object to the appointment of a fiduciary. Practitioners face a difficult burden to prove the ineligibility of a fiduciary.

ANALYSIS

Any person with beneficial interest, who is effected by appointment, has right to object. SCPA § 709 provides the time when a party may file objections to issuance of letters or appointment of a lifetime trustee. Any person with a beneficial interest, who is effected by such appointment, has the right to object to issuance of letters.

For instance, in *In re Estate of O'Brien, 24 A.D.2d 779 (N.Y. App. Div. 1965),* a non-distributee appealed the appointment of administrators for decedents estate. The appellate court found no basis for appellant's filing of objections. Section 96 of the Surrogate's Court Act limits objectants to the granting of letters to persons "interested in the estate or fund". The sole distributee of the decedent's estate was not the appellant. Thus, the appellant, not being entitled either absolutely or contingently to a share in the estate, had no standing.

However, any person (even one without an interest) may alert the court to reasons why a person should not be appointed as a fiduciary.

In *In re Estate of Porrata, 89 Misc. 2d 663 (N.Y. Misc. 1977),* decedents sole distributee was his eight-year-old son.

His ex-wife waived her inheritance rights in a separation agreement. Limited letters of administration were issued to decedent's mother. Ex-wife filed a proceeding, in her capacity as the sons guardian, to vacate those letters. Decedents mother, not being a distributee and not being designated by the guardian of the sole distributee, was not entitled to receive letters of administration. Any person may bring to the attention of a court a reason why a party should not be appointed to serve as a fiduciary. The court revoked the letters of administration issued to decedents mother.

Keep in mind that the petitioning party may preempt objections by filing an ex-parte application for preliminary letters or letters of temporary administration. As soon as a client alerts you to decedent's death, check the court records for filing of a probate or administration proceeding and immediately file a notice of appearance in which a demand is made for notice of any application for preliminary letters or letters of temporary administration.

SCPA § 709 provides that co-fiduciary has standing to file objections. SCPA § 709 was amended in 2003 to provide that a nominated co-fiduciary has standing to file objections to the grant of letters to a co-fiduciary or co-trustee. Prior to the amendment, SCPA § 709 provided that any person interested . . . may file objections showing his interest in the estate and stating one or more of the legal objections established in 707 to granting the letters." Under SCPA § 103(39), a *person interested* is defined to include any person "entitled or allegedly entitled to share as a beneficiary in the estate." A literal reading of the statue precluded a co-fiduciary from filing objections to the qualifications of the other co-fiduciary. Such an interpretation was inconsistent with other statutes which permitted: a co-fiduciary to seek to remove a co-fiduciary (*See* SCPA § 711), and a fiduciary the right to file objections to probate on obtaining permission from the court. *See* SCPA § 1410; *In re Patterson*, N.Y.L.J., Jan. 18, 2001, at 32, col. 3 (Sur. Ct. Westchester County).

Objecting party assumes burden to establish basis for denial of letters. The objecting party assumes the burden to establish a basis for denial of letters. The objectant should be prepared to demonstrate that no irreparable harm will come to the estate as a result of the delay, or provide a viable interim solution pending a determination of eligibility. For example, an objectant may suggest that the court issue limited letters or letters of temporary administration to the Public Administrator to handle certain aspects of the estate administration. On the other hand, the petitioning party may counter by agreeing to imposition of a bond to protect estate assets. *See* SCPA § 710.

The court will weigh the impact of a delay on the administration of the estate in determining whether to hold a hearing. In addition, the court may evaluate the allegations to assess whether they are similar to objections to an accounting proceeding and consequently do not impact the qualification of the person seeking issuance of letters. Absent sufficient objection, the petitioning fiduciary will be appointed.

Mere allegation of hostility is insufficient to bar issuance of letters. Hostility is the most common objection raised to appointment of a fiduciary. A mere allegation of hostility among decedent's children is not sufficient to bar issuance of letters.

For example, in *In re Edelson, 88 A.D.2d 640 (N.Y. App. Div. 1982)*, decedents son, with the consent of one sister and over the objections of another, sought letters of administration. The court noted that the mere allegation by the objecting sister, where apparent hostility existed among the decedent's children, that she was more conversant with the decedent's estate did not, as a matter of law, make son ineligible to receive letters. The appellate court affirmed that the sister's objections should be dismissed, and letters of administration should be granted to son upon his qualifying according to law.

However, in *In re Estate of Thompson, 232 A.D.2d 219 (N.Y. App. Div. 1996)*, the court explained that a testatrix generally has the right to determine who is most suitable among those legally qualified to settle her affairs, and her selection is not to be lightly discarded. However, it is well settled that the Surrogate may disqualify a person from

receiving letters of administration where the friction between such person and a beneficiary or cofiduciaries is so severe as to interfere with the proper administration of the estate, and future cooperation is unlikely. The Surrogate's finding of such hostility here was amply supported by the record.

Also, an alleged conflict is not sufficient basis to deny letters.

For instance, in *Estate of Marsh, 179 A.D.2d 578 (N.Y. App. Div. 1992),* decedent's will named his daughter as an executor and a bank as a successor executor. Daughter was eventually removed as executor and the bank appointed. Daughter opposed the appointment of the bank. Noting that a testator's selection of a fiduciary should be given great deference, the appellate court held that mere conflict between a fiduciary and an interested party did not warrant removal of the bank. Actual misconduct, not a conflict of interest, justifies the removal of a fiduciary.

Objectant must be prepared to establish that the hostility or conflict is likely to impair the petitioner's ability to be fair and impartial. Objections should avoid mere speculation and supposition. Objectant must be prepared to establish specific facts indicating to the court that the petitioning party is likely to cause harm to the estate.

For further discussion of the issue, see 1-13 NY Practice Guide: Probate & Estate Admin § 13.11: Contested Application; 1-6 LexisNexis AnswerGuide New York Surrogate's Court § 6.14: Objecting to Appointment of Temporary Administrator; 2-33 *Warren's Heaton on Surrogate's Court Practice § 33.03*: Objection to Appointment of Fiduciary; 2-35 *Warren's Heaton on Surrogate's Court Practice § 35.06*: Proceedings Upon the Return of Citation; 3-46 *Warren's Heaton on Surrogate's Court Practice § 46.01*: Appointment of Trustee.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

Carew on Appointment Process and Function of Guardian Ad Litem

2008 Emerging Issues 1876

Carew on Appointment Process and Function of Guardian Ad Litem

By Colleen F. Carew and Kelliann Kavanagh

February 7, 2008

SUMMARY: Special protection is provided to persons under a disability who are necessary parties to a proceeding in the Surrogate's Court. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, discusses the circumstances under which guardians ad litem are appointed the courts, as well as the processes by which guardians ad litem can be appointed.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

Special protection is provided to persons under a disability who are necessary parties to a proceeding in the Surrogate's Court. The court will appoint an attorney to represent such a person. However, the mere fact that a person under a disability is a necessary party to a proceeding does not necessitate appointment of a guardian ad litem. The person under the disability must be adversely affected by the relief sought in the proceeding. Thus, the attorney nominated as a guardian should make a preliminary investigation into the necessity of appointment by reviewing SCPA § 403, which provides four instances where such appointment is not required. Where a guardian ad litem is necessary, appointment may be made by nomination or by the court, the latter being preferable since the petitioner may be better served and the ultimate decree is stronger.

Analysis

Guardian ad litem is advocate and officer of court. A guardian ad litem is an attorney under SCPA § 404 appointed to appear for and represent the interests of a person under disability. The guardian ad litem has dual responsibility to act as an advocate for the ward and as an officer of the court. [The guardian] cannot properly take a stance which, in effect, prevents the court or other parties from having full knowledge of material evidence which [such guardian] has secured and deems pertinent with respect to the issues in which [the] ward has an interest."

In *In re Estate of Roe, 65 Misc. 2d 143 (N.Y. Misc. 1970),* decedents only distributees, a nephew and a grandnephew (represented by a guardian ad litem), objected to probate of decedents will on the grounds of fraud and

undue influence. The guardian examined witnesses on the issues and obtained statements from them. The guardian filed a motion alleging that he did not have to produce the statements based upon privilege. The court denied the motion concluding that, in the interests of justice, no one should be allowed to conceal, from other interested persons, facts bearing upon issues. The guardians concurrent obligation to the court and all parties imposes a higher degree of objectivity.

A guardian failing to act accordingly may be removed.

For example, in *In re Lockwood,* N.Y.L.J., Jan. 25, 2001, at 32, col. 2 (Sur. Ct. New York County), *aff'd, In re Estate of Lockwood, 309 A.D.2d 708 (N.Y. App. Div. 2003),* the Surrogate removed a former guardian ad litem because his "beclouded view of the facts" and other derelictions jeopardized the interests of the infants he represented.

Two types of guardians ad litem appointments exist. The two typical types of guardian ad litem appointments are:

1. Usually, appointment of a guardian ad litem is made by the court even where the person under a disability personally appears in the proceeding, or appears by his or her own counsel. The guardian's appointment must comply with Part 36 of the Rules of Chief Judge, which were substantially changed in 2003;

2. Under limited circumstances, a guardian ad litem may be appointed based on nomination. Where an infant is over 14 years of age, the infant or a parent may request appointment of a particular attorney to serve as the guardian ad litem. The request must be made in an affidavit setting forth:

a. The circumstances surrounding the nomination;

b. The facts demonstrating that the proposed guardian is qualified, and;

c. Representation that the proposed guardian does not have an interest adverse to the ward. The court rules require the infant's parent or person having legal custody and the nominee attorney to file affidavits. *See* 22 NYCRR § 207.12. The court must be satisfied that the ward's interests will be adequately protected and the guardian ad litem's loyalty is not divided.

An application to dispense will be closely scrutinized to ascertain whether the party is seeking to limit the scope of an investigation. The request may be counterproductive, causing heightened scrutiny.

If relief sought does not adversely affect person under disability, appointment of guardian ad litem is not necessary. If the relief sought does not adversely affect a person under a disability, appointment of a guardian ad litem is not necessary. Petitioner should clearly establish those facts demonstrating absence of an adverse interest. Do not assume the court will do your work for you. SCPA § 403(3) provides the following four situations when appointment of a guardian ad litem is not required:

1. An uncontested probate proceeding when the person under disability is not adversely affected by the propounded will;

2. An accounting proceeding when such person's interest is fixed (e.g., by a specified sum of money or specific bequest) and the accounting party seeks to distribute fully such interest;

3. A proceeding when the public administrator receives process on behalf of the person under a disability (e.g., on behalf of unknown distributees), and;

4. A probate proceeding when decedent disposes of his entire estate to his or her surviving spouse, and the assets

are less than $ 50,0000 (e.g., the outright entitlement in intestacy).

In addition, SCPA § 315 provides for virtual representation of a person under a disability, obviating the need for appointment of a guardian ad litem.

Guardian ad litem must file notice of appearance with court, served on all parties. Like any other attorney, a guardian ad litem must file a Notice of Appearance with the court, served on all parties. In addition, the guardian ad litem qualifies by filing a Notice of Appointment and Certification within one week following appointment. *See* 22 NYCRR part 36.0; *see also* 22 NYCRR § 207.13.

For further discussion of the issue, see 1-6 NY Practice Guide: Probate & Estate Admin § 6.10: Service of Process Forms; 1-15 NY Practice Guide: Probate & Estate Admin § 15.02: Appointment of Guardian Ad Litem; 1-15 NY Practice Guide: Probate & Estate Admin § 15.03: When Guardian Ad Litem Not Required; 2-40 NY Practice Guide: Probate & Estate Admin § 40.04: Voluntary Judicial Accountings; 1-2 LexisNexis AnswerGuide New York Surrogate's Court § 2.19: Determining If Virtual Representation Applies; 1-15 LexisNexis AnswerGuide New York Surrogate's Court § 15.06: Appointing Guardian ad Litem; 1-4 *Warren's Heaton on Surrogate's Court Practice § 4.06*: Statutory Definitions; 1-7 *Warren's Heaton on Surrogate's Court Practice § 7.02*: Who May Appear on Behalf of Party; 1-8 Warren's Heaton on Surrogate's Court Practice Ch. 8: Appointment of Guardian ad Litem.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

Martin on the Role of Guardian Ad Litem in Compromising a Wrongful Death Action

2008 Emerging Issues 1877

Martin on the Role of Guardian Ad Litem in Compromising a Wrongful Death Action

By Andrew L. Martin

February 7, 2008

SUMMARY: In proceedings for leave to compromise wrongful death actions, the guardian ad litem needs to be aware of and analyze how the recovery may affect the ward. Andrew L. Martin of the Surrogates Court of Nassau County, New York, discusses such matters as the necessity for guardians to consider the adequacy of any recovery and the rules for allocating, all in the context of *In re Kaiser, 198 Misc. 582 (N.Y. Misc. 1950).*

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

In proceedings for leave to compromise wrongful death actions, the guardian ad litem needs to be aware of and analyze how the recovery may affect the ward. Specifically, the guardian ad litem must consider whether: the size of recovery is adequate; circumstances of the case merit a departure from the usual formula to allocate recovery among those entitled to share; and a structured settlement is advisable for the ward's share of the recovery.

Analysis

Guardian ad litem has general and special duties in wrongful death compromise proceedings. Before performing the specialized duties a guardian ad litem is expected to perform in a wrongful death compromise proceeding, a guardian ad litem must perform the duties common to all proceedings in which a guardian ad litem is appointed. The guardian ad litem must satisfy himself or herself that the court has the subject matter jurisdiction to grant the relief requested, the court has personal jurisdiction of all necessary parties (especially his or her wards), and the petitioner is a person authorized to commence the proceeding.

Guardian ad litem must be satisfied that recovery is adequate. If the supreme court action went to verdict or the supreme court already determined the adequacy of a settlement, then adequacy of recovery is conclusively determined and the guardian ad litem should not consider it. However, if the adequacy of the settlement was not determined, then the guardian ad litem must give the court a determination of the settlement's adequacy. This determination will likely

require review of the supreme court file and consider the economic loss to the wards, their ages, the life expectancy of the decedent and surviving spouse, and any insurance along with defendant's ability to pay beyond the limits of the insurance coverage if that insurance is inadequate to compensate for the loss. If the guardian ad litem does not believe the recovery is adequate, his or her report to the court should state this belief and its rationale. EPTL § 5-4.6(b).

Consider *Kaiser* and exceptions when allocating recovery. A guardian ad litem appointed in a wrongful death compromise proceeding must know the formula for distribution of wrongful death proceeds set forth in *In re Kaiser*. Most New York courts use *Kaiser* as a guideline in making distribution of wrongful death proceeds. The guardian ad litem should not accept the petitioner's *Kaiser* calculation simply because the petitioner's counsel is experienced in wrongful death or personal injury matters; those calculations are often wrong. The guardian ad litem must also know *In re Acquafredda* and other cases in which courts have found sufficient reason to vary from or abandon the *Kaiser* formula. *Acquafredda* does not alter the courts' application of the *Kaiser* formula in the usual case; *Acquafredda* lessens rigid adherence to the *Kaiser* formula in the unusual case in which application of the *Kaiser* formula would produce an inequitable or absurd result. The guardian ad litem should consider whether the surviving spouse might be disqualified from sharing in recovery based on abandonment of the decedent. The surviving spouse not sharing in recovery will enhance the children's share of the recovery.

In *In re Kaiser, 198 Misc. 582 (N.Y. Misc. 1950),* administratrix sought approval of a wrongful death settlement and a determination of the proper distribution of the proceeds. The court held that the proceeds should be distributed to decedent's spouse and next of kin based on the period they might reasonably have looked to decedent for support, which represents their pecuniary loss. Using the aggregate number of years of anticipated dependency of the spouse and next of kin as the denominator and the respective years of anticipated dependency of each as the numerators of the fractions, distribution was directed to each in accordance with the fractional parts of the settlement attributable to each.

In *In re Acquafredda, 189 A.D.2d 504 (N.Y. App. Div. 1993);* EPTL §§ 5-1.2, 5-4.4(a)(2), the guardian of decedents children requested distribution of wrongful death damages in three equal shares for decedents widow and two children. The widow requested distribution under the "Kaiser formula." The trial court concluded that equity was best served by allocating equal shares among the widow and her two children because the widow's remarriage put the children into an arena of uncertainty concerning their future. The appellate court affirmed holding that there was no imperative for the automatic application of Kaiser.

Tailor recovery for wards to circumstances. It is often desirable to satisfy an infant child's share of a wrongful death recovery by funding an annuity for the child. An annuity can postpone the child's receipt of the recovery to an age beyond 18 at which the child may be more responsible. In addition, annuity payments are income-tax-free and can be structured to provide for lump-sum payments at opportune times, like when college tuition payments are due. *See* Practice Insight for EPTL § 5-4.6, "Structured Settlements in the Compromise of Wrongful Death Actions."

Review decree for accuracy and completeness. The guardian ad litem should review carefully the decree to be entered, particularly when there is to be a structured settlement for the ward. The guardian ad litem should take special care that the annuity payments to the ward are as the guardian ad litem expected, all annuity payments are guaranteed, and A.M. Best or a similar rating agency rates highly both the company writing the annuity and the company to whom the obligation to make payments will be assigned.

For further discussion of the issue, see 1-6 NY Practice Guide: Probate & Estate Admin § 6.10: Service of Process Forms; 1-15 NY Practice Guide: Probate & Estate Admin § 15.02: Appointment of Guardian Ad Litem; 1-15 NY Practice Guide: Probate & Estate Admin § 15.03: When Guardian Ad Litem Not Required; 2-40 NY Practice Guide: Probate & Estate Admin § 40.04: Voluntary Judicial Accountings; 1-2 LexisNexis AnswerGuide New York Surrogate's Court § 2.19: Determining If Virtual Representation Applies; 1-15 LexisNexis AnswerGuide New York Surrogate's

Court § 15.06: Appointing Guardian ad Litem; 1-4 *Warren's Heaton on Surrogate's Court Practice § 4.06*: Statutory Definitions; 1-7 *Warren's Heaton on Surrogate's Court Practice § 7.02*: Who May Appear on Behalf of Party; 1-8 Warren's Heaton on Surrogate's Court Practice Ch. 8: Appointment of Guardian ad Litem.

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Andrew L. Martin is the Chief County Attorney of the Surrogates Court of the State of New York, Nassau County. Admitted to the NY bar in 1986, he is a frequent author for LexisNexis Matthew Bender. For example, he is a contributing author to Warrens Heaton on Surrogates Court Practice Legislative and Case Digest.

This article was updated and expanded by Kelliann Kavanagh, Esq.

Carew on Compensation Payable to a Guardian Ad Litem

2008 Emerging Issues 1878

Carew on Compensation Payable to a Guardian Ad Litem

By Colleen F. Carew and Kelliann Kavanagh

February 7, 2008

SUMMARY: An attorney appointed as a guardian ad litem must ensure that a requested legal fee is fair and reasonable and that it bears direct relation to the size of the ward's interest. Colleen F. Carew, a New York attorney with extensive experience in Estate and Probate matters, discusses the manner in which guardians ad litem request fees, the criteria applied for fixing fees, as well as when and from where such fees are paid.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Insight

An attorney appointed as a guardian ad litem must ensure that a requested legal fee is fair and reasonable and that it bears direct relation to the size of the ward's interest. The guardian should not lose sight of the dual responsibility to act as an advocate for the ward and as an officer of the court.

Analysis

Guardian's affidavit and report should clearly establish all actions taken which advanced interest of ward. A guardian must file an affidavit of legal services supporting the request for fixation of legal fees. *See* 22 NYCRR § 207.13(c). The guardian's affidavit and report should clearly establish all actions taken which advanced the interest of the ward. Do not embellish to increase a fee request. A guardian ad litem is entitled to receive reasonable compensation, which is the same standard for fixing fees of any attorney appearing in Surrogate's Court. *See* SCPA § 2110.

For example, in *In re Burk's Will, 6 A.D.2d 429 (N.Y. App. Div. 1958)*, an incompetent was represented by a special guardian in a probate proceeding. The court found that no proceedings were initiated by the guardian and a compromise as to the will was not brought about through her efforts. A special guardian may receive reasonable compensation governed by the criteria applicable to the determination of the value of legal services. Here, the record left much to be desired regarding the actual time spent and the nature and extent of the services rendered by the guardian. Guardians fee was reduced based upon the value of services rendered and the size of her wards interest.

In *In re Ault, 164 Misc. 2d 272 (N.Y. Misc. 1995),* a guardian ad litem represented infant beneficiaries in an unsuccessful appeal from a determination of those infants rights. As a result, the guardian sought additional compensation for services rendered. Where a duly appointed guardian ad litem has successfully and competently represented his wards' interests, he is entitled by law to fair and reasonable compensation for his services. Based upon the services rendered and taking into account all the relevant factors, the court fixed the guardian's fee in the amount requested by the guardian.

The criteria applied for fixing fees includes: time spent; nature and complexity of the matter; size of the ward's interest in the estate or trust; professional experience; and results obtained.

In *In re Estate of Freeman, 34 N.Y.2d 1 (N.Y. 1974),* decedents son and sole beneficiary contested the amount of attorney's fees awarded by the court for services rendered to his fathers estate. Long tradition is for lawyers' fees to be determined on the following factors: time and labor required; the difficulty of the questions involved and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved. The court affirmed the amount of attorneys fees.

In *In re Estate of Potts, 213 A.D. 59 (N.Y. App. Div. 1925), aff'd, 241 N.Y. 593 (N.Y. 1925),* an executor retained the services of attorneys to assist in managing decedents estate. The executor refused to pay the full amount for their services, and the attorneys initiated an action to recover their fees. Many important matters arose requiring the almost constant attention of the attorneys and the services they rendered were entirely satisfactory and successful. The court held that time spent, difficulties and nature of the services, professional standing, and results obtained should be considered in determining the reasonableness of attorneys' claim. Weighing these factors, the court granted the amount requested by the attorneys.

The guardian ad litem's fee may be payable, in whole or in part, from the following:

1. In most cases, the general assets of the estate;

2. When special circumstances are shown, the ward's interest; or

3. On good cause shown, any other party.

Key to the determination of the source of payment is whether the services of the guardian ad litem were rendered to the benefit of any other party. For example, in a construction proceeding, the guardian's participation may result in a benefit to other parties who may be required to share proportionately in the fee awarded. *See* SCPA § 1420.

A guardian ad litem is often in a unique position to facilitate resolution of a disputed proceeding. When this is the case, the court may fix the guardian's fee from the interests of those parties who benefited from that resolution.

Guardian's fee is fixed at conclusion of proceeding. The guardian's fee is fixed at the conclusion of the proceeding. An interim fee may be fixed in extraordinary circumstances. SCPA § 2111, *In re Condon*, N.Y.L.J., May 7, 1990, at 31, col. 2 (Sur. Ct. New York County). Under such circumstances, the court may reserve a determination of the guardian ad litem's fee for a future proceeding. SCPA § 405(2). All parties must be given notice of the requested fee and any interested party may object to that fee. The guardian should provide the parties with notice of the requested fee prior to filing the affidavit to ascertain whether objections may be raised. Do not presume that acquiescence by the parties will result in a fee award in the amount requested.

For further discussion of the issue, see 1-6 NY Practice Guide: Probate & Estate Admin § 6.10: Service of Process Forms; 1-15 NY Practice Guide: Probate & Estate Admin § 15.05: Compensation of Guardian Ad Litem; 1-23 NY Practice Guide: Probate & Estate Admin § 23.08: Guardian ad Litem Fees; 2-40 NY Practice Guide: Probate & Estate Admin § 40.04: Voluntary Judicial Accountings; 1-15 LexisNexis AnswerGuide New York Surrogate's Court § 15.10: Determining Compensation of Guardian ad Litem; 1-6 *Warren's Heaton on Surrogate's Court Practice § 6.27*: Service Upon Person Under Disability; 1-8 *Warren's Heaton on Surrogate's Court Practice § 8.17*: Compensation; 7-102 *Warren's Heaton on Surrogate's Court Practice § 102.01*: Accounting Decrees Generally.

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Colleen F. Carew practices law at the Law Office of Colleen F. Carew, P.C., in Yonkers, New York, and is a principal in the New York Law firm of Schram & Carew PC. Prior to that, she was employed by the Surrogate's Court of New York County. Ms. Carew has over 23 years of experience and focuses her practice on Estate Planning, Wills, and Trusts. In 2007, she was named one of the Best Lawyers in New York by Best Lawyers in America, and in 2006 she was named One of Top Fifty Women Lawyers in New York by Super Lawyers. Ms. Carew is a member of the Officer Trusts & Estates Section of the New York State Bar Association, and she served as Chair of the Section in 2006. In addition to appearing at numerous speaking engagements and conferences, she co-authors multiple columns a year on Surrogate's Court Practice for the New York Law Journal. Ms. Carew earned her Juris Doctorate from Fordham Law School in 1984.

This article was updated and expanded by Kelliann Kavanagh, Esq.

Blumberg, et al on Standard of Proof Required Under Ca. Fam. Code § 760

2008 Emerging Issues 1679

Blumberg, et al on Standard of Proof Required Under Ca. Fam. Code § 760

By Grace Ganz Blumberg, Richard E. Denner, Barbara A. DiFranza and Stacy D. Phillips

December 23, 2007

SUMMARY: California case law is inconsistent on whether the presumption must be overcome by clear and convincing proof, or merely by a preponderance of the evidence. In this Emerging Issues Analysis, members of the California Family Law Monthlys editorial board comment on *In re Marriage of Ettefagh (2007) 150 Cal. App. 4th 1578.*

PDF LINK: Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge

ARTICLE: Commentary by Grace Ganz Blumberg. California case law is consistent in treating the presumption that property acquired during marriage is community property as a presumption affecting the burden of proof, as opposed to a weaker presumption affecting the burden of producing evidence. (For a discussion of the distinction between the two, see Ca. Evid. Code § 601 and the Law Revision Comment to § 601.) However, California case law is inconsistent on whether the presumption must be overcome by clear and convincing proof, or merely by a preponderance of the evidence. As *Ettefagh* points out, much of the judicial language requiring clear and convincing proof is dictum because neither standard was met in cases articulating the higher standard.

Ettefagh concludes that a preponderance of the evidence is all that is required. Arguably, however, clear and convincing proof should be required to rebut the presumption that property acquired during marriage is community property, because in asserting that property acquired during marriage is his separate property, a party is also acknowledging that he exercised de jure and de facto management of that property. Thus he is in a far superior position to adduce evidence of the character of the property and consequently should bear the obligation to do so clearly and convincingly. In this sense, the parties are not equally situated. Although the context is different, the strict tracing rules established by *See v. See (1966) 64 Cal. 2d 778* are suggestive. It is not sufficient that a person who commingles community and separate property funds show that it is more likely than not that he used separate property to purchase an asset during marriage. Instead, he must show that he did in fact use separate funds.

In any event, as an appellate case finding sufficient evidence to sustain a trial court's determination that a separate property proponent met his preponderance of the evidence burden of proof, the opinion is disappointing because it does not adequately recount the content of the father's self-serving testimony, nor of the documentary evidence, if any, supporting that testimony.

The net result in *Ettefagh* is unsettling. The husband walked away with almost all of the extensive real property acquired during a prosperous twenty-year marriage, either because the court found it to be his separate property, or because the court found it to be community property but did not utilize Ca. Fam. Code § 2660(b) safeguards in the distribution of real property located in countries that may well refuse to grant recognition to a California decree purporting to distribute realty within their borders, namely Iran and Turkey. The portion of the opinion sustaining the trial court's distribution of that community property realty equally to the two parties was, unfortunately, not certified for publication.

Commentary by Hon. Richard E. Denner, Judge (Ret.). In this case the realty was acquired during marriage, and despite the presumption that it was community, husband claimed it was separate and testified that the funds to purchase it came from gifts. The trial court apparently believed the testimony and found that the community property presumption was rebutted by this oral testimony.

Interestingly, the court of appeal notes that in many decisions the clear and convincing standard is mentioned, but the court does not find the decisions to be controlling. Nowhere in the decision is there mention of documentation to back up husband's testimony. In this the court of appeals is not helping the stability of the law. If oral testimony alone can support this decision, there is little reason not to take a try at it. To this commentator this decision does not make good sense. In family law the emotions are high and many times there is a willingness to lie. For example, the Legislature ended oral transmutations, and one reason was the willingness of the parties to fabricate testimony. Not to use a clear and convincing standard is a mistake.

Commentary by Barbara A. DiFranza. It is good to have a controversy so clearly and convincingly dispatched by a single opinion. Two principles emerge: neither dicta nor disembodied quotations from secondary authorities (e.g., *Witkin*) constitute law.

An example where those principles have been forgotten are found in the mis-citation of cases which involve the cumulative method of allocation of community and separate property interests in stock options. [*In re Marriage of Hug (1984) 154 Cal. App. 3d 780; Marriage of Nelson (1986) 177 Cal. App. 3d 150; In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216;* and *Marriage of Walker (1989) 216 Cal. App. 3d 644.]* Although some commentators have claimed that each of these cases upholds the cumulative method, i.e., front loading the numerator in the time rule of each option period, the issue of what method to use was not discussed in any of these cases. Thus the cumulative method was neither holding nor dicta, rendering these cases' value as authority worthless, except as some sort of legal comfort food for practitioners and judges who don't want to chew on a controversy long overdue for at least one good appellate case.

Commentary by Stacy D. Phillips & Robyn Santucci. Wife raises on appeal the standard of proof necessary to establish Husband's burden of proof in overcoming the community property presumption set forth in *Family Code § 760* that, except as otherwise provided by statute, all property acquired during the marriage is community property. At stake in *Ettefagh* were valuable Northern California parcels of land Husband's father testified were gifts made to Husband during the marriage. Some of the properties were acquired by Husband's father--supposedly with his own funds--and were in my view suspiciously placed in the name of Husband at a time when Wife and Husband lived together in Iran. Based upon Husband's father's testimony and upon what the trial court thought insufficient written documentation contradicting Husband's claim that the properties were "gifts" to him, the trial court concluded that the contested properties were Husband's separate property. The trial court used the "preponderance of the evidence" quantum of proof stated in Evidence Code Section 115to rebut the *Family Code Section 760* presumption. Wife appealed the standard of proof used, arguing that the higher "clear and convincing evidence" standard should have been used in determining whether Husband had overcome the community property presumption. Wife claimed that because the trial court used the incorrect standard, it reached the incorrect result.

The appellate court addressed this simple issue with a single conclusion: consistent with the "default" standard "generally" used in civil actions, preponderance of the evidence was correctly used in this case and is the standard of proof applicable in most family law cases. Yet, at no point does the three standards of proof mean for the fact finder,

short of stating that each standard (preponderance of the evidence, clear and convincing proof, or proof beyond a reasonable doubt) concerns the "degree of confidence" the fact finder should have "in the correctness of factual conclusions for a particular type of adjudication." *Evidence Code Section 115* fails to define the three standards of proof, and instead simply lists them. Even the definition of the word reflected in the dictionary for "preponderance" provides no additional clarification, defining it as "superiority in weight, force, importance, or influence [*see* American Heritage Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004].

Rather, in assessing Wife's arguments, the appellate court handily dismisses all of the family law cases relied upon by Wife which appear to have used the "clear and convincing standard," instead performing its own "analysis of the interest at risk" test. The appellate court stated that in financial suits generally where only money is at stake, each stakeholder's interest is "inverse but equal," i.e. Husband and Wife have comparatively equal risk and public policy does not afford any special protection for either of their interests. Because society does not have a preference for either side's interest or protection, a higher burden of proof is not required. However, such a conclusion is tantamount to equating the finding and protection of "community" property with that of "separate" property, which appears inconsistent with the public policy in California and that applied by the family law courts.

References. California Family Law Practice & Procedure 2d ed. § 20.11[2] (scope of community presumption from acquisitions during marriage), § 20.12[2][a] (conflict in presumptions arising from acquisition of property in sole title during marriage); California Family Law Litigation Guide, Unit 41 (time of acquisition), Unit 42 (form of title presumptions); Complex Issues in California Family Law, Vol. D., § D3.09[3] (standard of proof to rebut community property presumption).

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Grace Ganz Blumberg is a Professor of Law at UCLA Law School. She is a Reporter for the American Law Institute's Principles of the Law of Family Dissolution (2002), for which she authored the chapters on child support and nonmarital cohabitation. A gifted teacher who has made significant contributions to the School of Law's Academic Support Program, Professor Blumberg received the School of Law's Rutter Award for Excellence in Teaching in 1989 and the University's Distinguished Teaching Award in 1999.

Richard E. Denner is a recently retired Judge of the Superior Court who was assigned to the Family Law Departments in the Central District of Los Angeles. He presided in Family Law Departments as a Judge and Superior Court Commissioner for over 20 years before retiring in 2006. He is the author of numerous articles and lectures extensively on family law matters, including retirement benefits, interstate enforcement of support, and family law updates. He is a frequent contributor to the Beverly Hills and Los Angeles Bar, Family Law Sections Family Law Symposiums. He is a former Adjunct Professor of Law at Whittier College School of Law in Los Angeles and while teaching there was a contributing author to the Whittier College Law Review. At Whittier he taught classes in trial practice, family law and community property. He is a Member of the Board of Editorial Consultants of Matthew Bender's California Family Law Monthly and has written such lead articles as 'Celebrity Goodwill: Sic Transit Gloria Mundi,' 'Nonmarital Cohabitation After Marvin: In Search of a Standard' and 'Projected Average Salary in Pension Valuation: To Use or Not to Use.' Judge Denner received his Bachelor of Arts degree with a major in Business Administration in 1962 from Occidental College in Los Angeles, California. He received his Juris Doctor degree from the University of California, Berkeley, School of Law in 1965.

Judge Denner's contribution to the California Family Law Litigation Guide has been motivated by his recognition of the need to assist attorneys in the integration of family law and evidence in the logical preparation and presentation of information on family law issues. While many works provided resources to research the law for the family law practitioner, none seemed to help the attorney gather the correct evidence and make a logical presentation to the court.

Judge Denner's continuous involvement with this publication began with the launch of the California Family Law Trial Guide in 1992.

Barbara A. DiFranza is a Certified Family Law Specialist by the Board of Legal Specialization State Bar of California and a member of the Nevada State Bar. Ms. DiFranza has provided court testimony as an expert witness and has been appointed as a judge pro tempore in Sacramento, Alameda, and Santa Clara counties. DiFranza has conducted seminars on the disposition of retirement benefits upon dissolution of marriage and Qualified Domestic Relations Orders, both on her own and for the Association of Certified Family Law Specialists. She has been a featured speaker at the State Bar convention in Monterey, the Trial Institute of the Texas Academy of Family Law Specialists, the Association of Certified Family Law Specialists, and the Enrolled Actuaries meeting in Washington, D.C.

Stacy D. Phillips, a Certified Family Law Specialist licensed by the State Bar of California's Board of Legal Specialization, is a founding partner of Phillips, Lerner, Lauzon & Jamra, LLP, Century City, Calif. and has practiced family law exclusively since 1984. She is listed by Lawdragon as one of the 500 Leading Lawyers in America for 2006 and 2007. In addition, The Los Angeles Daily Journal, Los Angeles' main legal trade publication, also named Phillips one of the "Top 75 Female Litigators in California" for 2005 and 2006. She also is listed among an elite group of attorneys by L.A. Magazine and Super Lawyers Magazine (for 2004, 2005, 2006, 2007 and 2008), as a result of a survey conducted jointly by Law & Politics and Los Angeles Magazine. She was also singled out by them in 2005, 2006, 2007 and 2008 as one of the Top 50 Female Super Lawyers" in Southern California, where she also placed among the top overall 100 vote-getters (men and women) for 2006, 2007 and 2008. Phillips is also listed in The Best Lawyers in America and has garnered a coveted AV rating in the Martindale-Hubbell Registry. Phillips is a member of the State Bar of California, the American Bar Association, the Los Angeles Bar Association and the Beverly Hills Bar Association. She is admitted to practice in all of California's State Courts and before the Southern District of the California U.S. District Court.

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24 of 42 DOCUMENTS

Denner, DiFranza, Kalemkiarian and Zolla on Knabe v. Brister

2008 Emerging Issues 1680

Denner, DiFranza, Kalemkiarian and Zolla on Knabe v. Brister

By Richard E. Denner, Barbara A. DiFranza, Sharon Kalemkiarian and Marshall S. Zolla

December 23, 2007

SUMMARY: The case of *Knabe v. Brister (2007) 154 Cal. App. 4th 1316* should be read and studied not so much for the agreement to transfer child support jurisdiction from one state to California but, more importantly, for the authority of counsel to sign binding stipulations without the signature of the clients.

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ARTICLE: Commentary by Hon. Richard E. Denner, Judge (Ret.). The parties through counsel, in writing, stipulated that California had personal jurisdiction to modify custody, visitation, and child support even though such orders were originally entered in Texas.

There were obvious possible challenges to the order. Counsel alone cannot stipulate to waive a substantive right. The argument was answered by the comment that the agreement was only for procedural rights, and thus counsel could do so without the client, in the scope of counsel's apparent authority. The choice of jurisdictions was claimed to be procedural.

However, *Family Code § 4960* provides that the original state obtaining jurisdiction has the exclusive right to modify the order unless "[t]he child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order." The written stipulation of counsel was sufficient to confer jurisdiction on the California court. Not mentioned is that although Texas took no affirmative action to divest itself of jurisdiction, the implication of this decision is that it did.

It did not help appellant's case that he had previously litigated in California under the stipulation. This was a close case on counsel's ability to sign a stipulation without the client. It may also have exposed him or her to a malpractice claim. When in doubt, get the client to sign.

Commentary by Barbara A. DiFranza. Although it's reassuring to know that the opposing counsel in any case has apparent authority to make some pretty far reaching decisions, I for one, do not want my client questioning such decisions made by me on my client's behalf. For that reason, except for the smallest of decisions in a case, the best rule for the practitioner's protection and the client's satisfaction is to get the client's written consent. This is especially easy to

do in this era of instant electronic communication coupled with most courts' willingness to allow fax signatures on stipulated orders.

Commentary by Sharon L. Kalemkiarian. Having spent an entire semester (or so it seems in memory) with a federal civil procedure professor drilling into our heads that jurisdiction affected "substantial rights", it seems quite incredible that an appellate court could determine that an attorney's agreement to jurisdiction of a child support order in California instead of Texas (when the client still resides in Texas) affects only the "procedure or remedy as distinguished from the cause of action itself." This seems, frankly, a tortured conclusion.

Nevertheless, this court decided that a stipulation signed by the attorneys only was enforceable, when that stipulation stipulated to a California court's becoming the court with continuing, exclusive jurisdiction over a Texas support order. One wonders what would have happened if the client had not, in fact, already litigated a matter pursuant to that stipulation (albeit a custody and visitation matter) without contesting jurisdiction. I also wonder if the result would be the same were the court not dealing with a child support order. With the child and mother in California, the court would be inclined to insure that the support order could be efficiently modified by the payee.

Commentary by Marshall S. Zolla. This case should be read and studied not so much for the agreement to transfer child support jurisdiction from Texas to California but, more importantly, for the authority of counsel to sign binding stipulations without the signature of the clients.

The necessity for a client to sign a stipulation, or whether counsel alone can sign and bind the client, is (or should be) a perceived concern in every family law case. Analysis and resolution of this issue hinges upon interpretation of the words "all of the parties" in *Family Code § 4960*, i.e., does it mean the litigant personally or does it allow consent by the litigant's attorney? The question is whether a "substantial right" of the client is involved in the agreement or stipulation. The *Knabe* court indicated that the California Supreme Court has not expressly defined what a substantial right is, but it has provided examples. Even after reviewing numerous of those examples, the opinion emphasizes that in the context of family law, simply determining whether a written stipulation is substantive or procedural, does not account for the complex and ongoing relationship between the parties and the matters they seek to resolve.

The family law context requires determination whether the issues which form the basis of the agreement or stipulation are central to the overall controversy and evaluation of the economic value of the stipulation, both in absolute terms and in relation to the total value of the disputed issues in the case.

The *Knabe* trial court denied husband's motion to strike the stipulation signed only by counsel and was affirmed on appeal. Family law practitioners must be ever vigilant as to the scope of their apparent or ostensible authority to bind a client without the client's clear authority or signature on the document. Obviously, gray areas will constantly be presented. Better to be safe by getting the client's signature or carefully confirming and papering the file rather than later contacting your malpractice carrier.

References

California Family Law Prac & Proc 2d ed. § 42.02 (jurisdiction to modify child support order, generally); § 111.05 (avoiding trial or limiting issues by settlement or stipulation, generally), § 151.51 (continuing, exclusive jurisdiction under UIFSA), § 151.58[1] (jurisdiction to modify foreign child support judgment by consent of parties); California Family Law Litigation Guide, Unit 10 (modification).

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Denner, Kalemkiarian, Phillips, Whittaker and Wolf on In re Marriage of Sareen

2008 Emerging Issues 1681

Denner, Kalemkiarian, Phillips, Whittaker and Wolf on In re Marriage of Sareen

By Richard E. Denner, Sharon Kalemkiarian, Stacy D. Phillips and Bernard N. Wolf and Chanelle Whittaker

December 23, 2007

SUMMARY: In *In re Marriage of Sareen (2007) 153 Cal. App. 4th 371*, the court found that the childs time spent in India after the father filed a premature custody action did not count toward establishing the childs home state. In this article, which appears in the September 2007 issues of California Family Law Monthly, members of the California Family Law Monthys editorial board comment on this case.

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ARTICLE: Commentary by Hon. Richard E. Denner, Judge (Ret.). Law school professors who teach jurisdiction could not conjure this fact situation. First, the child was born in New York and resided there for six months. H then tricked W into going to India with the child, a few days later filing for divorce and applying for an order restraining W and C to stay in India. Approximately one year later, W and C were able to leave India. W and C went first to New York and then to California. Three months later,W filed for custody in California.

If there was a home state, it would seem to be New York before the litigation action started. How does California get jurisdiction? First, neither party claimed New York was the home state, and six months had not passed in India before the divorce was filed in India. The appellate court found evidence that the child had a significant connection to California in that the child's mother had family here helping her and was receiving public assistance and working part time. This commentator thinks that perhaps a better ground would have been that no state had a better claim and some court had to act. However, this is the least preferred ground in the statute.

Commentary by Sharon L. Kalemkiarian. Don't be put off by the international nature of this dispute. Remember that the UCCJEA treats foreign jurisdictions the same as any domestic "State." And in this case, the Court has put forth a well reasoned and helpful analysis of the requirements for a Court to exercise jurisdiction when there is a dispute over where a custody action should proceed.

The first step when confronted with a jurisdictional challenge which falls within the UCCJEA, is to look carefully at the factors that must be analyzed before the Court can make a decision as to whether it shall exercise jurisdiction. After running through the provision of Ca. Fam. Code § 3421, this Court comes to the correct conclusion that there was,

in fact, no "home state" for this child. She had not resided in India for six months before the Father brought a dissolution and custody action in India; she had been absent from New York essentially for 17 months; and she had not resided in California for six months prior to the time the Mother commenced her action.

It is helpful to have a California Court affirm that sometimes there just is not a "home state" under the UCCJEA. In that instance, the Court must conduct what is essentially a "substantial minimum contacts" analysis, and conclude whether the parents and or a parent and child have enough contact with the jurisdiction to warrant the Court's deciding the matter at hand.

Also helpful in this case is the analysis regarding "forum shopping." A parent cannot "bootstrap" (the Court's word!) jurisdiction by filing immediately in a new location, letting six months pass before any Court ruling, and then declaring that the jurisdiction is the "home state" because six months have passed. Although the Court had no California case on point, *Sareen* now provides us with that authority. Clients should be counseled not to "forum shop" in hopes of getting away with moving a child from his or her home state, no matter how sympathetic the reasons for their move.

Commentary by Stacy D. Phillips & Chanelle Whittaker. The UCCJEA serves as the primary method of establishing subject matter jurisdiction in custody disputes involving other jurisdictions including foreign countries. In resolving jurisdiction, Ca. Fam. Code § 3405 states that foreign countries are treated as states unless the child custody laws of that country violate the fundamental principles of human rights. Ca. Fam. Code § 3400 specifies that in all child custody matters, there must be a six-month home state waiting period prior to the filing of a custody petition. As a result, a parent may not travel with a child to a new jurisdiction and file a child custody petition prior to the six-month waiting period, because the amount of time the child remains in the new jurisdiction following the filing of the custody petition may not be used as time accrued to meet the six-month home state requirement.

Father conceded that India was not the child's home state when he filed his initial dissolution of marriage and custody petition. Father instead argued that his filing of a preliminary custody petition in India prior to the UCCJEA's six-month home state waiting period requirement was not a violation of Indian law, and therefore his filing superseded the jurisdiction of the California court pursuant to Ca. Fam. Code § 3426. Further, Father asserted that at the time Mother filed the custody and child support petition in the state of California, the child's home state was India because both Mother and child had resided, albeit involuntarily, in India for over a year before Mother relocated to California and filed her new custody petition. However, this assertion was clearly unclean hands on the Father's part. It is evident that Father acted in bad faith from the moment he falsely represented facts to Mother regarding their vacation to Switzerland as well as his immediately filing for divorce and custody shortly after arriving in India.

Significant to the Court of Appeal's decision was the conclusion that at the time of filing in India, New York was properly the child's home state. The child and both parents admittedly resided in the state of New York for at least six months prior to the filing in India. However, the Court reasoned that Mother resided in India involuntarily and the 17-month absence from the state of New York could not be viewed as temporary. Therefore, at the time of Mother's filing of her custody petition in California, there was no state with home state jurisdiction.

In cases where no state has home state jurisdiction as the case at bar, California may exercise jurisdiction under Ca. Fam. Code § 3421(a)(2) when both of the following are true: (A) the child's parents, or the child and at least one parent or a person acting as parent, have a significant connection with the state other than mere physical presence, and (B) substantial evidence is available in that state concerning the child's care, protection, training and personal relationships.

Interestingly, in concluding that time spent in a state subsequent to filing the preliminary custody petition cannot be counted towards the minimum time necessary for jurisdiction under the UCCJEA, the Court relied on cases decided outside the state of California. In *Irving v. Texas*, the Court of Appeal concluded that it did not have jurisdiction to award custody in an action filed in Texas by a Father four days after arriving, when the children had previously lived in

the state of Mississippi.

The Court's decision in In re Marriage of Sareen, was both just and fair, as otherwise Father would have been allowed to ignore the jurisdictional laws set forth by the UCCJEA and arbitrarily relocate to a country of his choosing in order take advantage of the laws of that jurisdiction. This is one of the primary reasons why we have the UCCJEA.

Commentary by Bernard N. Wolf. One of the main goals of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) is to discourage well-intentioned local judges from hearing particularly bitter custody cases which actually belong in another forum. Every so often, however, a California Court succumbs to that temptation. *Sareen* is the latest example of the error.

For three years the husband and wife have engaged in a custody dispute involving their daughter S. in India. When the husband commenced the action there, India was not S.'s "home state." Indeed, the husband and S. had been in India for only a week. Still, by the time the wife filed her custody petition in Sacramento three years later, India was definitely the child's home state. The California trial judge correctly dismissed the wife's petition for lack of jurisdiction under the UCCJEA. The Court of Appeal incorrectly reversed this ruling.

First, the appellate court found, with justification, that three years ago India had not assumed custody jurisdiction substantially in conformity with the UCCJEA. (To compound the matter, India was not--and is not--a party to the Hague Convention on the Civil Aspects of International Child Abduction). Unfortunately, the appellate panel then made a quantum but fateful leap, holding that California could hear the wife's 2006 custody petition, despite the fact that by then S. had lived in India for three years. Under the home state preference in the UCCJEA, original custody jurisdiction belonged there, and there alone.

The UCCJEA operates internationally as well as nationally. The effect of the Court of Appeal ruling is to create jurisdictional competition between the Indian and California Courts over S., contrary to the purposes and provisions of the UCCJEA. *Sareen* reminds us how easily it is to fall into such traps when children are involved.

References. California Family Law Prac & Proc 2d ed. § 32.27 (jurisdiction to make initial custody decree under UCCJEA), § 32.29 (simultaneous proceedings in other states); California Family Law Litigation Guide, Unit 31 (custody and visitation).

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Information referenced herein is provided for educational purposes only. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

DiFranza et al on Division of Pension Benefits Under In re Marriage of Gray

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DiFranza et al on Division of Pension Benefits Under In re Marriage of Gray

By Barbara A. DiFranza, Dawn Gray, Sharon Kalemkiarian and Kathryn Kirkland & Stacy D. Phillips

December 23, 2007

SUMMARY: In this Emerging Issues Analysis, which appears in the November 2007 issue of Matthew Benders California Family Law Monthly, members of the California Family Law Monthly editorial board comment on *In re Marriage of Gray, 155 Cal. App. 4th 504 (Cal. Ct. App. 2007).*

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ARTICLE: Case Overview. An interlocutory judgment of dissolution of marriage was entered in 1980. The 1980 judgment stated that the trial court would reserve jurisdiction over it until benefits would become due and payable, at which time the Brown Formula would be applied. The trial court interpreted the 1980 judgment as having already determined that that apportionment method would apply by its reference to the "Brown Formula." The court concluded that the trial court's failure to exercise its discretion by its equating the term "Brown Formula" as used in the 1980 judgment with the strict time rule as the chosen method of apportionment constituted an abuse of discretion. The term "Brown Formula" was not a universally accepted synonym for the "time rule." Contrary to the trial court's construction of the 1980 judgment, that judgment's treatment of the pension required the exercise of judicial discretion to apportion community and separate property interests, by selecting an appropriate and equitable method of apportionment based on the particular facts and circumstances of the case, and to divide the community interest in the benefits equally between the parties.

Commentary by Barbara A. DiFranza. My QDRO drafting colleagues and I have collectively seen thousands of judgments which call for the use of the "Brown formula." We have little doubt that the attorneys who drafted them assumed that they were specifying that the time rule formula would be used. In the great majority of these cases, the clients were clueless that their retirement benefits would be divided by anything other than a method which would provide a fair apportionment of the benefits to the community. The court on remand will now be faced with applying an "appropriate method."

A proper QDRO determination requires an analysis of the benefits to be divided before any "formula" can be applied. One must understand the plan in order to discover what benefits were attributable to service and contributions during the community years. In a typical final average pay plan the benefits are based on a formula using final average compensation multiplied by a benefit factor and multiplied by years of credited service. Thus in a typical final average pay retirement plan with 20 years of service, removing any year from the calculation will take away 5% of the benefits;

and a marriage of 10 years--whether at the beginning or the end of the career--will produce the same community benefit.

In marked contrast, many union plans, such as IBEW, will provide a distinct formula applicable to and separately attributable to each year of service such that a disparate benefit is produced by each of those years of service. Thus the year-by-year analysis mentioned in the opinion applies in such plans and is likely to be used on remand.

Mr. Gray will profit from the blissful ignorance of the original attorneys who did not know that the "Brown formula" constituted a misnomer. Had the drafting attorney actually known this, s/he would likely have substituted the actual time-rule formula fraction (years of service during marriage divided by total years of service), resulting in a proviso that would have been binding on Mr. Gray as to his first wife.

What lesson may we take from *Gray*? When disposing of a pension plan in a marital settlement agreement or judgment--even when the details are to be left to a QDRO--one should not specify the method of division if one does not understand the pension plan to be divided. When we add this caution to the caveat that one must preserve an Alternate Payee's benefits against the possibility of Participant's retirement or death in the period before a QDRO is made and accepted, we are reminded that we should obtain expert assistance before that judgment or marital settlement agreement is completed.

Commentary by Dawn Gray. *Gray* is not a pension case. Rather, it is a lesson in how the court interprets judgments. The trial court not only held that the 1980 interloc's reference to the "*Brown* formula" was the equivalent of the "time rule," but also that by the reference, the judgment had decided the method to be used to apportion the interests in H's pension. The issue on appeal was whether or not the judgment was *res judicata* on the method to be used; there was no real dispute that the judgment had divided the benefits themselves, even though H tried to argue that the court had not yet even done that much. In determining whether or not the trial court was correct, the Sixth District examined *Brown* and its subsequent interpretation, even including the way in which family law treatises had referred to it in their shorthand. Its conclusion was that *Brown* did not state the method to be used to apportion pension interests, but rather established that the court had discretion to do this by a method that accomplished justice between the parties.

The obvious lesson from *Gray* is that we should keep in mind in drafting MSAs and stipulated judgments in 2007 that another attorney may be reading them in 2034. An attorney's shorthand reference to the "*Brown* formula" in 1980 might have seemed clear in his or her mind, but as the court held, "even if it is now, in 1980, the term Brown Formula' was not a universally accepted synonym for the time rule.'" So it may be now with references to a *Smith/Ostler*, *Epstein* credits, *Watts* charges, a *Feldman* motion or the *Moore/Marsden* formula. As this case demonstrates, better to spell out exactly what is meant in "non-lawyer English" than use our shorthand, because what the clients remember about what they intended 35 years before will be about as accurate as our ability to remember them 35 years later--when they contact us to find out why the judgment didn't do what they think it did.

Commentary by Sharon L. Kalemkiarian. This decision is an excellent review of the development of the "*Brown* Formula"--oops, I slipped. Write this sentence three times: "I will not refer to the *Brown* Formula, I will not refer to the *Brown* Formula, I will not refer to the *Brown* Formula."

So don't. In this case, a couple who divorced a few years after the "*Brown*" decision, referred to the "*Brown* Formula" for dividing an IBEW pension, without specifically referring to the time rule for dividing pensions. As a result, when the trial court applied the time rule, it determined that Wife's share would be around $560 per month. Another formula, more simply dividing just the community interest that was earned during marriage, would have resulted in benefits of $135 per month to wife. Given that Husband had been married and divorced again, and was dividing his $3,139 pension between two wives and himself, the difference mattered.

The Court concludes that it is simply not correct to equate the phrase "*Brown* Formula" with the time rule, particularly since there has been a long evolution in the holding of the *Brown* case that has resulted in the "time rule". *Brown*, the court opines, stood for two things: (1) pension rights that derive during marriage, whether or not vested, represent a community property interest subject to division; and (2) that inkind division may be accomplished by the court's retention of jurisdiction and later implementation of the division as benefits become payable. Neither of these principles, fundamental as they now appear in 2007, is a black-letter "time rule."

So again--follow me--"I will not refer to the *Brown* Formula."

Commentary by Kathryn Kirkland. This case clarifies a question that will come up more and more frequently in the next few years. From 1976, when *In re Marriage of Brown (1976) 15 Cal. 3d 838* was decided, until 1984, when ERISA was enacted (which essentially created the QDRO procedure), parties and counsel did not really know what to do with an unvested and/or unmatured pension if the parties did not agree to give the employee-spouse the pension in exchange for other assets. Because no other option was available, most judgments from this time period simply reserved jurisdiction over the pension.

In addition, prior to 1986, there were many entities which provided a defined benefit pension plan. In contrast to a defined contribution plan (such as a 401(k) plan), the value of a defined benefit plan is not simply the amount of funds contributed. Years of service and perhaps other factors affect the value of the plan.

Fast forward 20 to 25 years and the employee-spouse is retiring. How do we value the non-employee spouse's share in a defined benefit plan in which the employee-spouse has participated for a number of years after separation? In *Gray*, the parties said that the pension would be divided according to the "*Brown* formula". The trial court read "*Brown* formula" as binding on itself and meaning "time rule". The trial court then entered a division of the pension according to the time rule. Employee-spouse (Husband) appealed.

The appellate court, after a most thorough review of the evolution of pension rules, concluded that "*Brown* formula" is not synonymous with "time rule" and that use of the phrase "*Brown* formula" is not binding on the court for any particular rule of division. The case was remanded to the trial court so that the trial court could "exercise its discretion to equitably apportion the defined pension benefits . . . ."

It is this instruction on remand that all practitioners should note. As the saying goes, "there is more than one way to skin a cat." The appellate court used the term "equitably" in its remand instructions. When faced with the issue of dividing a pension from an old judgment, it is necessary for the advocate to look at the equities involved as to the two parties, rather than merely applying a rule such as the time rule.

The court cites Matthew Bender's treatise, Kirkland, et al., *California Family Law Practice & Procedure 2nd ed.*as a resource for division of pensions. It has an extensive discussion of all the issues relating to division of pensions.

Commentary by Stacy D. Phillips & Robyn C. Santucci. The issue on appeal in *Marriage of Gray* is whether the trial court abused its discretion by equating the term "*Brown* Formula" as used in a 1980 judgment with the strict "time rule" method of division of pension rights. The 1980 judgment referenced "the *Brown* Formula" as to how certain pension rights would be divided; the trial court, in turn, determined 25 years later upon Mr. Gray's eligibility for benefits that the division of the pension must be accomplished vis-a-vis the "time rule," because the trial court erroneously found the two phrases equivalent.

The appellate court stated that in the context of dividing community property generally, "a trial court's failure to exercise discretion is itself an abuse of discretion" in overturning the trial court's decision. Instead, the trial court was required to exercise its discretion to apportion community and separate property interests by selecting an appropriate and equitable method of apportionment based upon the particular facts and circumstances of the case.

Consequently, the matter was remanded to the trial court so that it could exercise its discretion in order to reach an equitable division of property rights. In effect, the trial court was not constrained to use the common and community-favoring "time rule" to divide the benefits. Rather, it needed to achieve an equity in apportionment, by any particular formula necessary to achieve this equity.

Important in the appellate court's analysis was whether the term "the *Brown* Formula" as used in the 1980 judgment was a "universally accepted synonym" for the most common division method--the "time rule"--of dividing pension benefits. *Marriage of Brown (1976) 15 Cal. 3d 838* established that (1) pension rights even if nonvested or unmatured at the date of separation are still divisible community property. The *Brown* decision further established that (2) such division can be accomplished by either a cash-out method to the non-employee spouse at the time of judgment, or a retention of the court's jurisdiction until the pension benefits become subject to payment, i.e. deferring division until the employee spouse becomes benefits eligible. However, even though *Brown* addresses a later division of benefits, it did not address, let alone dictate, a particular method of achieving the division. The appellate court ultimately found that "*Brown* did not either establish or promote the use of the "time rule," or any other specific formula, as a method for the ultimate pension division on the court's exercise of its retained jurisdiction."

Interestingly, a post-*Brown* case, *Marriage of Freiberg (1976) 57 Cal. App. 3d 304,* is the most synonymous with the "time rule." In *Freiberg*, the court found that pension rights flow from the services provided during employment, and thus focused specifically on apportioning years of service between community and separate property, depending on the overlap of the years of service with the marital period. This, as did the "time rule," equalizes all years of service regardless of level of compensation at the time of marriage versus at the time of retirement--a method which generally favors the community.

In essence, the appellate court in *Gray* was not persuaded that the trial court needed to strictly apply the "time rule" in dividing Mr. Gray's pension benefits because "the time rule" cannot be necessarily inferred from the language of the 1980 Judgment. The appellate court, in fact, found that Mr. and Mrs. Gray both understood at the time of the judgment in 1980 that the community pension benefits would be divided upon Mr. Gray's eligibility as consistent with the principles for which *Brown* stands, but that neither party's understanding necessarily dictated strict application of the "time rule."

The reason Mr. Gray appealed the trial court's conclusion, and probably the reason the appellate court decided in his favor, was because to apply the "time rule" as the trial court had, would have provided Mr. Gray with less than 50% of his total pension benefit -- after 42 years of service with the International Brotherhood of Electrical Workers ("IBEW"). Mr. Gray had married and divorced a subsequent Mrs. Gray. The second "Mrs. Gray's" pension benefits had already been divided via QDRO after a year-by-year analysis of Mr. Gray's hourly contributions at IBEW during their marriage (also not a strict "time rule"). Between the two of them, the two "Mrs. Grays' " interest would have exceeded Mr. Gray's monthly benefit. Given these circumstances, the appellate court determined a modified version of the "time rule" was a more appropriate and equitable method of apportionment.

This case should be viewed as a reminder to all practitioners or judges who refer to a case name when preparing settlements, "deal memos," judgments, orders, etc. All too often we refer to the "Brown Formula" and the "time rule" interchangeably. Better to be safe than sorry, when drafting Judgments, orders, etc.--be specific as to whether you mean the "Brown Formula" or the "time rule".

References *California Family Law Practice & Procedure 2d ed.* § 21.42[2],[3] (court's discretion in dividing pension benefits), 21.43[1] (division of nonmatured pension benefits), § 21.51 (requirements for QDROs, generally); *California Family Law Litigation Guide,* Unit 63 (pension, retirement, and disability).

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attorneys by L.A. Magazine and Super Lawyers Magazine (for 2004, 2005, 2006, 2007 and 2008), as a result of a survey conducted jointly by Law & Politics and Los Angeles Magazine. She was also singled out by them in 2005, 2006, 2007 and 2008 as one of the Top 50 Female Super Lawyers" in Southern California, where she also placed among the top overall 100 vote-getters (men and women) for 2006, 2007 and 2008. Phillips is also listed in The Best Lawyers in America and has garnered a coveted AV rating in the Martindale-Hubbell Registry. Phillips is a member of the State Bar of California, the American Bar Association, the Los Angeles Bar Association and the Beverly Hills Bar Association. She is admitted to practice in all of California's State Courts and before the Southern District of the California U.S. District Court.

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DiFranza, Gray, Phillips, Wagner and Zolla on Marriage of Sabine and Toshio M.

2008 Emerging Issues 1683

DiFranza, Gray, Phillips, Wagner and Zolla on Marriage of Sabine and Toshio M.

By Barbara A. DiFranza, Dawn Gray, Stacy D. Phillips and Stephen James Wagner & Marshall S. Zolla

December 23, 2007

SUMMARY: *In re Marriage of Sabine & Toshio M., 153 Cal. App. 4th 1203 (Cal. Ct. App. 2007),* is must reading on the subject of retrospective and prospective child and spousal support in California. The case presents a common dilemma for a custodial parent who has the misfortune of having a child with a recalcitrant payor: is something better than nothing?

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ARTICLE: Commentary by Barbara A. DiFranza. This well reasoned opinion is must reading on the subject of retrospective and prospective child and spousal support. It reminds us to review our client debriefing letters to make sure that each departing client understands that, if s/he is faced with adverse financial events, s/he must promptly file a motion so as not to build up an arrearage that can neither be compromised nor subject to bankruptcy discharge.

Commentary by Dawn Gray. This case presents a common dilemma for a custodial parent who has the misfortune of having a child with a recalcitrant payor: is something better than nothing? The public policy of ensuring full and timely support for children simply is not consistent with allowing a support payor to fail to pay support for years and then bargain away most of his responsibility to provide for his child by offering a small percentage of arrearages to a desperate custodial parent. Allowing such an agreement would not only undermine the purposes of support, but would signal a free pass for millions of support payors. Courts are obviously not willing to set that precedent. However, the result in some cases is that the custodial parent ends up with a huge but uncollectible arrearage order.

Family Code Section 3585 says that "(t)he provisions of an agreement between the parents for child support shall be deemed to be separate and severable from all other provisions of the agreement relating to property and support of the wife or husband. An order for child support based on the agreement shall be law imposed and shall be made under the power of the court to order child support." That means that the court always has the ability to refuse to enforce any agreement between parents regarding child support arrearages, "for it is settled law in this state that a minor's right to support and maintenance by his father may not be limited or contracted away by his parents." *Fernandez v. Aburrea (1919) 42 Cal. App. 131, 132, 183 P. 366.*

In *Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 947, 126 Cal. Rptr. 805,* the California Supreme Court said that "(t)here is a statutory obligation of child support imposed on parents. This obligation continues notwithstanding the parents' lack of custody, and is unaffected by any agreement between the parents. When a child support agreement is incorporated in a child support order, the obligation created is deemed court-imposed rather than contractual, and the order is subsequently modifiable despite the agreement's language to the contrary." In *In re Marriage of Ayo (1987) 190 Cal. App. 3d 442, 448-451, 235 Cal. Rptr. 458,* the Fourth District said that "(i)t is clear that the law imposes upon parents the obligation of supporting their children and the children's right to such support cannot be limited or abrogated by their parents."

More recently, and under current law, *County of Shasta v. Caruthers (1995) 31 Cal. App. 4th 1838, 1841, 38 Cal. Rptr. 2d 18,* the Third District held that: "California law provides that every child has a right to support from both parents. (Ca. Fam. Code §§ 3900, 3901 [former Civ. Code §§ 196, 196a, 242].) A child has rights independent of its mother, including the right to establish a parent-child relationship with its father and to enforce the father's duty of support. (Ca. Fam. Code §§ 4000, 7600 et seq. [former Civ. Code §§ 196a, 7000 et seq.].) The trial court's ruling that the underlying action is barred by the settlement and judgment of dismissal in the earlier action between Regina and defendant is contrary to California law prohibiting a parent or guardian from unilaterally compromising a child's right to parental support."

This court reaches the same result by holding that approving the parties' agreement would amount to an impermissible retroactive modification of child support, concluding that "(u)nder section 3651(c)(1), the trial court had no authority in these circumstances to enter an order requiring Sabine to accept in full settlement of accrued [support] less than the full amount due.' (*Keck v. Keck [(1933) 219 Cal. 316,]* 321.) Accordingly, the trial court properly concluded that Toshio was liable for the arrearages that accrued before May 2003." Toshio pulled out all of the stops in an attempt to get the court to enforce the "agreement." He argued accord and satisfaction, waiver, and apparently even cases involving child concealment. For very good reasons, it didn't work. Perhaps this case will serve as another reminder to child support payors to do what the court ordered them to do in the first place: support their children.

Commentary by Stacy D. Phillips & Trey Holliday. This case is puzzling. First, the Court states on one hand that "parties [are not] precluded from settling all disputes that might affect the calculation of arrearages," which is consistent with most family law practitioner's experience in settling arrearage claims, i.e. wiping the arrearage and interest slate clean by agreement in exchange for some specified sum paid to the payee. This is especially true where there is a dispute over how much was paid towards the Order, whether the payments made counted toward the Order, whether payments made for certain expenses counted as "child support," etc. However, the holding of *Sabine & Toshio M.* is that the Court has "no discretion to waive or forgive any part of a support arrearages debt. Support orders are not retroactively modifiable as to accrued arrearages. . . ." Further, Father's contention that the parties "could lawfully contract to forgive the past due payments" was incorrect as a matter of law.

Although this case fails to state it succinctly, the technical difference between these two seemingly counterpoised rules is that parties may settle claims for back support only when there is a "bona fide dispute concerning the debt," i.e., when the existence of the debt is in question, the meaning of the Judgment is in question, or the amount owed is in dispute.

Further, also counter to common conception, this case states that a "prospective waiver" of court-ordered child support is possible. The parties' agreement regarding waiver of prospective support in this case was "not an enforceable modification of future support" only because Father failed to pay the agreed upon sum "within the requisite 30 days." Common practice would dictate that a prospective waiver of child support is not possible, the only option being setting child support (inherently modifiable upon a change of circumstances) to zero.

Commentary by Stephen James Wagner. The *Sabine* opinion is a "text book" opinion as it relates to the compromise of past due support. It is a must read for all family law practitioners.

While this case involves the California Child Support Services Department (CSSD), with one exception, the holdings apply to all cases, whether handled by CSSD or private attorneys.

It is interesting to note that the written agreement apparently stated that its validity was to be determined by Japanese law. However, since the parties cited only California authority, the *Sabine* court applied only California law.

The *Sabine* opinion makes clear that the court always has the authority to determine whether child and spousal support arrearages exist, but as to accrued (past due) support, the court does not have the authority to alter the amount due, even by stipulation of the parties, unless there is a bona fide dispute concerning the debt. The opinion acknowledges that a person has the right to waive future support payments.

It is interesting to note that the *Sabine* court states in Footnote 2 that the *Hamer* court "misread *Graham* and *Paboojian* as permitting the parties to waive *arrearages* by agreement." Thus, *Sabine* declines, without so stating, to follow *Hamer*. This may create a split of authority on this issue. If so, then the principles of *Auto Equity Sales v. Superior Court (1962) 57 Cal. 2d 450, 20 Cal. Rptr. 321, 369 P.2d 937* would apply. *Auto Equity* stands for the proposition that if decisions of higher courts conflict, then the lower court may adopt the better-reasoned opinion. "Courts faced with conflicting decisions have the option of treating the question as open and deciding it by adopting the better rule as if there were no controlling precedent." (See 9 Witkin, Calif. Proc. 2d (4th ed., 1997) Appeal, § 970.)

Commentary by Marshall S. Zolla. Tabloid headlines blare with tales of young, spoiled celebrities attending meetings of AA. In the arguably less exotic realm of family law, AA stands for "Accrued Arrearages."

Here is yet another case where a negotiated agreement between divorced spouses attempting to deal with accrued arrearages was held unenforceable. We recently were presented with another failure of an attempt to avoid accrued arrearages in *In re Marriage of Tavares* [2007 California Family Law Monthly 210-214 (July 2007)].

The convoluted facts of *Sabine & Toshio M.*, including exhusband's relocation to Japan, years of non-payment, retention of Japanese counsel, heavily negotiated and then heavily contested agreements, should not obscure the lessons here: (1) parties cannot lawfully forgive child support payments that accrued before the agreement was signed and arrearages cannot be waived by agreement or other conduct; and (2) future support and medical expense payments cannot be effectively modified by conditional agreement.

The lesson here is not new but its breach seems to be oft-repeated. Court orders for support are not to be modified or waived by out-of-court agreements of the parties, particularly conditional agreements with pervasive ambiguity embedded in its terms.

Draft a proper and timely stipulation, have it signed and approved, and submit it to the court for signature and entry. Clients deserve to avoid the legal tsunami which occurred in *Sabine & Toshio M.*, even if it doesn't make the tabloids.

References

California Family Law Prac & Proc 2d ed. §§ 42.03, 52.04, 140.09[2][a] (retroactive modification of support order), 141.05 (estoppel based on child concealment), 141.05A (laches), 141.06 (motion to determine arrearages), 141.20, 141.21 (general statutory authority for enforcement of support obligations by district attorneys and local child

support agencies); California Family Law Litigation Guide, Units 10 (modification), 32(child support), 33 (spousal support).

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Gray, Kalemkiarian, Richmond, Wolf and Zolla on In re Marriage of Williams

2008 Emerging Issues 1684

Gray, Kalemkiarian, Richmond, Wolf and Zolla on In re Marriage of Williams

By Dawn Gray, Sharon Kalemkiarian, Diana Richmond and Bernard N. Wolf and Marshall S. Zolla

December 23, 2007

SUMMARY: *In re Marriage of Williams, 150 Cal. App. 4th 1221 (Cal. Ct. App. 2007)* answers a question that has been lingering since the first of the recent line of California cases dealing with the difference between "income" and "assets" as well as imputation of income on assets for child (and spousal) support purposes.

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ARTICLE: Commentary by Dawn Gray. Even if the decimal points in the Williams' financial figures are a little more to the right than in the "average" case, its holding will be applicable to every party who owns a home. As a reversal, it is a particularly strong case; its holding means that as a matter of law, the trial court errs in imputing income on equity in a payor spouse's residence. In re Marriage of Williams thus answers a question that has been lingering since the first of the recent line of cases dealing with the difference between "income" and "assets" as well as imputation of income on assets for child (and spousal) support purposes.

These cases began with *County of Kern v. Castle, 75 Cal. App. 4th 1442 (Cal. Ct. App. 1999),* in which the Fifth District held that the trial court had the discretion to impute earnings on F's inherited assets. *Castle* was followed quickly by the Third District's decision in *In re Marriage of Dacumos, 76 Cal. App. 4th 150, 153 (Cal. Ct. App. 1999),* that the trial court properly imputed income on under-utilized income-producing assets, noting that the "broader definition of earning capacity to include income that could be derived from income-producing assets as well as from work is in accord with the legislative intent."

In *In re Marriage of Destein, 91 Cal. App. 4th 1385, 1395 (Cal. Ct. App. 2001),* the First District held that "trial courts have discretion to attribute income to investment assets." The same reasoning applied in *In re Marriage of Cheriton, 92 Cal. App. 4th 269 (Cal. Ct. App. 2001),* in which the Sixth District held that stock options were not "income" for support purposes until they were exercised and actually generated net proceeds. In the most recent case on the subject, *In re Marriage of De Guigne, 97 Cal. App. 4th 1353 (Cal. Ct. App. 2002),* the First District held that the court properly deviated from guideline child support on the basis that during marriage, H had sold separate assets to generate additional family income, and that therefore the children's living standard should continue to be based on the living standard generated thereby. The panel said that the trial court "concluded it would not be in the children's best interests to have their lives changed so radically while their father shelters, and continues to enjoy, a substantial asset that produces no income." Most recently, in *In re Marriage of Pearlstein, 137 Cal. App. 4th 1361 (Cal. Ct. App. 2006),*

the First District said that "where the supporting party has chosen to invest his or her funds in nonincome- producing assets, the trial court has discretion to impute income to those assets based on an assumed reasonable rate of return."

All of these cases dealt with imputing income on various types of assets that some people may own, but *Williams* applies them to an asset that many more people own--equity in the family residence. The case began with Thomas Williams' attempt to decrease child support because of Hilary Williams' receipt of cash proceeds from the sale of the residence awarded to her in the dissolution action--which proceeds are the very *definition* of equity. This backfired when Mrs. Williams filed a successful companion motion to increase support based on his higher equity.

The evidence at the hearing showed that their equity was approximately the same, although Hilary's was liquid and Thomas's was not. She had downsized to a "tiny" 2,325 square foot, three-bedroom, one bath house on one acre, leaving some of her funds for remodeling and the remainder she "freed up" to help support herself and the children. There was no indication that Thomas had done anything similar. The trial court adopted the approach used by Hilary's forensic accountant, who estimated the parties' assets and income, including imputing a 3% return on the equity in Thomas's residence because of the "magnitude of equity being sheltered in the personal residence." Thomas's forensic expert countered that the imputation was incorrect because he could not alter the nature of the property in order to earn ANY income on the equity. That is logical; a personal residence is not an investment property that can be rented out to produce an income--after all, the payor parent has to live *somewhere*. Nor is it a liquid investment that can be placed in more lucrative vehicles or stock shares that could be shifted to other companies.

The appellate court held that Hilary's sale of her house and Thomas's purchase of his (and his resulting mortgage obligation) constituted a sufficient change in circumstances to justify a modification of support. It then turned to the consideration of investment assets in calculating child support, concluding that "under the earning capacity doctrine (Ca. Fam. Code § 4058(b)) the trial court has the discretion to impute a reasonable rate of return on the supporting parent's underutilized or non-income producing investment assets in order to calculate guideline child support in the best interests of the child." It upheld the imputation of 3% interest on all of Thomas's other assets, but it held that the equity in a personal residence is not an "underutilized or non-income producing investment asset." It essentially drew the line of imputation to shelter a personal residence from use in the child support calculation, concluding that "we find no precedent that allows attribution of an assumed rate of return on the supporting parent's home equity in determining parent's income for the purpose of calculating guideline child support, even if a certain amount of home equity is sheltered." Apparently the "certain amount" can be large, because the evidence showed in this case that Thomas was sheltering $6 million in equity and essentially living off of it, showing minimal actual earnings.

Fortunately for the Williams children, Thomas had sufficient other assets to justify a substantial support award. Other children may not be so fortunate; where a payor parent's only asset is his or her home, the children will not be entitled to support based on that asset. However, to be fair to the homeowner, in an appreciating market the equity in a family residence could rise dramatically and an award based thereon could, in theory, be higher than the payor could ever make from income, requiring encumbering the residence in order to pay support. That may not be a good precedent to set.

Regardless of the reversal on the law, this case presents a good contrast between a successful expert's approach and one of an expert who does not persuade the court. Hilary's expert presented various possible methods of calculating child support based on the choice of income or assets used in the formula. He included Hilary's assets, measured Thomas's income on the basis of his spending and not on his (extremely low) actual earnings, and imputed a 3% rate of return on Thomas's investments. He substantiated this choice of rates and even backed out $1.8 million of Thomas's equity in his residence because "in his view that is a reasonable amount of home equity to be shielded from child support;" he used that figure because it was the same amount of equity in Hilary's home (which he also shielded). This approach seems very reasonable and the trial court favored it over that of Thomas's expert, who presented no method of calculating child support and who recommended "that child support should be calculated on the basis of Thomas's actual monthly income of $803 . . ." That was patently ridiculous in light of Thomas's stipulation "that employment income of $20,833 per month would be attributed to him." Obviously working with the forensic expert to educate him

or her regarding the facts of the case and providing reasonable approaches in light of the law will make a much better impression on the court.

Commentary by Sharon L. Kalemkiarian. Our high-asset clients shouldn't pop open the expensive champagne just yet. While the court in Williams places some boundary around the expansive holding of De Guigne, in holding that a court should not attribute interest to home equity in a primary residence absent a showing of special circumstances under section 4057, the court gives a black letter rule with one hand, but takes it away with the other.

To deviate from the child support guidelines requires specific findings as to why such a deviation is justified--and why the guideline amount would be unjust or inappropriate. The appellate court does not want trial courts to use interest on the equity in a primary residence to attribute additional income to a payor. Rather, the court directs the lower courts to look at income--and if the guideline calculation of support (without attributing income to the equity in the home) appears to be unjust or inappropriate, and the proper findings are made justifying a deviation under *Family Code § 4056, then and only then* can the court take into consideration whether the equity that a payor is holding in a residence could lead the court to make a "non-guideline" upward support order.

The sequence of the inquiry is important here for practitioners. The lower court, in this case, did make a guideline order--but on a high level of imputed income, which included the non-existent interest on the equity in the primary residence. The appellate court is leaving open the possibility that Mr. Williams should have been paying more support than a guideline amount, based upon his income without that phantom interest. But the trial court must first calculate a guideline amount on that income--make the findings that a deviation is justified, explain why, and then determine a non-guideline amount that would be appropriate.

Commentary by Diana Richmond. The rich really do live differently than the rest of us. In this child support modification, the trial court had to resolve whether to impute income on ex-wife's $5 million proceeds of sale of a 5,500-square-foot home and/or on ex-husband's 11,000-square-foot home in Pebble Beach with $6.45 million equity (especially when he also had another home in Hillsborough with $1.25 million equity which he "conceded" was investment property). Having sold his internet business to Cisco Systems for shares worth more than $65 million, neither party was employed, although the parties agreed that ex-husband be imputed with monthly employment income of $20,833 and ex-wife be imputed with monthly employment income of $2,800. Query: should either party have stipulated to employment income when their investment income was so substantial? Ex-husband did so in a transparently vain effort to have the court ignore his investment income altogether.

Although the trial court imputed a 3% rate of return on all of ex-husband's assets, the Court of Appeal reversed in part by excluding any return on ex-husband's Pebble Beach home. The decision sets a common-sense precedent for not including home equity (except in an extremely rare case such as De Guigne): ex-husband had argued convincingly that public policy reasons preclude imputation of income to a parent's home equity, since ownership of a home in an affluent community would practically guarantee litigation over how much income to impute to substantial residence values.

Imputation at 3% was a very conservative rate, and it originated with ex-wife's own accountant. Understandably, ex-husband did not challenge it. Wife's accountant had offered two alternate theories for ex-husband's income: either using ex-husband's actual interest income on his investments plus long term capital gains of $252,000 per month, or using husband's actual monthly withdrawals of $108,000 from his investment account. The trial court chose the most sensible of these routes by adopting the rate of return approach. Using capital gains strikes me as relying on a factor which is episodic and controllable by the investor's tactical decisions, while relying on a reasonable rate of return is an achievable constant.

Commentary by Bernard N. Wolf. In Williams, the Court of Appeal has held that a trial judge may not attribute income to the equity of a parent's residence for the purpose of calculating guideline child support. In the view of some, the rule may be good public policy. But is it good law?

The father in *Williams* invested heavily in his enormous residence, which contained well over $6 million in equity. Despite the fact that he was able to withdraw $108,027 each month based on margin loans against his brokerage account, he reported monthly income of only $803. The trial court held that the two Williams children were entitled to live according to the actual and attainable lifestyle of their father. To achieve an appropriate, if still modest, level of child support, the judge imputed a 3 percent rate of return against a series of assets, including the equity in Thomas's residence above $1.8 million.

The Court of Appeal reversed, holding that ". . . a supporting parent's home equity generally may not be considered for the purpose of calculating child support absent a showing of special circumstances under [*Family Code] section 4057*, subdivision (b), that render guideline support unjust or inappropriate. . . ."

Why?

Family Code § 4058(b) permits a trial judge to compute a parent's earning capacity in lieu of actual income, consistent with the best interests of the children. The Supreme Court has recognized the trial court's unrestricted discretion in applying, or not applying, earning capacity for child support purposes. Nothing in the language of Section 4058(b) precludes consideration of residence equity, regardless of the circumstances, in making a determination of earning capacity under the Statewide Uniform Guideline.

There may be valid policy reasons for excluding residence equity attributions, including the floodgate effect that might possibly occur in the family law courts. Thomas argued, somewhat hyperbolically, that "[v]irtually every home will turn into a potential source of conflict, and simply residing in an affluent community like Pebble Beach or Saratoga will practically guarantee litigation over how much income' to impute to substantial residence values." Others might dispute this rather apocalyptic scenario.

Public policy considerations underlying the scope of statutory enactments such as the Statewide Uniform Guideline generally lie with the Legislature. The Legislature has enacted a series of specific public policy pronouncements regarding the proper level of child support. In my opinion the Legislature, not the Courts, should determine whether or not to permit attributions against residence equity.

Commentary by Marshall S. Zolla. It's hard to feel much sympathy for parties who sold their business during marriage for between $65 and $85 million, had an 11,000 square foot home on the 17 mile drive in Pebble Beach and enjoyed an "extraordinarily high standard of living." Harder still when they are fighting over a reasonable level of child support for their two kids. But, hey, someone's got to make the tough calls. Unfortunately, this trial court got it wrong and was reversed.

Williams from the Sixth Appellate District (May 17, 2007) should be read in concert with *In re Marriage of Schlafly*, also from the *Sixth District, 149 Cal. App. 4th 747 (Cal. Ct. App. 2007),* as both opinions reversed a trial court order for wrongful imputation of income in a child support computation [for discussion of *Schlafly* decision, *see* 2007-8 California Family Law Monthly 8 (2007)].

Is it proper for a trial court to impute an assumed 3% rate of return on investment assets? Yes, holds *Williams*, in an appropriate case, based on the reasoning and rationale found in *Cheriton, Destein, Dacumos,* and *Pearlstein*. Is it proper, in a child support computation, to impute income to the equity in the payor's residence? No, it is not, based on the recent holding in *In re Marriage of Henry, 126 Cal. App. 4th 111 (Cal. Ct. App. 2005),* absent a showing of special circumstances under *Family Code section 4057(b)*. Such an imputation in De Guigne was distinguished because in that

case Section 4057(b) special circumstances were found to exist.

For a time, we saw appellate decisions open wide the net to capture as much child support as possible: *In re Marriage of Destein, 91 Cal. App. 4th 1385 (Cal. Ct. App. 2001); County of Orange v. Smith, 132 Cal. App. 4th 1434 (Cal. Ct. App. 2005).* More recently, the trend seems to have become more restrictive, narrowing the scope of permissible income to consider in the child support calculation: In re Marriage of Henry

Williams presents an instructive set of nets, some with a wide reach, others much more restrictive, which caused the partial reversal. The calculation of includable income for purposes of child support computation is no longer a perfunctory task. With an expanding array of compensation variables, coupled with a diverse pattern of judicial interpretation, this critical component of the child support matrix must be given much more careful analysis.

References. California Family Law Prac & Proc 2d ed. §§ 41.04 (legislative intent and principles behind child support guideline), 41.07[2][a], [e] (calculation of parent's income under child support formula), 41.08[2],[4],[6] (factors rebutting presumption of correctness of guideline child support amount), 42.20 (change of circumstances requirement for child support modification), 42.23 (prior stipulated order and changed circumstances requirement); California Family Law Litigation Guide, Units 10 (modification) and 32 (child support).

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DeCarolis and Leone on Elkins v. Superior Court

2008 Emerging Issues 1651

DeCarolis and Leone on Elkins v. Superior Court

By Patrick DeCarolis Jr. and Lawrence E. Leone

December 20, 2007

SUMMARY: In this Emerging Issues Analysis, California attorneys Patrick DeCarolis, Jr. and Lawrence E. Leone comment on *Elkins v. Superior Court, 41 Cal. 4th 1337, 63 Cal. Rptr. 3d 483, 163 P.3d 160, 2007 Cal. LEXIS 8214 (Ca. 2007),* in which the California Supreme Court reversed the Court of Appeals and found that the local court rule governing dissolution trials improperly deviated from statewide procedural rules governing all trials.

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ARTICLE: Commentary by Patrick DeCarolis, Jr.: A slip and fall case can take two weeks of trial time, but a family law case involving the financial well being of a family for years to come only gets two hours has always been repulsive to me; finally, we have a definitive Supreme Court case that agrees. I can remember the "good old days" before Reifler and Stevenot became the norm, when oral testimony controlled at the Order to Show Cause hearing. Maybe it's just nostalgia, but it seemed that the truth came out a little more often with people standing up and telling their stories with the spoken word. Signing a document prepared by an experienced and skilled attorney is so much easier than standing up and telling the story out loud.

The court notes that "[o]ral testimony . . . given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses." This demeanor is sometimes the turning point in the case. This writer has seen the momentum of the case change direction within a minute or two of the court having the opportunity to observe a witness testifying. The oral testimony usually doesn't sound quite the same as the assertions in the trial brief!

The idea that a slip and fall case can take two weeks of trial time but a family law case involving the financial well being of a family for years to come only gets two hours has always been repulsive to me. Finally, we have a definitive Supreme Court case that agrees. It stated that "family law litigants should not be subjected to second-class status or deprived of access to justice." Perhaps a quick note to the legislature and the governor would be in order to provide family law with enough judges to make this happen. The workload of family law judges in our county is overwhelming. The only way to actually do the job is to take home files and read every night for hours.

The simple legal premise of the case is that local rule cannot deviate from State law. The common theme in appellate cases on this point is that a local court cannot advance the goal of efficiency or expediency by adopting

procedures inconsistent with state law.

Commentary by Lawrence E. Leone: The California Supreme Court decision in *Elkins* will change the face of family law and, hopefully, will stop judicial officers from treating family law litigants as second-class citizens. The implications of the case are nothing short of a revelation and an affirmation that the rule of law trumps the budgetary needs of court administrators. For thirty years clients have asked why family law litigants had fewer rights than persons contesting traffic tickets, and I could not, to my satisfaction, explain why statutory and constitutional protections, such as the rules of Evidence and California Code of Civil Procedure, seemed to be suspended for hearings that concerned matters profoundly impacting the lives of children, parents, and spouses.

When one examines this historical denial of rights, fundamental to a free society that shamefully relegated family law litigants to the back of the proverbial bus, we see that the blatant denial of a full and fair adjudication was explained as necessitated by the needs of trial courts to process their heavy case load in a timely manner. The back-room argument used to truncate the usual Due Process protections afforded to the "normal" litigant was called "Reiflerization." The argument was that it was a practical impossibility to honor the rights of family law litigants (and their children) the same way as the system treated slip-and-fall or "real" litigation matters, because of limitations on judicial resources. At long last, recognizing the elephant-in-the-room, the California Supreme Court has ruled that "a fair and full adjudication on the merits is at least as important in family law trials as in other civil matters, in light of the importance of the issues presented such as the custody and well-being of children and the disposition of a family's entire net worth."

Historical perspective. A plausible explanation for this historical injustice may be that the courts and society have traditionally considered divorcing spouses and parents in paternity matters as illegitimate, in "*pari delicto*" or "in equal fault." In law school we learned that if parties were both at fault, relief was often denied or restricted. Interestingly enough, "no-fault divorce" was a Bolshevik reform instituted following the Russian Revolution. Christian teaching opposed the divorce process, and placed impediments to the process of dissolving and resolving marriage and paternity issues, necessitating the formation of courts of equity (as opposed to courts of law). The California Legislature and Governor Reagan took steps to remove fault from the legal landscape in 1969, but it took the *Elkins* Court to substantially complete the process. Family law litigants, long regarded *sub silentio* by judicial administrators as vaguely unclean must now be treated as "real" litigants possessed with the full panoply of constitutional, statutory, and case law rights.

Context. The Family Code establishes as the law of the state--and superior courts are without authority to adopt rules that deviate from this law--that except as otherwise provided by statute or rule adopted by the Judicial Council, "the rules of practice and procedure applicable to civil actions generally . . . apply to, and constitute the rules of practice and procedure in, proceedings under [the Family Code]" [*see Fam. Code § 210*]. Notwithstanding this clear statement, the local rule in question provided, in effect, that family law trials were not required to proceed under the same general rules of procedure that govern other civil trials. The promulgators of the rule believed that family law litigants were not entitled to the same kind of trial guaranteed to normal litigants. Parties were required to present their case by written declarations, and oral testimony was not permitted except in "unusual circumstances," although upon request, the court might allow parties to cross-examine declarants. Mr. Elkins was in pro per and did not follow the local rules. The trial proceeded "quasi by default" and Ms. Elkins was awarded largely what she requested. Mr. Elkins argued that the rules violated his Constitutional rights to Due Process and that the rules conflicted with various provisions of the Evidence Code and Code of Civil Procedure. The Court of Appeal affirmed and Supreme Court acted.

The Law. Citing *Shippey v. Shippey (1943) 58 Cal. App. 2d 174, 177*, the *Elkins* court observed that "matters of

domestic relations are of the utmost importance to the parties involved and also to the people of the State of California. . . . To this end a trial judge should not determine any issue that is presented for his consideration until he has heard all competent, material, and relevant evidence the parties desire to introduce." Also, notwithstanding local rules, declarations ". . . constitute hearsay and are inadmissible at trial, subject to specific statutory exceptions, unless the parties stipulate to the admission of the declarations or fail to enter a hearsay objection."

Reality Check. The specific holding of *Elkins* is that courts have no power to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law. This holding follows a line of cases that have invalidated local rules that have "advanced the goals of efficiency and conservation of judicial resources by adopting procedures that deviated from those established by statute, thereby impairing the countervailing interests of litigants as well as the interest of the public in being afforded access to justice, resolution of a controversy on the merits, and a fair proceeding." The Court correctly observed that "family law litigants should not be subjected to second-class status or deprived of access to justice. . . . The same judicial resources and safeguards should be committed to a family law trial as are committed to other civil proceedings."

The decision responds to our legal system and profession's need to recognize that what made this country great is not short term political expediency at the cost of civil rights; rather, it is that we, as a system of justice, must venerate the rule of law, no matter how expensive. While proceeding by declarations may have appeared to be efficient and moved cases through the system, it did violence to the parties' rights and adversely affected the public's respect for and trust in the court system. In addition, a byproduct of the hearing-by-declaration process fundamentally changed the judicial officer's role from that of someone who actively heard, witnessed, questioned and evaluated the dialectic process (question and answer) to that of a passive reader of creative declarations, largely drafted by skilled counsel. Adding to the false economy of the "Reiflerization" process is the fact that lengthy declarations (almost never drafted by a witness!) would then precipitate voluminous written objections by careful counsel seeking to protect the record. Assuming the judicial officer ruled on the objections, counsel would then spend the time redacting the declarations. Vigilant counsel understand that failure to make and protect a record, where the interest of a client so requires, falls beneath the standard of care and is an ethical breach. Under "Reiflerization" there was a fiction that the rules of evidence and procedure were being followed, causing careful counsel to file the proper objections in writing, and then to insist that the court rule, because if counsel did not insist, the evidentiary objections were deemed waived.

More often than not, some judicial officers would bristle, chide counsel for their lack of trust in the judicial officer, ignore the objections if not the declarations, attempt to avoid ruling on the objections, or, in the interest of time (threatening a substantial delay), coerce a waiver of objections or the necessity to rule thereon. Far too often it became clear that a judicial officer with 35 matters on his or her docket had "skimmed" the declarations and was prepared to rule based on counsel's argument. Imagine how the client felt when he or she heard a judicial officer make a statement from the bench that demonstrated that his or her pleadings had not been read, because the court was busy. Clients watching this process were typically aghast at the monumental expense caused by their counsel drafting their declarations (telling their story for them), preparing voluminous objections, and then arguing to a judicial officer who appeared to be unfamiliar with the issues. The "Reiflerization" process, for reasons of judicial economy, relegated parties to that of secondary participants in matters that dramatically impacted their lives and that of their children. It was common to hear a party, represented by counsel, ask the court: "May I say something?"

An additional by-product is that conscientious judicial officers in family law often "burn out" at sifting through the volumes of reading for cases that may settle on the day of the hearing! In my view, this aberrational process has also impeded the development of discernment and of trial skills common to many "civil" trial judges and experienced civil trial lawyers.

The End of "Reiflerization"? The case of *Reifler v. Superior Court (1974) 39 Cal. App. 3d 479*, is often cited in support of a separate-but-equal litigation process. The case does not so hold. Clearly it was used to move family law litigants through the judicial system with minimal cost to the system. And if the litigant's rights were compromised, so be it. For more than 30 years, this case has been used to justify the assertion that family law courts could deny the

application of the rules of Evidence and Code of Civil Procedure by refusing to take oral testimony, as if it were a privilege and not a right. It has been recognized that the "Reiflerization" process creates an anomaly that if there were a factual conflict in the declarations, on appeal the court resolved the conflict in favor of the prevailing party--the exact opposite of what would happen on a motion for summary judgment. In the civil summary judgment context, conflicts in declarations must be resolved in favor of the losing party, lest a litigant's constitutional right to a "jury" trial be effectively denied. Central to the protections afforded by a jury trial is the ability of the jury to hear and see all the admissible evidence. One basis for excluding hearsay statements is that the jury could not see the witness testify. A fair hearing requires the opportunity for both sides to present their best case and all the admissible evidence supporting their claims. With some exceptions, it is critical for a trier of fact to be present so that he or she might personally assess the credibility of a witness whose testimony (evidence) is subjected to the dialectic or examination process. This is fundamental Due Process.

In supporting the separate-but-equal process it was argued that since there is no constitutional right to jury trial in family law, given its English roots in what was fundamentally an ecclesiastical adjudication, the equity courts may make its own rules. This is not the law and never has been. Ironically, Justice King, who opined that a "streamlined procedure" for family law hearings on the paperwork expedites the crowded dockets of family courts in urban areas in *In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051*, signed an amici brief challenging the local rule.

Motions vs. OSCs. The big issue concerns whether the application of this decision will be limited to family law "trials," thereby allowing the separate- but-equal process to continue for pendente lite or temporary order (OSC) hearings. A close reading of the opinion suggests that the better view is that, absent a stipulation allowing the process, the court may not conduct a hearing by declarations except where the issues are preliminary or ancillary procedural matters.' The *Elkins* Court observes that *Code of Civil Procedure Section 2009* ". . . has no application to the proof of facts which are directly in controversy in an action. It was not intended to have the effect of changing the general rules of evidence by substituting voluntary ex parte affidavits for the testimony of witnesses. The section only applies to matters of procedure--matters collateral, ancillary, or incidental to an action or proceeding--and has no relation to proof of facts the existence of which are made issues in the case, and which it is *necessary to establish to sustain a cause of action*." Again, it appears that declarations may only be used for hearings on motions concerning "preliminary or ancillary procedural matters." For someone or a court to suggest that a hearing impacting temporary custody rights, the use of the family residence, restraining orders and financial orders are "collateral or incidental" seems to again ignore the elephant if not the law. If credibility is at issue or a valid dispute exists as to a question of fact, all admissible evidence may and should be offered, be it oral testimony or documents. While the forces of "Order" might seek to mitigate the rights of families, the rule of "Law" must always prevail, eventually.

The decision confirms that all relevant evidence is admissible, including evidence bearing on the issue of witness credibility. *See* Ca. Evid. Code §§ 210 and 351. It is well settled that the same rules of Evidence enable the court to exclude cumulative and prejudicial evidence. Permitting oral testimony rather than relying upon written declarations at trial is consistent with the historically and statutorily accepted practice of conducting a hearing trial by means of the oral testimony of witnesses given in the presence of the trier of fact. Traditionally testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses and also allows the judicial officer to ask the witness questions too.

Is a pre-trial hearing concerning financial issues or where children will live, albeit temporarily, a "minitrial," requiring the protections of due process? Yes. Great care should be taken before a lawyer fails to request an evidentiary hearing, including oral testimony, or to object to inadmissible evidence, including hearsay statements, at a hearing where matters go beyond the collateral or incidental. A practical distinction must be drawn between setting temporary child and spousal support based on W-2 or tax return information and a contested custody hearing. As with the slow demise of segregation, it seems plausible that the lower courts will struggle to implement the decision and that the litigants may not expect instantaneous results. The burden, at least in theory, has been shifted from the litigants to the judicial system.

Note that once a judgment or final order is entered regarding a custody issue the resulting judgment is entitled to substantial deference, the modification of which may require a showing of a change of circumstances based upon res judicata and issue preclusion principles.

References: *California Family Law Practice And Procedure, 2nd ed., §§ 111.02* (applicability of general civil trial rules and procedures; local court rules), 111.07 (setting for trial, generally); *California Family Law Trial Guide*, Units 1 (master procedural checklist), 20 (evidence issues).

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30 of 42 DOCUMENTS

Allen, Blumberg, Duncan, DeCarolis, and Leone on In re Marriage of West

2008 Emerging Issues 1652

Allen, Blumberg, Duncan, DeCarolis, and Leone on In re Marriage of West

By James D. Allen, Grace Blumberg, Roderic Duncan, Patrick DeCarolis, Jr. DeCarolis, Jr. and & Lawrence E.Leone

December 20, 2007

SUMMARY: In this Emerging Issues Analysis, members of the California Family Law Monthly Editorial Board comment on *In re Marriage of West, 152 Cal. App. 4th 240; 60 Cal. Rptr. 3d 858; 2007 Cal. App. LEXIS 1007 (Ca. Ct. App. 2007),* in which the Court of Appeals reversed a trial courts order reducing husbands spousal support obligation.

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ARTICLE: Commentary by James D. Allen. The trial court's decision was so harsh that it simply failed the 'sanity test.' The trial judge clearly made an erroneous ruling, but the parties made it very difficult on him by not setting forth in their marital settlement agreement a clear recitation of the then current facts upon which the spousal support order was made. Further, they failed to set out their expectations as to Sylvia's future income production and how such income production would affect either party's right to move for a modification of the support order. In this vacuum, the trial court clearly struggled to try to figure out what the parties had in mind when the initial support provisions were made and to then apply those facts and expectations to the new set of circumstances. The obvious lesson is to set out the then current facts and the then current expectations in the agreement.

The easiest part of the trial court's ruling to overturn was the use of the 'half the length of the marriage' provision in a marriage which was of 'long duration' (more than ten years in length). As this was one stated basis for the trial court's ruling, by itself this reasoning would justify reversal and remand.

The more interesting issue involves the appellate court's handling of the proceeds from the sale of the community business. Because the parties did not state whether Sylvia's receipt of the principal and interest was a factor in setting the original amount of support, and because Sylvia did not move to increase her support when the payments stopped, the appellate court essentially disregarded the monies received in determining how the trial court should have addressed the issue. The trial court criticized Sylvia for not saving some of the principal (and perhaps the interest as well). However, as pointed out in the opinion, both parties listed the installment payments as identical amounts of 'other income' on their respective Income and Expense Declarations. Arguably, upon the cessation of the installment payments either party could have moved for modification, but neither did, suggesting that both of them disregarded the proceeds from the sale of the business in reaching an agreement on spousal support. Moreover, the appellate court pointed out that there was no *Gavron* type warning, either in the marital settlement agreement or in one of the prior hearings, that would have put Sylvia on notice that she was expected to save and invest the business sales proceeds to assist in her

support.

One of the more striking aspects of the trial court's reduction of spousal support is the court's apparent failure to give weight to the standard of living of the parties during marriage. It seems without dispute that Sylvia would *never* be able to support herself at the marital standard of living. Her stated expenses were around $100,000 per year, a number not out of proportion to Til's earnings when the parties negotiated their marital settlement agreement. Yet the trial court, in dealing with a twenty year marriage which included a child who was still a minor, simply reduced spousal support to zero, even though it was apparently without disagreement that Til was earning in excess of $400,000 per year. The trial court's decision was so harsh that it simply failed the 'sanity test.'

Commentary by Grace Ganz Blumberg. *West* is worth reading for its careful critical examination of the trial court's reasons for modifying a former wife's spousal support. It also reminds us that the 'one-half the length of the marriage' factor for determining spousal support does not apply to a marriage of long duration [Ca. Fam. Code § 4320(l)].

Commentary by Patrick DeCarolis, Jr. The lesson from this case is if you win, make sure the findings supporting the ruling are in the record. Also try to guide the court to avoid findings that will get it reversed.

The court could have found that Sylvia could have used a better effort to become self supporting and used that as a factor to reduce the support. But using the factor set forth in Ca. Fam. Code § 4320(l) regarding 'half the length of the marriage' as a guidepost was erroneous, since that section does not apply to marriages with a length greater than ten years.

The trial court also seemed to find that Sylvia should have invested her assets more prudently by stating one of its bases for the modification was 'that Sylvia received a significant cash asset from the sale of the community business.' But it did not clearly make a finding about what she could have received in income if she had preserved that asset. Such a finding would have helped preserve the lower court's ruling.

On a similar point, the appellate court seems to have expanded the *Gavron* admonition [*see In re Marriage of Gavron (1988) 203 Cal. App. 3d 705*] requiring the court to warn the support recipient that she/he has duty to make reasonable efforts to assist in his or her support needs. Here the court states: 'It is also unfair to penalize Sylvia for failing to invest the principal without first warning that she would be expected to invest it ... it would be an abuse of discretion to penalize her for failing to invest that asset without providing her with fair warning of the court's expectation.'

It appears that good practice now requires practitioner's to ask for a *West* admonition in appropriate cases.

Commentary by Hon. Roderic Duncan, Judge (Ret.). The current state of the law regarding spousal support is examined here. This case, and the recent opinion in *Marriage of Shaughnessy (2006) 139 Cal. App. 4th 1225*, go a long way to summarizing the current state of the law regarding spousal support in the dissolution of marriages of more than 10 years in this state:

a reasonable change in career paths by the supported spouse is acceptable and may well be considered the requisite change of circumstances to support a modification,

and a reasonable change of career will not bring a penalty in computing the amount of support,

step-down orders are still fine so long as they are not based on unreasonable expectations of the recipient's income or needs, and

Family Code Section 4320 requires that the half-the-length-of-the-marriage rule not apply to marriages of more than 10 years.

None of these points are new or surprising. Two other points bear a little more attention.

The first may apply more to judges than lawyers: stepping down a support award to zero does not terminate support. To do that the judge must use the magic 'termination' word. Not making his intentions clear on that point earned this trial judge a bit of an admonition.

The second distinguishes the well known case *Marriage of McElwee (1988) 197 Cal. App. 3d 902* in pointing out that simply spending down money received from a division of the community property when one is not basing a request for an increase in support on the exhaustion of that community source should not be equated with what Ms. McElwee did. Disposing of income-earning property or investing unwisely may still bring a penalty if one is asking for an increase in support, but Ms. West was not doing that here.

Commentary by Lawrence E. Leone. The complicated and lengthy facts of this case could have been used for the spousal support question and model answer on the family law specialization exam. The issues presented are many and important. Briefly, Ms. West (Sylvia) and Mr. West (Til) were married for 20 years and appear to have been litigating since that time. Approximately eight years after judgment Til filed his latest attempt to modify (effectively terminate) support, notwithstanding the fact that his income had dramatically increased from $237,000 in 1997 to $404,000 in 2004, while Sylvia had actual earnings of less than $600 per month. The lower court chided Sylvia for not saving some of the money from the sale of the family business and issued an ambiguous step down order that would have effectively terminated support after one-half the length of the marriage. Consistent with prior decisions, with some exceptions, appellate courts seldom affirm decisions that effectively terminate support after a lengthy marriage.

Change of Circumstances. This is the threshold issue in any modification proceeding. The court correctly points out that if there is no substantial evidence of a material change of circumstances, absent a waiver of this requirement, an order modifying a support order will be overturned as an abuse of discretion. A 'change of circumstances' is defined as a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. It includes all factors affecting need and ability to pay as set forth in *Family Code Section 4320*. As in any contract, the parties may, expressly within a stipulation or judgment, define the methodology whereby support may be modified. As a practice tip, it is always a good idea to set forth the clear expectations of the parties and clarify how and to what degree an order may be modified. The lesson is that careful drafting, while the parties are in a cooperative mood, may often prevent future litigation.

Sylvia claimed that there was no change in circumstances to justify a modification. The reviewing court disagreed, finding that (1) she had changed professions from that of a teacher to that of a real estate salesperson, (2) the ambiguous language of the prior order allowed modifications after September 2002, and (3) she had actual earnings that could be projected as meeting her needs. The settlement agreement required Sylvia to make good faith efforts to become self-supporting.

Step-Down Factors. The lower court looked (1) to her favorable earnings outlook, (2) the amount of assets she had previously received from the sale of the business (approximately $500,000 over eight years -- $62,000 a year) and (3) one-half the length of the marriage. Curiously, the reviewing court took no position on whether the lower court had the discretion to reduce support for other, unarticulated factors.

Projected Earnings. The message here may be that while a step down order is permissible after a lengthy marriage, it must be tightly constrained by the evidence. Again, a step down support order must be based on 'reasonable inferences to be drawn from the evidence, not mere hopes or speculative expectations.' Here, Sylvia was projected to earn $33,550 after three years and yet retained the ability to return to court to seek an upward modification. The lower court erred in making a retroactive order when Sylvia had no earnings. Clearly the evidence of her favorable earning prospects did not support effectively terminating her support where Til had high earnings and she did not have a realistic ability to support herself consistent with the marital standard of living.

Imputed Income From Assets-Necessity for 'West Warning'. The reviewing court distinguishes *In re Marriage of McElwee (1988) 197 Cal. App. 3d 902* and *In re Marriage of Terry (2000) 80 Cal. App. 4th 921*, before observing that, with some exceptions, neither party should be imputed income from a division of assets. The court then goes on to opine that it would be unfair to impute such income without a warning as was given in the *Gavron* case. It therefore appears to be prudent to include a '*West* warning' in agreements and judgments where a supported party is receiving income producing assets and there is an expectation that he or she will manage the property wisely.

Length of Marriage. The court of appeal held that *Family Code Section 4320(l)* is 'inapplicable' to a lengthy marriage. While the opinion is correct that the goal of being self supporting within one-half the length of the marriage may be limited to 'short' marriages, the trial court certainly has wide discretion, based on other factors, provided they are articulated within the ruling. The reviewing court cited a portion of Ca. Fam. Code § 4320(l), as follows: '(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage.' But the court of appeal does not expressly comment on the next sentence in 4320(l), to wit: 'However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.' Perhaps this omission is related to the reviewing court expressing no opinion on the 'unarticulated factors' that might have been used by the trial court. Better practice is to set forth, within the judgment or MSA, the expectations of the parties and that the supported spouse has a duty to use 'reasonable' efforts to become self-supporting within a particular period of time. It is also possible to provide that after a particular period of time that the burden of proof shifts to the supporting party.

References

California Family Law Practice and Procedure, 2nd ed., §§ 51.31 (*Fam. Code § 4320* spousal support factors), 51.53[2] (retention of jurisdiction over long-term marriage), 51.112 (Richmond order), 51.113 (step-down order), 52.20 (changed circumstances requirement), 52.22 (change in need and ability to pay as changed circumstance), 52.23 (disposition of community property as changed circumstance), 52.24 (failure of expectation on which order is based as changed circumstance), 52.43 (when court should terminate spousal support and jurisdiction); *California Family Law Trial Guide*, Units 10 (modification), 33 (spousal support).

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Richmond on The Future of Family Law: Premarital Agreements

2008 Emerging Issues 1640

Richmond on The Future of Family Law: Premarital Agreements

By Cynthia E. Richmond

December 19, 2007

SUMMARY: In this Emerging Issues Analysis, which appears in the August 2007 issue of Matthew Benders California Family Law Monthly, California family law specialist Diana Richmond comments on the future of premarital agreements, especially in the context of California decisional law on the unconscionability of certain premarital agreements.

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ARTICLE: Introduction. The defendant Monsanto Company is a producer of genetic research for the seed industry. Among other technologies, Monsanto developed a genetic modification for soybean seeds which made the plants resistant to Roundup, a common herbicide. Monsanto also created a genetic modification for corn seeds which renders the seeds resistant to the European Corn Borer. Monsanto patented its products and thereby obtained a lawful monopoly over the genes. Since Monsanto was not a seed producer at the time the genes were patented, it lacked the ability to commercialize them. Therefore, in 1992 and 1993, Monsanto granted broad licenses to its co-defendants, Pioneer Hi-Bred International and Syngenta Crop Protection, Inc. Pioneer and Syngenta are both major seed producers and distributors. The licenses permitted Pioneer and Syngenta to develop commercial genetically modified ("GM") seeds using the patented genes. With respect to the soybean licenses, Monsanto received full up-front payment from both Pioneer and Syngenta. Monsanto also received a full up-front payment from Pioneer for the corn seeds, but Syngenta's corn license required payment of royalties which floated with whatever premium Syngenta might charge for its GM seeds.

In the mid-1990s, Monsanto began producing its own seeds. Around the same time, Monsanto licensed its patented genes to many other independent seed companies to produce and sell the GM seeds. Both the licenses to the independent seed companies and Monsanto's own sale of the GM seeds required payment of "technology fees," which were payments for the use of the patented genes.

Overview. The plaintiffs, farmers who purchased genetically modified corn and soybean seeds, brought a putative class action against Monsanto, Pioneer, Syngenta, and another seed producer, Aventis Crop Science USA Holding under Sections four and fifteen of the Clayton Act, *15 USCS § 15* and *15 USCS § 25*, for treble the damages caused by an alleged price-fixing conspiracy in violation of Section One of the Sherman Act, *15 USCS § 1*. The plaintiffs' theory was that Monsanto wished to extract the monopoly profits it would have earned from its patented genes, despite the fact

that it had surrendered its monopoly over the genes to Pioneer and Syngenta through licensing agreements. To that end, the plaintiffs alleged that Monsanto secured the agreement of Pioneer and Syngenta to inflate the prices of their GM corn and soybean seeds to support Monsanto's technology fees. In other words, even though Pioneer and Syngenta could have charged less than Monsanto and other licensees for their GM seeds (because they did not have to pay the technology fees), they agreed not to undercut Monsanto's fees through normal price competition. The plaintiffs further alleged that Monsanto supported its technology fee by securing the agreement of Aventis to limit its production of a soybean that competed with the GM soybean sold by Monsanto and others.

After filing their complaint, the plaintiffs moved for certification of two classes. One class was composed of farmers who from 1996 to the present purchased Roundup Ready soybean seeds or the right to grow the seeds directly from the defendants. The other class consisted of farmers who from 1996 to present purchased Yieldgard corn seeds (seeds that are resistant to the European Corn Borer) or the right to grow the seeds.

Analysis of District Court Decision. After carefully reviewing the evidence, the District Court denied the motions for class certification, concluding that the plaintiffs failed to meet the predominance requirement. *Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005).* Pursuant to Rule 23(b)(3), *USCS Fed Rules Civ Proc R 23*, plaintiffs seeking class certification must demonstrate that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. But the District Court found this element lacking, noting that a plaintiff seeking treble damages under § 4 of the Clayton Act, *15 USCS § 15*, must establish an antitrust injury and the fact of damage or injury. Accordingly, the Court reasoned that in order to satisfy the predominance requirement, plaintiffs must show "that both conspiracy and impact can be proven on a systematic, class-wide basis."

The District Court found that the plaintiffs did not show impact on a class-wide basis. Rejecting the plaintiffs' "presumption" of class-wide impact, the Court cited two key reasons why a presumption of impact was improper in this case. *First*, the GM seeds are not "homogenous products." Rather, the seed market is highly individualized. Many hybrids of general types of seeds are produced. The hybrids are developed with different traits so as to be compatible with the varying quality of soil, aridity, and severity of pest or weed problems. For example, the GM corn and soybean seeds each come in many variations.

Second, and also fatal to the plaintiffs' efforts to establish predominance, the plaintiffs could not use common proof to ascertain the amount of the premiums paid, which is an essential element of a price-fixing claim. The plaintiffs attempted to measure the premium, but their approach was rejected by the District Court. To begin with, the plaintiffs' expert attempted to compare the price of GM seeds to that of their conventional counterpart. The theory was that the difference between these figures represented the premium that resulted from the price-fixing agreement. But the District Court found fundamental errors in this approach. In many instances, the GM seeds do not have a conventional counterpart. In addition, the insertion of the GM trait might affect other characteristics of the seed which might otherwise affect the price.

The Court ultimately determined that there was no reliable methodology with which to determine the "but-for the conspiracy" marketplace prices. In the seed market, the supply-and-demand conditions for sales vary so much "that the but-for' prices could be determined only through individualized inquiries for each potential class member." This inquiry would necessarily require consideration of factors unique to each potential class member, i.e., the variety of seeds purchased, geographic location, growing conditions, and the terms of purchase. The Court opined that the "dynamics of this localized industry make it highly unlikely that the existence and workings of the alleged conspiracy could be shown through common proof." In light of these findings, the Court concluded that the plaintiffs did not meet their burden of establishing an antitrust impact on a class-wide basis through common proof.

Analysis of Eighth Circuit Decision. On appeal, the Eighth Circuit affirmed the District Court's decision. The Eighth Circuit held that the evidence produced demonstrated that not every member of the proposed classes could prove with common evidence that they suffered impact from the alleged conspiracy. Monsanto and its co-defendants, tracking

the reasoning of the District Court, emphasized that the following facts defeated the plaintiffs' ability to prove predominance:

(1) Since individual seed varieties can be used only in particular geographies, the characterization of list prices as "national" is misleading and does not reveal a "nationwide" approach to pricing;

(2) List prices for each of the hundreds of individual seed varieties were set in reference to local competitive circumstances;

(3) List prices differed [from] variety-to-variety, and sometimes differed from region to region for a single variety;

(4) List-price *premiums* varied significantly as well, and frequently were substantially lower than the Monsanto technology fee;

(5) Many discounts on seeds were anything but formulaic--Syngenta alone had over 150 seed discount programs, and regional sales representatives were authorized to negotiate *ad hoc* discounts in the field, frequently involving free goods; and

(6) Heavy and variable discounting led to wide variation in the prices that farmers actually paid, and widespread examples of Pioneer and Syngenta seeds being sold at zero or near-zero premiums.

The plaintiffs, on the other hand, first challenged the District Court's suggestion that to prove the conspiracy element, the plaintiffs must prove not only the existence of an agreement, but also that the defendants actually performed the actions that they agreed upon. Correcting the District Court, the Eighth Circuit clarified that the "mere act of agreeing to raise prices" violates Section 1 of the Sherman Act, *15 USCS § 1*. The Court went on to note that evidence establishing that the defendants entered into a conspiracy that would affect all class members "would perforce be evidence common to all class members for proving the conspiracy." But proof of conspiracy is not proof of common injury. Accordingly, the Court examined whether the plaintiffs had sufficient evidence to prove a class-wide injury with proof common to the class.

In conducting its analysis, the Court relied on the following findings by the District Court:

(1) The market for seeds is highly individualized, requiring particularized evidence to determine the competitive price that could have prevailed in the locality of any individual farmer;

(2) Prices for GM seeds varied widely, and some farmers paid negligible premiums or no premiums at all for GM seeds; and

(3) The plaintiff's expert did not show that the fact of injury could be proven for the class as a whole with common evidence.

Based on these findings, the Court concluded that it was not possible for the plaintiffs to prove injury with common evidence.

Taking a closer look at the evidence, the Court explained that it was clear that the District Court was presented with undisputed evidence that the list prices among hybrids varied greatly and that, where GM hybrids existed alongside corresponding non-GM hybrids, the list prices showed negligible or no list-price premiums. The Court held that the presence of negligible and zero list premiums indicated that any price-fixing agreement was not performed across the board. As a result, the Court held that circumstantial evidence of a price-fixing agreement among the defendants was not common evidence of a class-wide injury. Rather, under the facts of this case, each plaintiff would still need to present evidence that the list prices of the seeds he purchased were inflated due to the conspiracy.

The Court also rejected the plaintiffs' argument that the District Court improperly resolved disputes between the

parties' experts that go to the merits of the case. When ruling on class certification, a court may be required to resolve disputes concerning the factual setting. Further, the District Court's findings with regard to the disputes was properly limited. But ultimately the plaintiffs' expert was unable to set forth a reliable methodology for using common proof to establish injury on a class-wide basis. Accordingly, the Court affirmed the District Court's order, denying the plaintiffs' motion for class certification.

Conclusion -- Analysis of *Monsanto* -- Common Evidence of a Class-Wide Injury Requirement. The Eighth Circuit's decision in Monsanto teaches that at the class certification stage, plaintiffs must--as a critical threshold matter--present concrete proof to establish that they will be able to offer common evidence of a class-wide injury. Notably, the District Court took a hard look at the evidence presented by the plaintiffs' expert and refused to accept the expert's "assumptions, presumptions, and conclusions." To the contrary, the Court opined: "I cannot presume' or assume'--much less conclude'--class-wide impact here because the evidence submitted during the class certification hearing demonstrates that such a presumption would be improper."

In price-fixing cases involving allegations of a single conspiracy covering multiple products, some issues going to the merits of plaintiffs' claims may appear to be susceptible to common proof. But the District Court and Eighth Circuit opinions in *Monsanto* provide a reminder that, even if plaintiffs were to demonstrate some commonality with respect to merits issues, a class should not be certified if plaintiffs cannot demonstrate the existence of common evidence showing class-wide injury. In other words, if class treatment is not shown to be appropriate for calculating injury and damages from the alleged conspiracy, the question whether the existence of the alleged conspiracy does or does not present issues of common fact is moot. As a consequence, focusing early in a case on whether there is common evidence of class-wide injury is particularly appropriate in litigation addressing an alleged common agreement to price fix with respect to a diverse array of products.

For a Thorough Discussion on monopolization offenses particularly attempts and conspiracies to monopolize, see 2 von Kalinowski, et al., Antitrust Laws and Trade Regulations Ch. 26 (Matthew Bender & Co., Inc. 2007). 2-26 Antitrust Laws and Trade Regulation, 2nd Edition

For a Thorough Discussion on restraints of trade particularly price-fixing agreements, see 2 von Kalinowski, et al., Antitrust Laws and Trade Regulations Ch. 13 (horizontal price-fixing) (Matthew Bender & Co., Inc. 2007). 1-13 Antitrust Laws and Trade Regulation, 2nd Edition 13.syn; Ch. 18 (vertical price-fixing) 1-18 Antitrust Laws and Trade Regulation, 2nd Edition 18.syn

For a Thorough Discussion on class actions and antitrust law, see 3 von Kalinowski, et al., Antitrust Counseling and Litigation Techniques Ch. 23B (Matthew Bender & Co., Inc. 2007). 3-23B Antitrust Counseling and Litigation Techniques Scope.

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Allen and Blumberg on In re Marriage of Ruelas

2008 Emerging Issues 1641

Allen and Blumberg on In re Marriage of Ruelas

By James D. Allen and Grace Blumberg

December 19, 2007

SUMMARY: In this Emerging Issues Analysis, California attorney James Allen and Professor Grace Ganz Blumberg comment on *In re Ruelas, 154 Cal. App. 4th 339, 64 Cal. Rptr. 3d 600, 2007 Cal. App. LEXIS 1361 (Cal. Ct. App. 2007),* in which the court affirmed a judgment that a condominium acquired during the marriage for the benefit of the wifes parents was not community property.

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ARTICLE: Commentary by James D. Allen. Reimbursement, whether it be pursuant to statutory authority or case law, has become a valuable tool for inserting "equitable division" into "equal division." There are numerous specific reimbursement rights found in the Family Code, but there is no statutory restriction which limits reimbursement rights which may be created by the judiciary. The Legislature created reimbursement rights to "fill in the gaps" where strict equal division would have been inequitable. Trial and appellate courts have crafted reimbursement provisions where equity seemed to require it, and many of those are now firmly embedded in the fabric of California family law, *Epstein* being one of many which quickly spring to mind.

The trial court in *Ruelas* was faced with a dilemma. The facts clearly supported a finding that a resulting trust should be imposed, and that the condominium should be titled in the names of Wife's parents. Although the property had been purchased during the marriage, the purpose had been to create a way for Wife's parents to buy a home, since they were unable to qualify for a loan themselves due to poor credit. Moreover, most, but not all, of the consideration paid for the condominium and monies used to make the monthly payments, had come from the parents. But some community funds had also been used.

Once the court found facts sufficient to impose a resulting trust on the property, it had to deal with the community contribution. Perhaps it could have found the money used to have been a gift from the community. Or perhaps the court could have fashioned a *pro tanto* order (but according to the Court of Appeal it was not required to), finding that the community had a subordinated interest in the condominium. This, in effect, was what the court did, but rather than apportioning the property, the court ordered reimbursement to Husband *from Wife* in a dollar amount equal to one-half of the community funds traceable to the acquisition of the condominium.

The oddity here is that the reimbursement wasn't ordered to come from the parents to the community even though

the parents ended up with the property. Nevertheless, the trial court "did equity" and its order was approved on appeal. Add this case to the growing list of judicially created reimbursements as remedies.

Commentary by Grace Ganz Blumberg. When property is transferred to one person and the consideration is paid by another, a trust presumptively results in favor of the person who paid the consideration. In *Ruelas*, a couple whose credit would not qualify them for mortgage financing, had the seller deed a condominium to their married daughter, with the intention to purchase the condominium for themselves. The father then opened an account at his credit union for the daughter, into which he deposited each month sufficient funds for the mortgage payments so that she could make the payments. At the daughter's divorce, her husband tried mightily to claim the home as a community asset, but the trial court awarded title to the daughter's parents. As the court of appeal opines, *Ruelas* "comes close to a paradigm of a resulting trust." When property is transferred to one person (the daughter) and the consideration is paid by another (the father), a trust presumptively results in favor of the person who paid the consideration. Few cases are as easy and uncomplicated as *Ruelas*, which is worth a read as a refresher on resulting trusts and the distinctions between resulting and constructive trusts.

References

California Family Law Practice and Procedure, 2nd ed., §§ 20.03[1] (definition of community property), 20.11[2][a] (scope of community property presumption from acquisition during marriage), 20.12[1],[2] October 2007 338 (Pub. 110) (effect of form of title), 20.40 (overview of property division principles), 20.51 (reimbursement issues, generally), 23.13 (reimbursement for payment of separate debt with community property); *California Family Law Trial Guide*, Units 40 (equal division requirement), 41 (time of acquisition), 42 (form of title presumptions), 48 (division or assignment of debt); *Complex Issues In California Family Law, Volume E, E2.03* (equitable right of reimbursement when one spouse uses community funds to pay separate property obligations).

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James D. Allen is a regular contributing commentator on new cases for California Family Law Monthly (LexisNexis Matthew Bender), and the co-editor of a compendium on marital settlement agreements. He is certified by the State Bar of California as a specialist in family law, is a Fellow of the American Academy of Matrimonial Lawyers, and has regularly been named in The Best Lawyers in America. Mr. Allen is also a member of the Board of Directors of Kids' Turn, a non-profit organization which offers help and support to children and their parents in the midst of divorce.

Grace Blumberg is a Professor of Law at UCLA Law School. She is a Reporter for the American Law Institute's Principles of the Law of Family Dissolution (2002), for which she authored the chapters on child support and nonmarital cohabitation. A gifted teacher who has made significant contributions to the School of Law's Academic Support Program, Professor Blumberg received the School of Law's Rutter Award for Excellence in Teaching in 1989 and the University's Distinguished Teaching Award in 1999.

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Allen and Kirkland on In re Beverly

2008 Emerging Issues 1642

Allen and Kirkland on In re Beverly

By James D. Allen and Kathryn Kirkland

December 19, 2007

SUMMARY: In this Emerging Issues Analysis, California attorneys James Allen and Kathryn Kirkland comment on *In re Beverly, 374 B.R. 221, 2007 Bankr. LEXIS 2574* (U.S. Bankr. App. Pan., 9th Cir. 2007), in which the court found that the pre-bankruptcy marital settlement agreement constituted an avoidable fraudulent transfer.

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ARTICLE: Commentary by James D. Allen. The trial court's decision was so harsh that it simply failed the 'sanity test.' The trial judge clearly made an erroneous ruling, but the parties made it very difficult on him by not setting forth in their marital settlement agreement a clear recitation of the then current facts upon which the spousal support order was made. Further, they failed to set out their expectations as to Sylvia's future income production and how such income production would affect either party's right to move for a modification of the support order. In this vacuum, the trial court clearly struggled to try to figure out what the parties had in mind when the initial support provisions were made and to then apply those facts and expectations to the new set of circumstances. The obvious lesson is to set out the then current facts and the then current expectations in the agreement.

The easiest part of the trial court's ruling to overturn was the use of the 'half the length of the marriage' provision in a marriage which was of 'long duration' (more than ten years in length). As this was one stated basis for the trial court's ruling, by itself this reasoning would justify reversal and remand.

The more interesting issue involves the appellate court's handling of the proceeds from the sale of the community business. Because the parties did not state whether Sylvia's receipt of the principal and interest was a factor in setting the original amount of support, and because Sylvia did not move to increase her support when the payments stopped, the appellate court essentially disregarded the monies received in determining how the trial court should have addressed the issue. The trial court criticized Sylvia for not saving some of the principal (and perhaps the interest as well). However, as pointed out in the opinion, both parties listed the installment payments as identical amounts of 'other income' on their respective Income and Expense Declarations. Arguably, upon the cessation of the installment payments either party could have moved for modification, but neither did, suggesting that both of them disregarded the proceeds from the sale of the business in reaching an agreement on spousal support. Moreover, the appellate court pointed out that there was no *Gavron* type warning, either in the marital settlement agreement or in one of the prior hearings, that would have put Sylvia on notice that she was expected to save and invest the business sales proceeds to assist in her

support.

One of the more striking aspects of the trial court's reduction of spousal support is the court's apparent failure to give weight to the standard of living of the parties during marriage. It seems without dispute that Sylvia would *never* be able to support herself at the marital standard of living. Her stated expenses were around $100,000 per year, a number not out of proportion to Til's earnings when the parties negotiated their marital settlement agreement. Yet the trial court, in dealing with a twenty year marriage which included a child who was still a minor, simply reduced spousal support to zero, even though it was apparently without disagreement that Til was earning in excess of $400,000 per year. The trial court's decision was so harsh that it simply failed the 'sanity test.'

Commentary by Grace Ganz Blumberg. *West* is worth reading for its careful critical examination of the trial court's reasons for modifying a former wife's spousal support. It also reminds us that the 'one-half the length of the marriage' factor for determining spousal support does not apply to a marriage of long duration [Ca. Fam. Code § 4320(l)].

Commentary by Patrick DeCarolis, Jr. The lesson from this case is if you win, make sure the findings supporting the ruling are in the record. Also try to guide the court to avoid findings that will get it reversed.

The court could have found that Sylvia could have used a better effort to become self supporting and used that as a factor to reduce the support. But using the factor set forth in Ca. Fam. Code § 4320(l) regarding 'half the length of the marriage' as a guidepost was erroneous, since that section does not apply to marriages with a length greater than ten years.

The trial court also seemed to find that Sylvia should have invested her assets more prudently by stating one of its bases for the modification was 'that Sylvia received a significant cash asset from the sale of the community business.' But it did not clearly make a finding about what she could have received in income if she had preserved that asset. Such a finding would have helped preserve the lower court's ruling.

On a similar point, the appellate court seems to have expanded the *Gavron* admonition [*see In re Marriage of Gavron (1988) 203 Cal. App. 3d 705*] requiring the court to warn the support recipient that she/he has duty to make reasonable efforts to assist in his or her support needs. Here the court states: 'It is also unfair to penalize Sylvia for failing to invest the principal without first warning that she would be expected to invest it ... it would be an abuse of discretion to penalize her for failing to invest that asset without providing her with fair warning of the court's expectation.'

It appears that good practice now requires practitioner's to ask for a *West* admonition in appropriate cases.

Commentary by Hon. Roderic Duncan, Judge (Ret.). The current state of the law regarding spousal support is examined here. This case, and the recent opinion in *Marriage of Shaughnessy (2006) 139 Cal. App. 4th 1225*, go a long way to summarizing the current state of the law regarding spousal support in the dissolution of marriages of more than 10 years in this state:

a reasonable change in career paths by the supported spouse is acceptable and may well be considered the requisite change of circumstances to support a modification,

and a reasonable change of career will not bring a penalty in computing the amount of support,

step-down orders are still fine so long as they are not based on unreasonable expectations of the recipient's income or needs, and

Family Code Section 4320 requires that the half-the-length-of-the-marriage rule not apply to marriages of more than 10 years.

None of these points are new or surprising. Two other points bear a little more attention.

The first may apply more to judges than lawyers: stepping down a support award to zero does not terminate support. To do that the judge must use the magic 'termination' word. Not making his intentions clear on that point earned this trial judge a bit of an admonition.

The second distinguishes the well known case *Marriage of McElwee (1988) 197 Cal. App. 3d 902* in pointing out that simply spending down money received from a division of the community property when one is not basing a request for an increase in support on the exhaustion of that community source should not be equated with what Ms. McElwee did. Disposing of income-earning property or investing unwisely may still bring a penalty if one is asking for an increase in support, but Ms. West was not doing that here.

Commentary by Lawrence E. Leone. The complicated and lengthy facts of this case could have been used for the spousal support question and model answer on the family law specialization exam. The issues presented are many and important. Briefly, Ms. West (Sylvia) and Mr. West (Til) were married for 20 years and appear to have been litigating since that time. Approximately eight years after judgment Til filed his latest attempt to modify (effectively terminate) support, notwithstanding the fact that his income had dramatically increased from $237,000 in 1997 to $404,000 in 2004, while Sylvia had actual earnings of less than $600 per month. The lower court chided Sylvia for not saving some of the money from the sale of the family business and issued an ambiguous step down order that would have effectively terminated support after one-half the length of the marriage. Consistent with prior decisions, with some exceptions, appellate courts seldom affirm decisions that effectively terminate support after a lengthy marriage.

Change of Circumstances. This is the threshold issue in any modification proceeding. The court correctly points out that if there is no substantial evidence of a material change of circumstances, absent a waiver of this requirement, an order modifying a support order will be overturned as an abuse of discretion. A 'change of circumstances' is defined as a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. It includes all factors affecting need and ability to pay as set forth in *Family Code Section 4320*. As in any contract, the parties may, expressly within a stipulation or judgment, define the methodology whereby support may be modified. As a practice tip, it is always a good idea to set forth the clear expectations of the parties and clarify how and to what degree an order may be modified. The lesson is that careful drafting, while the parties are in a cooperative mood, may often prevent future litigation.

Sylvia claimed that there was no change in circumstances to justify a modification. The reviewing court disagreed, finding that (1) she had changed professions from that of a teacher to that of a real estate salesperson, (2) the ambiguous language of the prior order allowed modifications after September 2002, and (3) she had actual earnings that could be projected as meeting her needs. The settlement agreement required Sylvia to make good faith efforts to become self-supporting.

Step-Down Factors. The lower court looked (1) to her favorable earnings outlook, (2) the amount of assets she had previously received from the sale of the business (approximately $500,000 over eight years -- $62,000 a year) and (3) one-half the length of the marriage. Curiously, the reviewing court took no position on whether the lower court had the discretion to reduce support for other, unarticulated factors.

Projected Earnings. The message here may be that while a step down order is permissible after a lengthy marriage, it must be tightly constrained by the evidence. Again, a step down support order must be based on 'reasonable inferences to be drawn from the evidence, not mere hopes or speculative expectations.' Here, Sylvia was projected to earn $33,550 after three years and yet retained the ability to return to court to seek an upward modification. The lower court erred in making a retroactive order when Sylvia had no earnings. Clearly the evidence of her favorable earning prospects did not support effectively terminating her support where Til had high earnings and she did not have a realistic ability to support herself consistent with the marital standard of living.

Imputed Income From Assets-Necessity for 'West Warning'. The reviewing court distinguishes *In re Marriage of McElwee (1988) 197 Cal. App. 3d 902* and *In re Marriage of Terry (2000) 80 Cal. App. 4th 921*, before observing that, with some exceptions, neither party should be imputed income from a division of assets. The court then goes on to opine that it would be unfair to impute such income without a warning as was given in the *Gavron* case. It therefore appears to be prudent to include a '*West* warning' in agreements and judgments where a supported party is receiving income producing assets and there is an expectation that he or she will manage the property wisely.

Length of Marriage. The court of appeal held that *Family Code Section 4320(l)* is 'inapplicable' to a lengthy marriage. While the opinion is correct that the goal of being self supporting within one-half the length of the marriage may be limited to 'short' marriages, the trial court certainly has wide discretion, based on other factors, provided they are articulated within the ruling. The reviewing court cited a portion of Ca. Fam. Code § 4320(l), as follows: '(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage.' But the court of appeal does not expressly comment on the next sentence in 4320(l), to wit: 'However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.' Perhaps this omission is related to the reviewing court expressing no opinion on the 'unarticulated factors' that might have been used by the trial court. Better practice is to set forth, within the judgment or MSA, the expectations of the parties and that the supported spouse has a duty to use 'reasonable' efforts to become self-supporting within a particular period of time. It is also possible to provide that after a particular period of time that the burden of proof shifts to the supporting party.

References

California Family Law Practice and Procedure, 2nd ed., §§ 51.31 (*Fam. Code § 4320* spousal support factors), 51.53[2] (retention of jurisdiction over long-term marriage), 51.112 (Richmond order), 51.113 (step-down order), 52.20 (changed circumstances requirement), 52.22 (change in need and ability to pay as changed circumstance), 52.23 (disposition of community property as changed circumstance), 52.24 (failure of expectation on which order is based as changed circumstance), 52.43 (when court should terminate spousal support and jurisdiction); *California Family Law Trial Guide*, Units 10 (modification), 33 (spousal support).

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Blumberg and Duncan on Brothers v. Kern

2008 Emerging Issues 1643

Blumberg and Duncan on Brothers v. Kern

By Grace Blumberg and Roderic Duncan

December 19, 2007

SUMMARY: In this Emerging Issues Analysis, Professor Grace Ganz Blumberg and Hon. Roderic Duncan (Ret.) comment on *Brothers v. Kern, 154 Cal. App. 4th 126, 64 Cal. Rptr. 3d 239, 2007 Cal. App. LEXIS 1348 (Cal. Ct. App. 2007),* in which the court found that the constitution does not insulate a criminal defendnat from child support claims that reduce his ability to afford an attorney to defend against a criminal prosecution.

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ARTICLE: Commentary by Grace Ganz Blumberg: *Brothers* takes the reader on a Cook's Tour of child support provisions. In *Brothers*, the court of appeal sustained a trial court's order requiring an incarcerated convicted murderer awaiting sentence to use a portion of a $150,000 retainer he had paid to his defense attorney, which funds the attorney had placed in a trust account, to post a $17,000 security deposit for future child support payments, to be held by the Department of Child Support Services and disbursed monthly to cover all payments that would come due during the remaining two years of the child's minority. *Brothers* takes the reader on a Cook's Tour of child support provisions--including Section 4058(b) imputation of interest on income from the parent's liquidation of all his assets to provide his attorney with a retainer, Section 4057(b)(5) upward departure from the guideline amount, and Section 4012 good cause requiring a security deposit to insure child support payments--and concludes by deciding that requiring the child support obligor to pay the security deposit, thus diminishing the amount of money available to pay an attorney of his choice, did not violate his Sixth Amendment right to counsel. Although some of the issues presented are unlikely to arise frequently, *Brothers* is instructive and covers a lot of ground.

Commentary by Hon. Roderic Duncan, Judge (Ret.): Opinions from the Court of Appeal continue to flow forth on the issue of what constitutes income for the determination of child support. There are several helpful additions in this opinion, but the unique factual situation of the case limits the likelihood of attorneys citing it frequently. After all, how often is one going to run into a case where a death row inmate sells his residence to finance his criminal appeal and then argues that the proceeds are not available for the payment of child support because he would prefer to spend them on fees for his attorney to appeal his conviction? Much of the decision is devoted to knocking down child support arguments urged by the attorney who represents him in both his murder and his child support litigation.

The recent decision in *In re Marriage of Williams (2007) 150 Cal. App. 4th 1221*, might have been helpful to plaintiff husband in an attempt to prevent the trial court from considering the value of his residence in setting support if he hadn't sold the residence when he was taken into custody. Actually, it would have been a stretch to allow reliance on *Williams* when he was residing in jail instead of his house. His attorney's reliance on *In re Marriage of de Guigne (2002) 97 Cal. App. 4th 1353*, for the proposition that assets can only be used as a basis for a child support award under special circumstances was disposed of quickly by the court as being contrary to the holding of the case. Likewise, the court disregarded the attorney's strange reliance on *In re Marriage of Pearlstein (2006) 137 Cal. App. 4th 1361*, for the argument that unrealized gains are not normally considered in setting child support. Obviously, plaintiff had realized gain when he sold the house "shortly after his arrest."

The major contribution of this case to the law of child support is in its interpretation of the statute regarding departure from the basic guideline under *Family Code Section 4057(b)*. Although, as noted above, Mr. Brothers' unusual circumstances of being a convicted murderer results in some of the factors discussed here being irrelevant, a good outline of such an argument is presented.

A discussion of the provisions of *Family Code Section 4012* regarding requiring a security deposit for future support payments is a good reminder to attorneys about the usefulness of this effective tool.

References. *California Family Law Practice and Procedure, 2nd ed., §§ 41.07*[2][a],[c],[e] (net disposable income under child support formula), 41.08[6] (special circumstances as factor rebutting presumption of correctness of child support formula), 41.45[1], 140.50[1], 140.51[1] (security for payment of child support); *California Family Law Trial Guide*, Unit 32 (child support).

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Grace Blumberg is a Professor of Law at UCLA Law School. She is a Reporter for the American Law Institute's Principles of the Law of Family Dissolution (2002), for which she authored the chapters on child support and nonmarital cohabitation. A gifted teacher who has made significant contributions to the School of Law's Academic Support Program, Professor Blumberg received the School of Law's Rutter Award for Excellence in Teaching in 1989 and the University's Distinguished Teaching Award in 1999.

Hon. Roderic Duncan, Judge (Ret.), is a Contributing Consultant and Author to Matthew Bender's California Family Law Practice and Procedure and a Commentator to its California Family Law Monthly. Mr. Duncan was appointed to the California Municipal Court in 1975, and he was elected to the California Superior Court bench in 1987. Over the years, he has been a lecturer and faculty member at two dozen educational programs for judges. In 1990, Judge Duncan was chosen the Judicial Officer of the Year by the California State Bar, Family Law Section. Since retiring from the bench in 1995, he has been doing private judging and mediation.

Denner, DiFranza, Gray, Kalemkiarian, Phillips, Wolf on In re Marriage of Smith

2008 Emerging Issues 1644

Denner, DiFranza, Gray, Kalemkiarian, Phillips, and Wolf on In re Marriage of Smith

By Richard E. Denner, Barbara A. DiFranza, Dawn Gray, Sharon Kalemkiarian and Stacy D. Phillips & Bernard N. Wolf

December 19, 2007

SUMMARY: In this case, the Sixth District Court of Appeal held that a trial court properly ordered a former husband (1) to pay his former wife a percentage of any veterans' disability payments he might receive during retirement, and (2) to participate in the military's Survivor Benefit Plan, naming his former wife as sole beneficiary.

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ARTICLE: Commentary by Hon. Richard E. Denner, Judge (Ret.). The Devil, they say, is always in the details. It certainly was the case of *In re Marriage of Smith, 148 Cal. App. 4th 1115 (Cal. Ct. App. 2007).* Col. Smith was a member of the military on active duty. As such he had earned a military pension. Because some was earned prior to marriage and some after separation there were both separate and community interests in his pension. A stipulated judgment provided in effect that the pension should be divided by the time rule. No mention was made of the issues that might occur if Col. Smith, if qualified to do so, elected a disability pension or if he should predecease his ex-spouse.

California law has for some time provided for a community interest in a disability pension (which is normally separate property) if in obtaining the disability pension a community interest was forfeited. However, applying the rule to military pensions has met resistance in the conflict of federal law with state law. Federal law now allows a division of 'disposable retired pay' which would be the allowance after reduction by any sums forfeited by electing a disability pension. The ruling in this case is that because the parties referred to the community interest in the pension and not just a division of the 'disposable retired pay' that it was proper to use the forfeiture rule. Since the appellate court treats the issue as one of stipulated language, it may well be that a different result would occur with slightly different language.

The order also required Col. Smith to elect the survivors benefit plan and name his ex-spouse as beneficiary, and to pay some of the costs of the plan. This was sustained on the grounds that the ex-spouse will not be able to will her share upon her death, and Col. Smith will receive the entire community share if the ex-spouse predeceases him. A word of caution: California community property law has not fared well in the federal courts. This decision, while consistent with cases in this state, might be more than the federal courts will allow. If you represent the military spouse and plan to appeal, you probably should be willing to seek federal review.

Commentary by Barbara A. DiFranza. We are thankful for reinforcement of *Krempin* in holding that a non-participant spouse (NP) will be compensated when the Participant spouse (P) waives service for disability retirement. But we have something new and valuable here, thanks to the vindication of the testimony of eminent Colorado-based pension expert Col. Edwin Schilling (USAF Ret.): the court is encouraged to be flexible in allocating the various portions of the benefits payable in such a way as to result in an equal division of the community portion of the retirement plan. Here two components of the pension asset were valued and offset against one another: (a) the portion of member's retirement benefit ordered relinquished to pay for a portion of the survivor benefit premium, and (b) the value of the contingent and involuntary reversion of benefits that would occur if the nonmember spouse died before the member.

Despite abolition of the 'terminable interest rule', when NP dies after retirement, military and other plans are able to require that the NP's share of the retirement benefits revert to P. We don't encounter this problem in California state and local plans, since case law says they are governed by *Family Code § 2610*. See e.g., *In re Marriage of Carnall, 216 Cal. App. 3d 1010 (Cal. Ct. App. 1989).* Nor do we have the problem in federal civil service cases since the Civil Service Retirement Equity Act allows payment of a nonemployee spouse's benefit to the estate of the nonemployee spouse. Also, in ERISA plans, where a QDRO is made effective prior to P's retirement, we don't have a problem in that each party's share of the benefit may be separated such that each party's benefit continues for that party's lifetime. However, in many other situations the family lawyer must obtain an actuary's assistance-in order to achieve an equal community division in the context of an in-kind division.

What cases? For one, in military retirements, as is illustrated by *Smith*. More frequently, however, the need for actuarial appraisal arises in the context of an ERISA plan where P retires before the parties separate. In such plans, unless NP waives the benefits, ERISA requires that P's benefit be reduced to allow the payment of a monthly benefit of 50% of the beginning benefit to NP (called the 'qualified joint and survivor annuity'). For example, a $1,000 single life annuity may be reduced to $900 during the P's lifetime with $450 payable to the NP for NP's life after P's death. Only in rare cases will a plan allow P to undo this arrangement. As you will see, one will need an actuarial appraisal before one can proceed to fairly divide such an asset.

Draw a chart with three vertical columns, headings in the first row: 'Situation', 'P Gets', 'NP Gets'. Then add three more rows beneath and show the amounts received by P and NP for these three respective Situations: 'Both Alive', 'P Only Alive', and 'NP Only Alive'. Insert the values from the benefit statement. Take a look at your results and think about whether it looks equal. Without an actuary or other qualified pension evaluator, you will unlikely be able to make that determination. At best you will be struck, as in *Smith*, with the inequality created by the fact that there was nothing in the NP column under the 'NP Only Alive' column.

The Three Situations represent three streams of benefits. Because of disparate mortality expectations for males and females which may be exacerbated by differing ages for P and NP, you need a forensic actuary to analyze the actuarial present value of these streams. Taking the resulting values and applying the appropriate apportionment method (usually the time rule) to determine the community interest, you can then apportion the benefits to the spouses in such a way as to limit NP's total receipt to value which is equivalent to one half of the community property portion of the three retirement streams.

Where the marriage is short in relation to the service that produced the benefit or where NP is significantly younger or healthier than P, the NP's 'NP Alive Only' benefit may turn out to be multiple times more valuable than NP's half community interest in the entire retirement. It is dangerous to leave such a retirement plan as the last asset standing, since there will be no other community asset remaining which can be used as an offset. Such a scenario furnishes still another reason to get the QDRO or other pension-dividing order done at the time of the dissolution judgment.

Even in the case of a plan's allowing a deceased NP to leave NP's benefits to that party's estate, an actuarial valuation can produce a more reasonable allocation of the benefits-one in which all of the benefits go to the parties during their lifetimes and none of the benefits go to heirs. For example, in the case of a CalPERS retirement, where the

NP's share of benefits continues beyond NP's lifetime under an optional settlement arrangement, the NP's post-life share can purposely be directed to P; and, in exchange, NP's receipt of monthly benefits during P's lifetime can be enhanced. Retirement benefits are intended for parties in their retirement years; it rarely makes sense to reduce these benefits in order to profit the younger generation.

Finally, *Smith* is another of a line of cases that relies on a court's reservation of jurisdiction to allow the court to augment the language of an original judgment to account for new developments with respect to a pension plan or the participant's exercise of his rights in the plan. Cf. *In re Marriage of Gowan, 54 Cal. App. 4th 80 (Cal. Ct. App. 1997),* where even a very general reservation allowed the court to augment wife's 50% share by a factor of six, due to significant post-judgment salary factor increases when Husband resumed employment with the plan sponsor many years after the dissolution. Although other courts have held that the court inherently retains jurisdiction to enforce its orders [*e.g., In re Marriage of Justice, 157 Cal. App. 3d 82 (Cal. Ct. App. 1984)],* the panoply of cases that have relied on the express reservation statement to repair or augment pension division terms makes the inclusion of an express statement mandatory. At the very least, use the *Krempin* clause quoted in *Smith*: 'The Court ... reserve[s] jurisdiction to make such orders relating to these retirement benefits as are necessary to carry out this agreement.'

Commentary by Dawn Gray. This case is a perfect example of the need for detail in judgments; what is left out the court will divide, with unexpected results for clients. Procedurally, it involved simply the trial court accepting a proposed DRO drafted by a retirement benefit specialist and supported by his testimony regarding the requirements of military retirement benefits. The *problem* in the case was the paucity of detail in the provision in the parties' stipulated judgment dividing the community interest in Husband's retirement benefits. The five-word provision stated only that his retirement would be divided; in carrying out that requirement, the expert included an order requiring Husband to pay for survivor benefits for Wife and a provision requiring him to indemnify Wife for any loss in her share of longevity benefits should he elect disability pay in lieu of longevity pay. Unfortunately for Col. Smith, extrinsic evidence on what the parties may have intended was inadmissible.

Courts have been fashioning ways to protect former spouses of retirees for decades, and the employee spouse rarely wins any argument involving his keeping more of the benefit earned during marriage than the other spouse. Their mandate is to make whatever orders are necessary to fully protect the nonemployee or nonmember spouse's interest in the benefits. Here, that took the form of using the survivor benefit plan to protect Wife's interest in the event that Husband predeceases her, but also requiring her to share the cost of the basic tier benefits and pay more should she elect a higher tier of benefits. Husband's argument was that allowing her this right meant that he could not name his current spouse as the survivor beneficiary, but the court said that was a problem with the benefit plan and not with its order, which it made purely to protect Wife's rights in the longevity benefit earned during their marriage. These arguments pop up every few years as yet another retiree tries creative arguments in an attempt to avoid sharing his or her benefits with the other spouse. Practitioners can avoid involving their clients in these types of dispute simply by consulting with the pension expert before drafting the judgment, or at least ensuring that all aspects of the plan in question are provided for in the final agreement.

Commentary by Sharon L. Kalemkiarian. I suspect that I am like many of my colleagues. When a client comes in with a military retirement at issue, I pull out my folder on military retirement and read, once again, a description of the requirements of the Uniformed Services Former Spouses' Protection Act (USFSPA). Then I conclude that I still can't understand it, and I call an expert on military pensions.

Short of calling an expert to write this commentary, I'll refer those of you who are interested in the twists and turns of military retirement case law to the detailed analysis of this case. I will not focus on those details- but instead on some of the very useful advice that the appellate court gives in this case to those of us looking for a way to protect the 'out spouse' from being denied community retirement benefits.

The essential facts are that after a seventeen year marriage, two relatively young people (in good health and in their 40's) divorce. Their marital settlement agreement provides that they will divide the community portion of Husband's

military retirement. He was still on active duty when they separated. The parties agreed that they would use the services of a designated expert to draft the order that would divide the military retirement, and provide that to the proper authorities and the court.

The expert, retained by Wife, advised Wife post-judgment that Husband might elect disability benefits (which he is entitled to do), and that husband would be required to waive a corresponding amount of retirement pay. Wife wanted to be sure that if he did so, she would still be able to receive her benefit-since she had no assigned interest in the disability pay (and under Federal law it is considered separate property). The expert drafted an order that essentially allowed her to seek an allotment from another source, to pay the amount owed to her from the retirement pay (which Husband might not be receiving).

The trial Court then ordered Husband to participate in the Survivor Benefit Plan, so that Wife could receive a Survivor's benefit to bring her payment up to the amount she would have received, if Husband had been receiving the retirement pay. Husband at this point was re-married, and certainly did not want to name former Wife as the recipient of this benefit. It also cost him money, as the benefit he would receive is lower if he elects to name a survivor. He contested the order.

This is an interesting example of the broad berth that the appellate court will give to a trial court to fashion a remedy. There was no agreement that the former Wife be named the survivor-but the trial Court ordered this so that her interest would be protected. The appellate court refuses to re-fashion the remedy. Likewise, the Court is concerned with the clear intent of the stipulation-that she would receive the community portion of the military retirement. Her interest in her right under the Family Code could be protected by the Court-and it sought a way to do so, even if that interfered with the Husband's freedom to designate his new Wife as his survivor. Even when Husband suggested other ways to 'indemnify' the former Wife for her interest, the appellate court would not budge.

This case is a good reminder that practitioners should be creative-and bold-in their attempts to secure their client's interest, particularly if that interest needs to be protected from the uncertain actions of a spouse in the future.

Commentary by Stacy D. Phillips & Ram F. Cogan. *In re Marriage of Smith* constitutes a prime example of a Court of Appeal 'bending over backwards' to assure an 'equitable' distribution of 'army retirement' to a non-military spouse. To the extent the facts and the law provided any crack in the otherwise 'regrettable' conclusion that federal law denies a nonmilitary spouse retirement benefits upon dissolution, the Court of Appeal drove a Mack truck through it. As with most appellate decisions, the outcome is largely determined by the manner in which the issue is framed by the Court of Appeal. In this case the Court of Appeal cites to *In re Marriage of Krempin, 70 Cal. App. 4th 1008 (Cal. Ct. App. 1999),* for the proposition that the issue 'is whether the Stipulated Judgment contemplated the division of the retirement asset as it existed at the time of Judgment or whether the parties had agreed that Keith could waive all or part of the retirement benefit and thereby unilaterally reduce the value of the asset to be divided.'

Having framed the issue in such a manner, the 'writing was on the wall' as far as the Court of Appeal was concerned. The Court of Appeal goes so far as to conclude that there is nothing in the language of the Judgment at issue that would make it even reasonably susceptible of the interpretation put forth by the military spouse-*i.e.,* that the parties had agreed that Keith could reduce or eliminate the retirement asset by his voluntary waiver sometime in the future.

For its opinion, the Court of Appeal relied upon two general principles: (1) 'fairness'; and (2) that an unambiguous agreement between the parties should be given full force and effect. Simply put, the Court of Appeal concluded that the parties had negotiated an agreement which by its very terms provided for an equal division of Keith's retirement asset. According to the Court of Appeal, to allow Keith to deprive K.C. of a significant portion of that 'retirement asset' by making a future election to waive the asset in return for disability benefits would be unfair. The Court of Appeal's reasoning is further demonstrated by the manner in which it distinguishes the holding in *Mansell v. Mansell, 490 U.S. 581 (1989).* The Court of Appeal notes that *Mansell* held that federal law does not grant State Courts the power to divide military retirement pay that *has been waived* in order to receive veterans' disability benefits. However, in the case

at bar, Keith was not receiving any disability benefits when the Judgment was entered. Consequently, the Trial Court did not divide retirement pay that *had been waived*. As noted above, the post Judgment Order merely provided that if Keith elects (*i.e.*, in the future) to receive disability in lieu of retirement, he will indemnify K.C. for his unilateral reduction of the retirement asset. In this way, K.C. is assured to receive the benefit of the bargain she made at dissolution.

Clearly, had Keith been receiving disability payments when the Judgment was entered, the conclusion may have been different. Under those circumstances, since the Judgment is silent as to disability pay and Keith would have been receiving both retirement asset and disability, the Court of Appeal would, presumably, conclude that under *Mansell* the State Court did not have the power to divide military retirement pay that had been waived to receive disability benefits and, consequently, that K.C. was out of luck. K.C.'s position would be much less sympathetic because the Judgment would have been entered at the time that the waiver had already occurred. Perhaps the lesson to be learned here is, if one is representing the military spouse, to the extent possible, effectuate a waiver prior to entry of Judgment.

In order to assure that K.C. continues to receive retirement benefits, thereby making the division of the military retirement more equitable, the Court of Appeal also found the Trial Court's Order that Keith participate in the SBP and that he name K.C. as the beneficiary, to achieve the correct outcome. In this case, the Trial Court fashioned its Order with regard to the SBP in order to assure protection for K.C. in her dollar interest in Keith's U.S. Army retirement. The potential significance here is the finding that 'substantial justice' equates with an equal division of the retirement benefits (whether Keith later elects to waive them or not for disability benefits) *and* the continued payment of those benefits if the military spouse predeceases the nonmilitary spouse. Of course, it is just as significant to note that the converse would hold true as well.

Keith argued that the parties did not agree to divide the SBP and, therefore, that the Trial Court had no authority to make the Order. The Court of Appeal found Keith's argument unpersuasive. Simply put, the Trial Court's methodology was an equitable means to ensure that K.C. receive her community share of Keith's retirement pay and the Trial Court unquestionably had jurisdiction to do so. Interestingly, the Court of Appeal also noted that Keith's argument assumes that the SBP *benefits* are a community asset subject to division. The Court of Appeal, however, noted that the asset is not the survivor's benefits as Keith suggests but, rather, the right to participate in the SBP.

This is a distinction which should be kept in mind whenever the issue of army retirement needs to be addressed. That right may be characterized as marital property with a value that can be actuarially calculated. However, neither the parties nor the Trial Court treated that right in this way. Instead, the Court of Appeal agreed with the Trial Court that using the SBP to ensure that the former spouse continues to receive retirement benefits makes division of the military retirement more *equitable*. The Court of Appeal found this to be particularly appropriate because if Keith were to die before retirement, K.C. would not receive a penny of retirement pay and if he died after retirement, K.C.'s checks would stop upon his death. Consequently, her payments were totally dependent upon Keith retiring and living. By naming K.C. as the SBP beneficiary, the Trial Court ensured that K.C. would not be deprived of her interest in the retirement if Keith were to predecease her.

Likewise, the Court of Appeal concluded that the Trial Court's Order requiring Keith to pay a portion of the premium for the SBP benefit was not an abuse of discretion. The Court of Appeal reasoned that the Trial Court strove to fairly divide the benefits and the risks between the parties, which is consistent with the holding in *In re Marriage of Carnall, 216 Cal. App. 3d 1010 (Cal. Ct. App. 1989)*. Keith argued that there is no justification for requiring him to pay any portion of the premium with his separate property. The Court of Appeal disagreed, reasoning that an equal division of the retirement demands some method of giving K.C. a right equal to Keith's-*i.e.*, Keith has the right to receive retirement payments for his lifetime while K.C. does not. Significantly, the Court noted that under federal law (*10 U.S.C. § 1450(i)*) K.C. is prohibited from leaving her interest to anyone upon her death. Consequently, if K.C. predeceases Keith, Keith would receive not only his share of the retirement but K.C.'s share as well. It is likely this inequity which, in no small part, persuaded both the Trial Court and the Court of Appeal that Keith's payment of the portion of the premium for the first level of benefits was an equitable result. Again, this notion of equity should be kept

in mind by any attorney representing a nonmilitary spouse under similar circumstances.

Lastly, the Court of Appeal concluded that it is simply too bad that Keith's new spouse would be left with nothing to compensate for the loss of his retirement pay upon his death. Keith noted that federal law prohibits dividing the survivor's benefit between a surviving spouse and a former spouse. Consequently, Keith further argued that the Court's Order deprived Keith of a separate property interest in the plan and prohibited his new wife from receiving any of the benefits upon his death. Again, the Court of Appeal noted that Keith misconstrued the benefit in question. The SBP benefits were not a community asset and were not divided at dissolution. Consequently, K.C.'s utilization of part of the maximum SBP benefit did not affect Keith's separate property.

In the alternative, Keith argued that the Trial Court should have allowed him to name his current wife as the SBP beneficiary and permit K.C. to impose a resulting or constructive trust upon the proceeds in an amount equal to her pro-rata share. The Court of Appeal summarily rejected the argument indicating that it was not in a position to determine which remedy is more appropriate to the facts of the case. This seems a bit of a 'cop out'. There is no indication whether Keith argued at the Trial Court level that such a remedy should be imposed and whether the Trial Court provided its reasoning for rejecting Keith's request. In short, there is no analysis as to whether the Trial Court abused its discretion in this regard. If the Court of Appeal was sincere in its conclusion that it is 'regrettable' that there is no provision to allocate the survivor's benefit, one would think that it would have addressed this issue more thoroughly. If equity was truly uppermost in the Court of Appeal's mind 'as it seems to have been' equitable consideration should run not only as to the former, but as to the new spouse as well. The Court of Appeal apparently had no desire 'to go there.'

Commentary by Bernard N. Wolf. *Smith* concerns the impact of the U.S. Supreme Court decision in *Mansell* on a stipulated division of military disability retirement pay.

Mansell is one of a long series of frustrating Supreme Court decisions which have invoked the Supremacy Clause to limit the power of family law courts to divide certain federal benefits upon dissolution of marriage. Following many of these regrettable rulings Congress quickly acted to undo them, or at least to mitigate against their harshest results. Not so with *Mansell*.

Fortunately, Mrs. Smith was able to escape the clutches of *Mansell* because the parties had previously agreed to split the community interest in her husband Keith's longevity retirement. *Mansell* merely held that if a spouse has waived longevity retirement pay in favor of disability pay, the disability benefits may not be treated as community property. At the time of the marital settlement, however, Keith had not made such a waiver of his longevity retirement. Therefore, the disability benefits which Keith subsequently elected were still subject to the jurisdiction of the Court.

Smith also touches on *Family Code § 2610(a)*, legislation which eliminated the 'terminable interest rule'. That widely-criticized rule had precluded the division of death benefits as community property. Section 2610(a) now authorizes a trial court to ensure that each party receives a full community share of a pension, '... including all survivor and death benefits... .' Nevertheless, the statute fails to tell us exactly how to divide death benefits. The problem is particularly acute because the real worth of survivor and death benefits often depends heavily on imprecise actuarial assumptions regarding the combined mortality of both the pension beneficiary and the formal spouse. Thus, the present value of these items is often difficult, if not impossible to calculate accurately.

References

1-21 California Family Law Prac & Proc 2d ed. §§ 21.32[1][a] (former spouses as beneficiaries under Survivor Benefit Plan), § 21.42[1] (court's duty to avoid termination of community interest in retirement benefits), § 21.60 (historical background on *McCarty* and enactment of FUSFSPA), § 21.61[1] (state courts' authority to divide military retirement benefits), § 21.62 [1][b] (remedies to compensate nonmilitary spouse for future award of disability pay); *California Family Law Trial Guide*, Unit 63 (pension, retirement, and disability).

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Richard E. Denner is a recently retired Judge of the Superior Court who was assigned to the Family Law Departments in the Central District of Los Angeles. He presided in Family Law Departments as a Judge and Superior Court Commissioner for over 20 years before retiring in 2006. He is the author of numerous articles and lectures extensively on family law matters, including retirement benefits, interstate enforcement of support, and family law updates. He is a frequent contributor to the Beverly Hills and Los Angeles Bar, Family Law Sections Family Law Symposiums. He is a former Adjunct Professor of Law at Whittier College School of Law in Los Angeles and while teaching there was a contributing author to the Whittier College Law Review. At Whittier he taught classes in trial practice, family law and community property. He is a Member of the Board of Editorial Consultants of Matthew Bender's California Family Law Monthly and has written such lead articles as 'Celebrity Goodwill: Sic Transit Gloria Mundi,' 'Nonmarital Cohabitation After Marvin: In Search of a Standard' and 'Projected Average Salary in Pension Valuation: To Use or Not to Use.' Judge Denner received his Bachelor of Arts degree with a major in Business Administration in 1962 from Occidental College in Los Angeles, California. He received his Juris Doctor degree from the University of California, Berkeley, School of Law in 1965.

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Barbara A. DiFranza is a Certified Family Law Specialist by the Board of Legal Specialization State Bar of California and a member of the Nevada State Bar. Ms. DiFranza has provided court testimony as an expert witness and has been appointed as a judge pro tempore in Sacramento, Alameda, and Santa Clara counties. DiFranza has conducted seminars on the disposition of retirement benefits upon dissolution of marriage and Qualified Domestic Relations Orders, both on her own and for the Association of Certified Family Law Specialists. She has been a featured speaker at the State Bar convention in Monterey, the Trial Institute of the Texas Academy of Family Law Specialists, the Association of Certified Family Law Specialists, and the Enrolled Actuaries meeting in Washington, D.C.

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Ms. Gray is a past president of the Association of Certified Family Law Specialists. She is also a regular presenter of family law courses at ACFLS seminars. In that capacity as well as in her consulting work, she has contributed to the result in many published family law appellate cases, both on behalf of amici and of parties. Having run her California family law practice from the east coast since 1998, she has also been a pioneer in telecommuting and the use of law office technology.

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Bernard N. Wolf, Esq., a Certified Family Law Specialist, maintains a law practice in San Francisco (Law Offices of Bernard N. Wolf). His primary areas of concentration are family law and civil appeals. He holds a B.A. from Stanford University, an M.A. from the Fletcher School of Law and Diplomacy, a J.D. from Hastings College of the Law, and an LL.M. (Tax) from Golden Gate University. Among the published decisions in which he has appeared as counsel before the California Supreme Court are: In re Marriage of Epstein; Kumar v. Superior Court; In re Marriage of Assemi; and In re Marriage of Lehman. Among the published decisions in which he has appeared as counsel before the California Court of Appeal are: In re Marriage of Kieturakis, In re Marriage of Nelson, In re Marriage of Green; In re Marriage of Cream; In re Marriage of Bergman; In re Marriage of Macfarlane & Lang; In re Marriage of Biddle; In re Marriage of Horowitz; and In re Marriage of Anderson. Mr. Wolf is a regular consultant to Matthew Bender's California Family Law Monthly.

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Stone v. Davis and transferred jurisdiction over child support order

2008 Emerging Issues 1601

Stone v. Davis and transferred jurisdiction over child support order

By Dawn Gray, Kathryn Kirkland, Stacy D. Phillips and Robyn C. Santucci and Bernard N. Wolf

December 18, 2007

SUMMARY: In this Emerging Issues Analysis, which appears in the May 2007 issue of Matthew Benders California Family Law Monthly, California attorneys Dawn Gray, Kathryn Kirkland, Stacy D. Phillips, Robyn Santucci and Bernard N. Wolf each provide varying insights and opinions regarding the California Court of Appeals Case Stone v. Davis and its implications regarding transferred jurisdiction over child support orders.

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ARTICLE: This case simply enforces the bright-line rule stated in the currently-effective version of California Family Code § 4909(a)(2). California *Family Code § 4909(a)(2)* requires written consent by all individual parties before another state may properly assume continuing, exclusive jurisdiction over a child support order regarding which California would have such jurisdiction absent the written consents. That express requirement prevailed over Stone's request of the Alabama court that it modify the California support order when it entertained Davis' request to modify custody. If the Alabama court had done anything other than simply continue the existing California support order, its modification may have been in excess of its jurisdiction because it would have improperly assumed jurisdiction to modify child support under the UIFSA. The lesson: Follow the UIFSA to the letter, and advise clients with sister state support orders in similar circumstances that attempted modifications in California are probably unenforceable without all parties' written consent in the originating jurisdiction.

The version of *Family Code § 4909* which would be operative upon the happening of certain conditions does not contain the written consent requirement. Instead, this version of § 4909(a)(2) provides that California has continuing, exclusive jurisdiction if the order was made in conformity with the Act, it is the controlling order and, "(e)ven if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order." That version of the subsection will only take effect under certain conditions, which have not yet been met. If that version takes effect, however, *Stone* will be effectively superseded by the change in the statute.

Kathryn Kirkland: This is one of those cases where one is tempted to say, "When all else fails, read the directions." Here, Mom and the child moved to Alabama. Dad stayed in Sacramento, California, the state and county

which originally issued the child support order. A request for modification of visitation was filed in Alabama by Dad. Mom counterfiled a request for increase in child support. The Alabama court dealt with the visitation but ordered that the amount of child support ordered by the California court remain the same. After Dad again requested modification of visitation, Mom filed a request for modification of child support in the Sacramento court. The Sacramento court found that the actions of the parties of filing in Alabama constitute "consent" to transfer of the matter to Alabama. Mom appealed.

The appellate court stated unequivocally: "The statutory language is unambiguous and clear. A California court retains continuing, exclusive jurisdiction to modify a child support order it lawfully issued so long as one of the parties to the order continues to reside in the state, unless all of the parties to the order file with the California court a writing consenting to jurisdiction in another state, or another state court modified the order as allowed by UIFSA."

As no writing giving written consent to a transfer of the matter to Alabama had been filed, California still retains exclusive jurisdiction. The statute, the Uniform Interstate Family Support Act (UIFSA), *Family Code §§ 4900* et. seq. means just what it says. *Family Code § 4909* sets forth the process for determining which state has exclusive jurisdiction over child support. The trial judge in Sacramento, for unknown reasons, chose to interpret the statute to mean that the parties' actions in Alabama could substitute for the required written consent. The appellate court corrects this misinterpretation.

And, as for practitioners, the advice also applies: Read the directions!

Stacy D. Phillips & Robyn Santucci: *Stone v. Davis* involves a jurisdictional dispute over a child support modification, governed by the Uniform Interstate Family Support Act (UIFSA). Here, Mother successfully overturned a California trial court's decision conferring jurisdiction to Alabama when California, as Mother argued, properly should have retained jurisdiction under UIFSA, even though Alabama was the more convenient forum.

After Mother and the parties' son relocated from Sacramento to Alabama in 2001, Mother moved unsuccessfully for a child support increase in Alabama in 2002. Mother then decided to bring her request to California in 2005--an ostensibly friendlier forum--even though she still lived in Alabama. When Father raised the argument that California no longer had jurisdiction to decide Mother's request subsequent to the child support adjudication in Alabama three years earlier, the trial court agreed with Father. The trial court found that both parties (obviously including Mother who had filed the modification motion in Alabama) had consented to jurisdiction in Alabama by failing to challenge the forum in 2002.

Although this outcome seems not only logical, but fair, considering Mother's unapologetic forum shopping, the appellate court reversed the trial court's decision as mandated by the clear tenets of UIFSA.

Under the premise that only one state at a time should have jurisdiction over the issue of child support, UIFSA's governing guidelines serve to simplify jurisdictional disputes regarding child support enforcement and modifications. UIFSA requires the state issuing the original order (here, California) to retain *continuing and exclusive* jurisdiction, so long as either the obligor parent, the obligee parent *or* the child are still residents of the issuing state, *or* unless all parties file a written consent with the tribunal of the issuing state to transfer jurisdiction to another state. As the appellate court's opinion states synonymously, the statutory language is "unambiguous" and "clear." The beauty of UIFSA is that jurisdiction is premised on ascertainable, rather than colorable facts, as was Father's forum non conveniens argument which was ultimately unpersuasive.

Stone v. Davis was reversed after a review de novo because not only was Father still a resident of California, but neither party had filed a written consent to transfer jurisdiction from California to Alabama. The fact that both parties previously submitted to jurisdiction in Alabama appeared not to matter, which begs the question--what Mother would have done had she prevailed in Alabama? What if Father paid increased support on the basis of an Alabama modified

child support order, only to determine that Alabama never had proper jurisdiction? Would Father be entitled to a refund for excess support? The questions were not covered by the Court and query whether we will have answers in the near future.

Bernard N. Wolf: Not surprising that the Court of Appeal adopted and applied the doctrine of continuing jurisdiction to child support in interstate cases; perhaps more surprising is that the specific issue has never arisen before in California. The late Brigette Bodenheimer, reporter and a principal author of the Uniform Child Custody Jurisdiction Act (UCCJA, now the UCCJEA), wrote passionately that the doctrine of continuing jurisdiction was at the heart of the Act. She explained that once a forum state assumes child custody jurisdiction, the court continues to exercise exclusive jurisdiction in all subsequent modification proceedings as long as either parent or the child resides in the state. In *Kumar v. Superior Court (1982) 32 Cal. 3d 689* the California Supreme Court explicitly endorsed Professor Bodenheimer's analysis and embedded the doctrine of continuing jurisdiction in the cornerstone of our custody jurisdiction law.

The Uniform Interstate Family Support Act (UIFSA) deals with interstate support orders. UIFSA has many features that resemble those of the UCCJA. Therefore, it is not surprising that in *Davis* the Court of Appeal adopted and applied the doctrine of continuing jurisdiction to child support in interstate cases. What is perhaps more surprising is that the specific issue has never arisen before in California.

References. California Family Law Practice and Procedure, 2nd ed., §§ California Family Law Prac & Proc 2d ed. § 40.43, § 151.51[3], [5] (continuing, exclusive jurisdiction), § 42.02, § 151.58 (jurisdiction to modify or terminate child support order); California Family Law Trial Guide, Units 10 (modification), 32 (child support).

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Bernard N. Wolf, a Certified Family Law Specialist, maintains a law practice in San Francisco (*Law Offices of Bernard N. Wolf*) concentrating on family law and civil appeals. Among the published decisions in which he has appeared as counsel before the California Supreme Court are: *In re Marriage of Epstein*; *Kumar v. Superior Court*; *In re Marriage of Assemi*; and *In re Marriage of Lehman*. Among the published decisions in which he has appeared as counsel before the California Court of Appeal are: *In re Marriage of Kieturakis*, *In re Marriage of Nelson*, *In re Marriage of Green*; *In re Marriage of Cream*; *In re Marriage of Bergman*; *In re Marriage of Macfarlane & Lang*; *In re Marriage of Biddle*; *In re Marriage of Horowitz*; and *In re Marriage of Anderson*. He is a regular consultant to Matthew Bender's *California Family Law Monthly*.

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DiFranza and Kirkland on United States v. Kukafka

2008 Emerging Issues 1613

DiFranza and Kirkland on United States v. Kukafka

By Barbara A. DiFranza and Kathryn Kirkland

December 18, 2007

SUMMARY: In this Emerging Issues Analysis, which appears in the May 2007 issue of Matthew Benders California Family Law Monthly, California attorneys Barbara A. DiFranza and Kathryn Kirkland analyze United States v. Kukafkas holding that the Child Support Recovery Act is a constitutional exercise of Congressional power under the Commerce Clause of the U.S. Constitution and its implications for practicing attorneys.

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ARTICLE: Facts and Procedure. In 1982, a husband (Ira) and wife (Esther) were married. They had four children. Ira was a trained electrical engineer, but in 1984 he went into a real estate business with his father-in-law. Ten years later, the partnership dissolved, due to a bad real estate venture. A bank foreclosed on Ira's home, and he and Esther moved to his in-laws' home. Financial pressures led to marital difficulties, and two of the children were diagnosed with serious illnesses. In mid-1996, Ira left Esther and the children in New Jersey, and relocated to his mother's apartment in Florida.

In 1997, Esther obtained a default divorce judgment from a New Jersey court. The divorce judgment required Ira to pay $400 a week in child support, $350 a week in alimony, and to obtain an ecclesiastical divorce. Living with his mother in Florida, Ira had no rent or basic living expenses, but he earned only sporadic income from odd jobs such as providing driving service to the elderly.

From 1998 to 2004, Ira consistently failed to make child support payments. In Florida contempt proceedings, he maintained that (1) Esther earned enough to support the children, (2) he was unable to find suitable employment, (3) he was awaiting returns on real estate ventures, (4) he was pursuing licensing and education, and (5) he was prevented by depression and diabetes from finding work. Ira was repeatedly admonished to find work and pay his $400 a week child support obligation. However, he made only the minimum payments needed to avoid being jailed for contempt.

By August 2004, Ira had paid $1,657 in child support and owed $127,343 in unpaid support. A New Jersey grand jury indicted him for willful failure to pay his child support obligation, in violation of the federal Child Support Recovery Act of 1992 (CSRA-*18 U.S.C. § 228*). A jury convicted him; and a District Court sentenced him to two years in prison, one year of supervised release, $145,337 in restitution, and $200 as a special assessment.

On appeal, Ira maintained that the CSRA exceeded Congress' power under the Commerce Clause [*relying on*

United States v. Morrison (2000) 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658]. He also maintained that the divorce decree was invalid because it interfered with his free exercise of religion under the First Amendment by requiring him to obtain an ecclesiastical divorce.

CSRA/DPPA Is Constitutional Exercise of Congressional Power Under Commerce Clause. The Court of Appeals affirmed. First, it noted that the Child Support Recovery Act of 1992, as amended by the Deadbeat Parents Punishment Act of 1998 (DPPA-Pub. L. 105-187, *112 Stat. 618),* makes it a federal crime to willfully fail to pay a child support obligation to a child in another state. Congress intended the CSRA to strengthen state efforts to enforce child support obligations of parents who flee across state lines.

The Court then explained that the U.S. Supreme Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. These are (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities that substantially affect interstate commerce [*citing United States v. Lopez (1995) 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626]*.

The Court further noted that the Supreme Court, in *United States v. Morrison (2000) 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658,* struck down portions of the Violence Against Women Act of 1994 (VAWA-*42 U.S.C. § 13981*) as unconstitutional because gender-motivated crimes of violence are not economic activity. In so doing, the *Morrison* Court reasoned that Congress could *not* regulate noneconomic conduct 'based solely on that conduct's aggregate effect on interstate commerce.'

However, the Court went on, the *Morrison* Court provided a framework for determining whether a law regulates intrastate activity that has a substantial effect on interstate commerce. Specifically, courts should consider (1) the economic nature of the regulated activity; (2) a jurisdictional element limiting the reach of the law to a set of activities that has an explicit connection with or effect on interstate commerce; (3) express Congressional findings regarding the effects of the activity on interstate commerce; and (4) the link between the regulated activity and interstate commerce [*citing United States v. Gregg (3d Cir. 2000) 226 F.3d 253, 262]*. Courts must then determine whether a rational basis exists for concluding that the regulated activities, taken in the aggregate, substantially affect interstate commerce.

Under this framework, the Court decided, the CSRA/DPPA 'clearly regulates an activity having a substantial effect on interstate commerce.' In particular, (1) the activity regulated by the CSRA/DPPA is commercial, or economic in nature; (2) the CSRA/DPPA contains an explicit jurisdictional element that limits its reach to interstate transactions, because it regulates only child support obligations to out-of-state children; (3) the CSRA/DPPA was passed after express legislative findings about the effect of unpaid child support on interstate commerce; and (4) the legislative history of the CSRA/DPPA illustrates the link between the national problem of unpaid child support and the legislation.

Therefore, the Court said, a rational basis exists for concluding that failure to make child support payments substantially affects interstate commerce. And, as a result, the CSRA/DPPA falls within Congress' authority under the Commerce Clause under the third *Lopez* category, even after the *Morrison* Court's decision.

Furthermore, the Court observed, the CSRA/DPPA also falls under the second *Lopez* category, which was not addressed by the *Morrison* Court. Child support payments regulated by the CSRA/DPPA are 'things' that are interstate in nature because they must be transmitted through instrumentalities of interstate commerce (*e.g.*, mail, wire, or electronic transfer), and the 'persons' targeted by the CSRA/DPPA are individuals who travel across state lines to avoid payment of child support.

Finally, the Court of Appeals added that the CSRA/DPPA encourages the payment of interstate debts by criminalizing an individual's willful failure to pay, and that '[s]uch discouragement of willful efforts to frustrate interstate commerce is a valid exercise of [C]ongressional power under the Commerce Clause.'

Collateral Challenge to Prosecution Under CSRA/DPPA Is Invalid. Next, the Court rejected Ira's argument that

the divorce judgment containing his child support obligation was invalid because the judgment included a requirement that he obtain an ecclesiastical dissolution of marriage. The judgment required him to obtain a 'Get', which is a divorce under Jewish law. The Court reasoned that Ira's conviction was based on his child support obligation, which was totally unrelated to any obligation that he pay for a Get. Thus, because the constitutionality of the Get requirement bore no relationship to Ira's indictment, the Court rejected Ira's collateral challenge to CSRA/DPPA prosecution.

'Clearly,' the Court said, 'the [CSRA/DPPA] is not the appropriate arena in which to litigate the terms of [Ira's] divorce... . the [CSRA/DPPA] does not require a federal court to ensure the validity of each aspect of the underlying court order containing the support obligation... . If it did, a federal prosecution under the [CSRA/DPPA] would become an avenue for relitigating substantive issues of state family law.'

Jury Instruction Regarding Willfulness Element Is Proper. In addition, the Court rejected Ira's contention that the District Court erred in instructing the jury on the willfulness element of the CSRA/DPPA. It concluded that the jury was properly instructed that '[i]n determining whether the defendant acted willfully, you must first find that the defendant had the ability to pay the child support... . This element of the offense is satisfied if you find that the defendant had the ability to pay any part of his child support, even if he did not have the entire amount which he was ordered to pay.' This instruction, the Court said, informed the jury that it could not find willfulness unless it determined that Ira could pay the support obligation.

The Court noted that the 'ability to pay' is *not* an element of a CSRA/DPPA offense. Instead, 'inability to pay ... provides a defense to liability ... and the defendant is free to present evidence that ... his income was not sufficient, after meeting his basic subsistence needs, to enable him to pay any portion of the support obligation' [*quoting from United States v. Mattice (2d Cir. 1999) 186 F.3d 219, 228-229].* Here, Ira presented such a defense. Moreover, the District Court told the jury that Ira's refusal to pay his support obligation had to be 'voluntary and intentional,' that Ira had to be aware of 'the unlawful nature of his acts,' and that Ira had a right to keep enough money to meet his personal needs.

Commentary

Barbara A. DiFranza: Family lawyers are happy to see the Commerce Clause stretched to enable the prosecution of deadbeat dads. It would be nice to have Mr. Kukafka appear in his prison garb in a reality TV show explaining why he could pay for his Get but paid almost nothing for his two ill children. The holding that "inability to pay" is a defense rather than "ability to pay" being an element of the crime will be helpful to parents and district attorneys pursuing deadbeat dads in contempt and criminal proceedings, and shores up the same conclusion in *Moss v. Superior Court (1998) 17 Cal. 4th 396,* which also held that a parent who willfully fails to seek employment commensurate with skills and abilities may be held in contempt.

Kathryn Kirkland: The jury instructions did not include the presumption that Father had the ability to pay because that was the finding of the court when the original order was issued. For family law practitioners who are representing a defendant in a criminal proceeding, or advising a criminal defense attorney, the understanding of this difference in use of the presumption might be useful. In this federal case from the District of New Jersey, Father was convicted of "willfully failing to pay child support" in violation of the Child Support Recovery Act of 1992 as amended by the Deadbeat Parents Punishment Act of 1998. Father had "abandoned" [the language of the opinion] Mother and four children who lived in New Jersey and moved to Florida. Two of the four children subsequently developed serious medical conditions. In 1997, Mother and the children went on welfare. The New Jersey

welfare department requested that Florida enforce the child support order issued by the New Jersey family court that had granted the dissolution of the parties' marriage. By August 2004 Father was in arrears by approximately $127,343.

There were several proceedings in Florida during which Father was repeatedly admonished to find work and pay the $400 per week child support. Father had many excuses but never paid the support. Ultimately a grand jury in New Jersey indicted Father under the above federal statutes. He was convicted and sentenced to two years in prison.

Father challenged his conviction on constitutional grounds, claiming that the statutes under which he was convicted were beyond the jurisdiction of the Commerce Clause. Under its own analysis and that of other districts, the court had no trouble finding the statutes constitutional, because they were only applied against parents who flee across state lines.

While it is not common for California obligor parents to leave California and not pay child support, it does happen. If, after requests for enforcement in another jurisdiction, payments are not received, federal criminal action is an option.

In addition to the constitutional challenge, Father claimed that the jury instructions were improper. The court found exactly the opposite: that the jury instructions were given in a manner most beneficial to Father. The court instructed the jury that it had to find that Father had the ability to pay the child support before it could find that Father "willfully" failed to pay. The "ability to pay" may not be that Father had the ability to pay all of the support, but that he had to ability to pay some support. The jury instructions did not include the presumption that Father had the ability to pay because that was the finding of the court when the original order was issued. As the court observed, that saved Father from having to overcome that presumption.

Family law practitioners are probably not going to be representing a client in criminal proceedings, but if a family law practitioner is representing a defendant in this kind of action, or advising a criminal defense attorney, the understanding of this difference in use of the presumption might be useful.

References: California Family Law Practice and Procedure, 2nd ed., § 141.140 (federal criminal liability for interstate flight to avoid child support).

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Abrams on Distinguishing Retirement & Disability Pensions & After-Acquired Plans

2008 Emerging Issues 1565

Abrams on Distinguishing Retirement and Disability Pensions and After-Acquired Plans

By Brenda Abrams

December 17, 2007

SUMMARY: When dealing with equitable distribution issues, assets may not always be what they appear or what they are named. It is essential to determine the purpose of an asset and not just the name of the asset, particularly with retirement accounts.

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ARTICLE: When dealing with equitable distribution issues, assets may not always be what they appear or what they are named. It is essential to look behind the name to determine the purpose. This is particularly the case with retirement accounts.

Florida Statute 61.076(1) provides that "All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs are marital assets subject to equitable distribution." On the other hand, case law clearly establishes that disability pensions are not subject to equitable distribution, even though they were accrued during the marriage. Disability benefits are considered personal to the recipient and represent future lost income, *Hoffner v. Hoffner, 577 So.2d 703 (Fla. 4th DCA 1991),* or compensation for pain and suffering, disability and disfigurement, *Rumler v. Rumler, 932 So. 2d 1165 (Fla. 2nd DCA 2006).* Although disability benefits are not available for equitable distribution purposes, the amount received is available as a source for the payment of alimony. The tricky part comes either when a plan is labeled as disability and is really a pension plan or when a plan, regardless of how titled, contains elements of both retirement and disability benefits.

In *Gaffney v. Gaffney, 2007 Fla. App. LEXIS 15177 (4th DCA 2007),* the Husband was employed by the Broward Sheriff's Office and was entitled to benefits under the Florida Retirement System (FRS), which was a defined benefit plan. The Husband retired under the Disability Election. The Husband's benefits in the plan accrued service credits based on the number of years he worked. The Husband's disability did not change the amount of his pension benefits, but permitted him to retire two years earlier, without any diminution in his pension. The trial court found that the Husband had converted his pension plan to a disability plan, therefore making this asset unavailable for equitable distribution. The Fourth District reversed, holding that the designation of the plan as a Disability Plan was not the relevant consideration. The court must look to the purpose of the plan to ascertain what portion of the plan, if any, represents compensation for lost wages, pain and suffering, disability and disfigurement and which portion of the plan

represents retirement benefits. The ability to retire two years earlier was not a factor in the amount of the Husband's payment, and does not change the characterization of the plan from a retirement plan to a disability plan for equitable distribution purposes. *Gaffney* cited with approval the Second District case of *Rumler v. Rumler, 932 So. 2d 1165 (Fla. 2nd DCA 2006).*

In *Rumler*, the Husband had retired as police office with the City of Homestead, and was receiving a pension, designated as a disability pension. The appellate court instructed that, when dealing with a pension, the plan should be analyzed to determine whether the plan, or any part of it, is subject to equitable distribution. The trial court should ascertain whether any portion of the plan is payment for lost wages, pain and suffering, disability and disfigurement. That portion should be quantified and excluded from equitable distribution, leaving the retirement portion, which is deferred compensation, available for equitable distribution.

Best practice dictates that, when dealing with equitably dividing a plan, the lawyer should retain the services of a pension evaluator to testify as an expert witness. The expert will be able to testify as to the characterization of the plan, and also be able to quantify for the trial judge, which amounts are attributable to specific components of the plan.

The practitioner should not be dismayed or confused by the name of the plan, because plans come in all sorts of "flavors." For example, in *Pullo v. Pullo, 926 So. 2d 448 (Fla. 1st DCA 2006) en banc*, the court dealt with a Deferred Retirement Option Program, referred to as a "DROP Account."

The Husband in the *Pullo* case was employed by the City of Jacksonville. When the parties divorced, the Husband was not in retirement pay status. The final judgment awarded the wife a one-third interest in the Husband's City of Jacksonville Pension/retirement benefit. After the parties were divorced, the City of Jacksonville adopted a DROP plan. DROP plans have also been adopted by other Florida cities. The purpose of this plan was to permit employees to defer their normal retirement benefits while continuing their employment with the City, and without losing their pension and other benefits. Continued employment with the City did not result in additional accrued benefits pursuant to the pension plan.

The Husband elected to join the DROP program, and his enrollment was irrevocable. He continued to work for the City. The Husband's previous entitlement to his City of Jacksonville pension/retirement plan was rolled over to the DROP account, eliminating his interest in the retirement plan. Since the DROP Account was created after the dissolution of the parties' marriage, the former Husband took the position that the DROP Account was a nonmarital asset, effectively defeating the Wife's one-third interest in the Husband's retirement benefits. The Wife brought an enforcement action in which she sought her pro-rata share of the DROP Account, interest in the account attributable to her share, and also to Cost of Living Adjustments (COLA) benefits.

The First District held that the former Wife was entitled to her pro-rata portion of the DROP Account, including COLA's and interest. The *Pullo* court cited and relied upon the Fourth District cases of *Russell v. Russell, 922 So. 2d 1097 (4th DCA 2006); Swanson v. Swanson, 869 So. 2d 735 (Fla. 4th DCA 2004)* and *Ganzel v. Ganzel, 770 So. 2d 304 (Fla. 4th DCA 2000).* In essence, the DROP Account was the successor in interest to the former Husband's retirement benefits previously awarded to the former Wife.

Once the retirement benefits were awarded to the former Wife in the final judgment, they became her separate nonmarital property. Therefore, when the DROP account was created after the dissolution of the parties' marriage, the Wife's portion of the Husband's retirement benefits were deposited into the DROP account.

Russell v. Russell, 922 So.2d 1097 (Fla. 4 DCA 2006) also involved a DROP plan the Husband had elected to participate in after the parties' marriage was dissolved. The Wife had been awarded a one-half interest in the Husband's pension plan which accrued during the marriage. In this case, the former Wife requested that her share of the Husband's pension benefits be deposited into the DROP account, along with her former Husband's, so that she could also be entitled to the enhanced benefits. Since the portion of the plan awarded to her represented her separate property, she was

entitled to share in the same benefits.

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ABOUT THE AUTHOR(S):

Brenda Abrams is the Editor of Florida Family Law, a five-volume treatise on family law in Florida, which is considered to be the premier set of books in the field. In addition to editing the treatise, Mrs. Abrams has authored many chapters in the publication. She is also the Editor of the Florida Family Law Reporter, a monthly publication that keeps Florida family lawyers up-to-date on statutory and case law, and the Florida Family Law Handbook, which is a practice guide. Mrs. Abrams is the Editor of a software program, Florida Family Law Automated Forms. All publications and software are published by Lexis Publishing Co. Mrs. Abrams has been practicing law since 1971. She graduated cum laude from the University of Miami Law School and has specialized in family law since 1976. She has been listed as one of the Best Lawyers in America, a publication of Woodward & White from 1987 through the present and designated as a "Super Lawyer." Mrs. Abrams has lectured extensively in the area of Family Law, including seminars and symposiums on behalf of the Family Law Section of The Florida Bar, the Heckerling Institute on Estate Planning and Taxation, the Institute presented by the Florida chapter of the American Academy of Matrimonial Attorneys, and for Family Law Certification. Mrs. Abrams was Chair of the Family Law Section of The Florida Bar. She is a Fellow of the Florida chapter of the American Academy of Matrimonial Attorneys, and has served in that organization on the Board of Managers and as chair of the Amicus Committee. Mrs. Abrams has been an adjunct professor at the University of Miami School of Law for more than 12 years and at Nova Law School, teaching advanced courses in Family Law Litigation and Collection of Judgments. Mrs. Abrams practices family law in south Florida.

When the Primary Residential Parent Should be Awarded Exclusive Use & Possession

2008 Emerging Issues 1573

Abrams on when the Primary Residential Parent Should be Awarded Exclusive Use and Possession of the Marital Residence

By Brenda Abrams

December 17, 2007

SUMMARY: Recent Florida case law indicates that the award of exclusive use of the marital home should be awarded to the primary residential parent unless the court finds that there is a reason to deny the award.

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ARTICLE: Several cases decided in 2006 and 2007 clarify when an award of exclusive use of the marital residence should be awarded to the primary parent, and when the award should be denied based upon compelling or special circumstances.

The equitable distribution statute, Section 61.075(1)(h) requires the trial court to consider "[t]he desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court shall first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home."

Recent case law appears to indicate that the award of exclusive use of the marital home should be awarded to the primary residential parent unless the court finds there is a reason to deny the award. In other words, the general rule favors exclusive use. If the award is denied, the home is usually ordered to be sold, and the proceeds divided equitably between the parties.

In *Schumaker v. Schumaker, 931 So. 2d 271 (Fla. 5th DCA 2006)*, the trial court found that the marital standard of living was made worse by the Husband's lack of consistent work, long periods of unemployment and massive credit card debt. The wife earned $9 per hour. On appeal, the wife was awarded exclusive use and occupancy of the marital home until the children reached the age of majority because the children needed the continuity and stability of their home during this time of crisis. The wife was able to pay the mortgage payment on the home, but would not be able to purchase a comparable residence if the marital home were to be sold. The Fifth District held that, ***absent compelling financial reasons, the custodial parent should be awarded exclusive use and possession of the marital residence until***

the children reach majority or become emancipated or the custodial parent remarries.

The Third District case of *Garcia v. Hernandez, 947 So. 2d 657 (Fla. 3rd DCA 2007)* was similar. The Husband had been awarded a 50% special equity interest in the Wife's portion of the home. Therefore, if the home was sold, she would only realize 25% of the net proceeds, which would be insufficient for her to acquire a new home for herself and the children. The wife worked from home as a manicurist and rented out an efficiency in the home. With the rental income, she was able to pay the entire mortgage payment.

The Third District cited a long line of cases holding that, as "a general rule, absent special circumstances, the primary residential parent should be awarded exclusive use of the marital home until the youngest child reaches majority." The evidence at trial was devoid of "special circumstances" or "compelling financial reasons" that would justify denying the wife exclusive occupancy. The minor children would be forced to move from the only house they knew and the Wife would be deprived of the rental income necessary to pay the mortgage. Since ***the husband did not present any special circumstances which would negate the general rule that the custodial parent be awarded the use and possession of the marital home until the minor child reaches majority***, the decision of the trial court ordering sale of the home was reversed, and the wife was awarded exclusive possession of the home during the child's minority.

The flip side of the coin in the Third District is *Delgado v. Delgado, 920 So. 2d 661 (Fla. 3rd DCA 2005),* wherein an award of exclusive use and occupancy of the marital home to the wife, who was the primary residential parent, was reversed because (1) the parties' financial circumstances did not permit such an award without dramatically degrading the husband's quality of life; and (2) the value of the marital home had risen substantially during the marriage, creating equity that could be utilized to establish two households if the home were sold. The critical question in making the awards of exclusive use and occupancy is whether the awards will be equitable.

In the Fifth District, in *Marshall v. Marshall, 953 So. 2d 23 (Fla. 5th DCA 2007),* the court found that the effect of awarding the Wife exclusive use of the marital home was to force the Husband from his modest economic status to a state of relative impoverishment.

An award of exclusive use was reversed in *Martin v. Martin, 959 So. 2d 803 (Fla. 1st DCA 2007).* Although the First District acknowledged the general rule that the primary residential parent should be awarded exclusive use of the marital home during the children's minority, the existence of special circumstances may require partition of the home. Here, the parties' relative financial circumstances, along with other considerations may constitute special circumstances. In this case, ***the short duration the parties lived in the home, "the lack of other significant assets and the large differential in relative earning power together constitute special circumstances."***

The lesson to be learned from these cases appears to be that the "default" position is an award of exclusive use and occupancy of the marital home to the primary residential parent. The burden is on the other side to demonstrate that special circumstances exist, what those circumstances are, and that they are sufficient to negate the general rule. Furthermore, the nonresidential parent opposing the award should establish that denial of exclusive use and occupancy is required to do equity and justice between the parties.

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ABOUT THE AUTHOR(S):

Brenda Abrams is the Editor of Florida Family Law, a five-volume treatise on family law in Florida, which is considered to be the premier set of books in the field. In addition to editing the treatise, Mrs. Abrams has authored many chapters in the publication. She is also the Editor of the Florida Family Law Reporter, a monthly publication that keeps Florida family lawyers up-to-date on statutory and case law, and the Florida Family Law Handbook, which is a practice guide. Mrs. Abrams is the Editor of a software program, Florida Family Law Automated Forms. All publications and

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Fackrell on Utah Mandatory Domestic Mediation & Mediator Qualification

2008 Emerging Issues 1291

Tamara A. Fackrell on Utah Mandatory Domestic Mediation and Mediator Qualification

By Tamara A. Fackrell

December 4, 2007

SUMMARY: Contested divorce cases have a mandatory mediation requirement in Utah. Further, mediation qualification is carefully prescribed by the state. This commentary discusses practical suggestions regarding mandatory domestic mediation and presents a roadmap for attorneys who want to expand their practice to include court-qualified mediation.

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ARTICLE: Setting the Scene. Bob and Cindy have engaged in a frenzied court battle for four years. While they were waiting in the lobby for mediation, the tension was so strong it was almost visible. Yet after the opening statement and a cooperative beginning, the parties began to let down their guard, work together, and emerge with a resolution. The attorneys were by their clients' sides, providing options, advising on the law, and encouraging the clients. The mediator was able to perform magic as the barriers of a four-year legal battle fell, resulting in a 10-page memorandum of understanding. But what if the mediation is agreed to orally but not signed or drafted in the mediation? Is the agreement binding? Is the communication in the mediation confidential? How can attorneys make binding agreements while also avoiding potential future controversy in court?

Mediation is most simply defined as a facilitated negotiation. Utah Code of Judicial Administration Rule 4-510, Utah Ethical Guidelines Rule 104, and Utah Code Annotated Section 78-31c-101 et seq. (new in 2006, known as the Utah Uniform Mediation Act) all govern alternative dispute resolution.

Confidentiality Under the Utah Uniform Mediation Act. The Utah Uniform Mediation Act (UUMA) was enacted effective May 1, 2006, with Utah the eighth state to adopt the Uniform Mediation Act. Confidentiality is of utmost concern to mediators and parties so as to ensure an open and candid mediation process. The mediation is treated as a confidential communication, in which the mediators, parties, attorneys, or third-parties involved cannot testify in future court proceedings regarding the mediation [*see* Utah Code Ann. §§ 78-31c-108, 78-31b-8(4), (5) (2006); Utah Rules Alt. Disp. Res. Rule 103; Utah Code Jud. Admin. Rule 4-510]. Before enactment of the UUMA, in *Lyons v. Booker [982 P.2d 1142 (Utah App. 1999)]*, the Utah Court of Appeals had held that confidentiality of the mediation process is essential for mediation to function properly, and held that no party to the mediation could disclose any comments or information acquired during mediation or in mediation-related discussions.

The definition of mediation is vast, and includes conduct or a statement, whether oral, in a record, verbal, or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator [Utah Code Ann. § 78-31c-102(2) (2006)]. Thus, confidentiality extends to discussions that occur in preparation for mediation, during mediation, and after mediation regarding the case.

Exceptions to Confidentiality. The privilege of confidentiality can be waived if *all parties involved*, including the mediator agree to waive confidentiality, if a person makes a representation about mediation that prejudices another person but only to the extent for the person to respond to the representation, or if mediation was used to commit or conceal criminal activity [Utah Code Ann. § 78-31c-105 (2006)].

The UUMA also provides for a confidentiality exception in an agreement evidenced by a record signed by all parties to the agreement [Utah Code Ann. § 78-31c-106(1)(a) (2006)]. Therefore, if all parties sign the agreement, it is not held confidential. Further, the UUMA provides that there is no privilege of confidentiality if (1) the proceeding is available under public meeting laws to the public, (2) there is a threat of physical harm, (3) it used in a crime of violence, or (4) needed in a claim for professional mediator malpractice [Utah Code Ann. § 78-31c-106(1)(b)(e) (2006)]. The UUMA also waives confidentiality if there is a need for the evidence that substantially outweighs the interest in protecting confidentiality [Utah Code Ann. § 78-31c-106(2)(b) (2006)].

Preparing Clients Before the Mediation. How can attorneys preserve confidentiality in the mediation process, yet reach workable agreements? Clients who are well prepared for mediation seem to more easily come to agreements, saving time and money. Some mediators will send a mediation mapping sheet for the parties to consider all of the issues involved, solutions to the issues, and alternatives to settlement. Mapping is most effective when each party will also consider the *other side's* positions, interests, and options put on the table in mediation. Attorneys should consistently use a form of mapping sheet they find effective. This will help prepare the parties for a reasonable bargaining range and collaborative options within the mediation. Preparation before mediation will set expectations for the party and will allow the mediation process to be productive.

Attorneys who give realistic settlement options before mediation help their clients significantly. Attorneys who tell their clients that their case is a slam dunk tend to create clients who are unwilling to make concessions, frustrating the process. A bargaining range that explores best- and worst-case scenarios is best in gauging mediation expectations for the parties.

Helpful Questions to Ask Before the Mediation. It is appropriate and recommended that attorneys coordinate with the mediator before the mediation about expectations in the case. This is essential for confidentiality, especially regarding communication before mediation and the mediation agreement. The following questions may be helpful:

1. Will the mediation have attorneys present?

2. Will the attorneys submit memoranda about issues in the case before the mediation?

3. If attorney memoranda will be provided, will the attorneys drafting them for the other side, or will they be confidential and just for the mediator?

4. Will the process be attorney-driven or party-driven?

5. Will the agreement be drafted during the mediation process?

6. Will the attorneys or the mediator draft the agreement?

7. If the mediator will draft the agreement, can he or she send standard clauses (i.e., payment of attorney's fees, future disputes, dispute resolution clauses) to the attorneys before the mediation so they can review them with the

clients?

8. If the agreement will be drafted after the mediation, should a short agreement outlining the future agreement be signed at the mediation?

9. If the attorneys will not be present at the mediation, should the parties sign the agreement?

10. If the attorneys will not be present at the mediation should they be available for a phone conference before any signatures?

Should Attorneys Be Present at the Mediation? Some clients choose to go to mediation without their attorneys because of the increased cost. If the parties sign the agreement in the mediation, but have not conferred with their attorneys, is the agreement binding or is the conference confidential? The UUMA arguably supports that the agreement is binding whether or not parties were able to talk to their attorneys, contemplating an agreement evidenced by a record signed by all parties to the agreement [Utah Code Ann. § 78-31c-106(1)(a) (2006)]. Therefore, it is advisable for attorneys to proceed with caution and take preparatory steps as described above if they will not attend the mediation.

Most mediators do different types of mediation forums. Sometimes there will be attorneys, other times only the parties will be present. The genre of the case is important in considering whether attorneys will be present, as well as the conflict-resolution styles of the parties. Parties who are less assertive generally do better with their attorneys present. Best practice dictates that the attorneys should either both attend or both not attend, although occasionally there is a good reason to have only one party's attorney attend.

Suggestions to Avoid Having Unsigned Agreement Protected by Confidentiality of UUMA. Many mediators prefer that the attorneys be present in the mediation. The mediation process can then be either a party-driven process with the parties performing most of the negotiation, or an attorney-driven process with the attorneys in charge. In the party-driven process, attorneys can be helpful in offering options, creating soft reality checks, and advising clients on their legal rights. Attorneys should be respectful of the other party, and refrain from name-calling and excessive haranguing. If the agreement is signed with the parties and attorneys present, there will be little dispute as to the binding nature of the agreement.

However, if there is no signature in the mediation, the confidentiality dilemma arises [*see* Utah Code Ann. § 78-31c-106(1)(a) (2006)]. One option includes having the parties sign a short agreement during the mediation with the main agreed points, then having the mediator or attorney draft a formal agreement after the mediation. If the agreement is not signed during the mediation, there is the potential for it to crumble under uncertainty afterward. This is a risk attorneys should discuss with their clients. Sometimes it is best to sign the agreement in the mediation; other times it may be best to give the client time to think about the agreement before signing it. If the agreement is not signed in mediation, there is a possibility for future negotiation and also future deadlock, and the potential agreement may become ensnared in the UMMA confidentiality clause.

If the attorneys are not present at the mediation, counsel should be available for a short phone conference afterward to advise the client before signing the documents. Counsel also may advise the mediator that they would like to review the final documentation before it becomes binding. Most mediators will be flexible and adapt the process given the attorneys' input. Mediators can also begin with the parties and have the attorneys enter the process later at an appropriate time. This can save the client money but ensure the parties have counsels' advice as they make important mediation decisions.

These practical suggestions should help to circumvent the effect of possible confidentiality on potential, yet unsigned, mediated agreements. Attorneys should consider whether they will attend the mediation process and whether the mediation agreement will be signed in the mediation or later, after further consideration. Failure to consider these implications in preparation for mediation can have dire consequences.

For discussion of alternative dispute resolution in Utah, including mediation, see Utah Civil Practice, Ch. 1, *Overview of Utah's Legal System*, § § 1.08[13] (Matthew Bender).

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Tamara A. Fackrell is a Utah attorney mediator. She graduated cum laude from BYU Law School and is part-time faculty at the Law School teaching mediation. She received the Phi Alpha Delta Professor of the Year Award in 2006, and supervises four mediation undergraduate classes at BYU in Marriage Family Human Development, Social Work, Pre-Law, and Psychology. She received a bachelor's degree at BYU magna cum laude in psychology with a minor in communications, and helped start the mediation program at Utah Valley State College.

Ms. Fackrell has had a private mediation practice focusing on divorce and domestic mediation since 1997. She helped initiate the Victim Offender Mediation Program in the Fourth District Juvenile Court and the Provo School District Truancy Program. She is a Master Mediator and Primary Trainer for the State of Utah and performs certifications in mediation for professionals. Tamara has written many curricula to teach youth communication, mediation, and negotiation skills. Ms. Fackrell was director of Community Dispute Resolution Services. She received an honorary award from the Juvenile Justice Services and the Slate Canyon Youth Program in 2004 and 2005 and was a Zion's Wow Award Winner in 2005.

Ellinwood on Sanctions for Nondisclosure of Financial Information

2008 Emerging Issues 1297

Ellinwood on Sanctions for Nondisclosure of Financial Information

By Lynne Ellinwood, Hon. Roderic Duncan Judge (Ret.),, Dawn Gray and Hugh T. Thomson & Stephen James Wagner

December 4, 2007

SUMMARY: The Fourth Dist. CoA upheld an order levying $390,000 in sanctions and fees on a husband in a dissolution proceeding based on the husbands nondisclosure of financial info. This Emerging Issues Analysis, which appears in the October 2007 issue of Matthew Benders California Family Law Monthly, California attorney Lynne Ellinwood provides an analysis of this decision, with additional commentary by the Family Law Monthlys Editorial Board members.

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ARTICLE: The Fourth District Court of Appeal, *In re Marriage of Feldman* (Civ. No. D047896, Ct. App., 4th Dist., Div. 1. filed 7/20/07; ord. pub. 8/7/07) -Cal. App. 4th-, -Cal. Rptr. 3d-, *2007 Cal. App. LEXIS 1293* recently held that a trial court in a dissolution proceeding properly ordered a husband to pay his wife $250,000 in sanctions and $140,000 in attorney's fees, based on the husband's nondisclosure of financial information regarding a million-dollar bond purchase, a multi-million-dollar home purchase, the existence of a 401(k) account, and the existence of several privately held companies.

In the opinion by Justice Irion (with O'Rourke, Acting P.J., Aaron, J., concurring), the appellate court closely examined the specific nondisclosures relied on by the trial court, and concluded that the trial court did *not* abuse its discretion in awarding sanctions.

Facts and Procedure. In 1969, a wife (Elena) and husband (Aaron) were married; in August 2003, after 34 years of marriage, Elena sought a marital dissolution. During the marriage, Aaron created a large number of privately held companies that, among other things, developed real estate and owned auto dealerships (the Sunroad entities). According to Aaron, his assets were worth more than $50 million. The characterization of the Sunroad entities as separate or community property was an issue in the dissolution proceedings.

Elena served interrogatories and a request for production of documents on Aaron, and also conducted depositions of Aaron and employees of the Sunroad entities. In November 2003, Aaron provided responses to the interrogatories and a schedule of assets and debts. Subsequently, at the request of Elena's attorney, Aaron provided updates to the schedule. He also provided many documents in response to the request for production.

In September 2004, Elena filed a motion for sanctions and payment of attorney's fees [*see* Cal. Fam. Code § 271(a), 1101(g), 2107(c)]. She alleged that Aaron had failed to disclose several financial transactions, including the purchase of a residence, the purchase of a $1 million bond, the existence of a 401(k) account, and the existence of several privately held companies. Mediation efforts proved unsuccessful.

Following full briefing and a hearing, a trial court ruled that Aaron had (1) breached his fiduciary duty to disclose financial information to Elena, (2) intentionally sought to circumvent the disclosure process, and (3) frustrated the policy of promoting settlement, as a result of his conduct. The trial court then ordered Aaron to pay sanctions of $250,000, and attorney's fees of $140,000. Aaron appealed.

Statutory Scheme Governing Duty of Disclosure. The appellate court affirmed. First of all, it examined the fiduciary disclosure obligations that govern the relationship between spouses in dissolution proceedings, and the sanctions applicable for breach of those obligations.

Under Cal. Fam. Code § 721(b), the appellate court said, "in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other." Moreover, the spouses' confidential relationship "imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other" [*see* Cal. Fam. Code § 721(b)].

Under Cal. Fam. Code § 1100(e), the appellate court continued, the spousal fiduciary duties of Cal. Fam. Code § 721 are made applicable during dissolution proceedings. *Family Code 1100(e)* specifically provides: "Each spouse shall act with respect to the other spouse . . . in accordance with the general rules governing fiduciary relationships [of persons having confidential relationships] as specified in [Cal. Fam. Code § 721], until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable."

Furthermore, the appellate court went on, Cal. Fam. Code § 2100(c) provides that "a full and accurate disclosure of all assets and liabilities in which both parties have or may have an interest must be made in the early stages of a proceeding . . . , together with a disclosure of all income and expenses of the parties." The disclosure duty is ongoing, because the statute also provides that "each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes . . ." [*see Fam. Code § 2100(c)*; *cf. Fam. Code § 2102(a)* (similar language)].

The appellate court then explained that the Family Code requires the service of both a preliminary and a final declaration of disclosure, in order to implement the disclosure duty [*see Fam. Code § 2103*]. The Family Code also requires a trial court to impose monetary sanctions and to award reasonable attorney's fees if a party fails to comply with *Fam. Code §§ 2100--2113*, the chapter that deals with a spouse's fiduciary duty of disclosure during dissolution proceedings [*see Fam. Code § 2107(c)*]. Specifically, under *Fam. Code § 2107(c)*, "[s]anctions shall be in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

In addition, the appellate court said, *Fam. Code § 271(a)* authorizes a trial court to order an opposing party to pay attorney's fees and costs in the nature of a sanction when "the conduct of each party or attorney . . . frustrates the policy of the law to promote settlement of litigation." This statute "advances the policy of the law 'to promote settlement and to encourage cooperation which will reduce the cost of litigation'" [*quoting from In re Marriage of Petropoulos (2001) 91 Cal. App. 4th 161, 177, 110 Cal. Rptr. 2d 111*].

Preliminary Statutory Interpretation Issues. Next, the appellate court examined, and rejected, two of Aaron's

contentions regarding the applicable statutory standards.

First, the appellate court said, Aaron argued that sanctions may *not* be imposed on a spouse who breaches the fiduciary duty of disclosure if the other party fails to establish any *harm* resulting from the breach. In disagreeing, the appellate court reasoned that neither of the statutes that authorize the imposition of sanctions sets forth any requirement of separate injury to the complaining spouse as a precondition to the imposition of sanctions [*see Fam. Code §§ 271(a)* (sanctions imposed to advance policy of promoting settlement of litigation and encouraging cooperation of litigants), 2107(c) (sanctions imposed to effectuate compliance with the law requiring disclosure)]. Thus, the appellate court concluded that no injury to the other party is required for the trial court to impose sanctions.

Second, the appellate court said, Aaron argued that sanctions may *not* be imposed under *Fam. Code § 2107(c)* unless the complaining party (1) makes a request for the undisclosed information, and (2) brings a motion to compel further response, or a motion to preclude evidence on the nondisclosed issue. In disagreeing, the appellate court reasoned that Aaron was misreading *Fam. Code § 2107*, which sets out in subdivisions (a) and (b) this procedure to follow when a party fails to serve a preliminary declaration of disclosure, but which also sets out independently in subdivision (c) that if a party fails to comply with any provision of *Fam. Code §§ 2100--2113*, the trial court must impose money sanctions against the noncomplying party. Thus, the appellate court concluded that the imposition of sanctions does *not* require additional procedural prerequisites.

Nondisclosures Warranting Sanctions. One by one, the appellate court then reviewed, and affirmed, the nondisclosures that the trial court relied on in ordering sanctions. In so doing, the appellate court applied the abuse of discretion standard, which dictates that a trial court's order will *not* be overturned unless, after the evidence is viewed most favorably in support of the trial court's order, no judge could reasonably have made the trial court's order [*citing In re Marriage of Burgard (1999) 72 Cal. App. 4th 74, 82 , 84 Cal. Rptr. 2d 739* (standard of review for sanctions under *Fam. Code § 271*)].

Omission of Israeli Bond. First, the appellate court noted that Aaron's November 2003 schedule of assets and debts (Schedule) omitted a $1 million bond that Aaron purchased from the Israeli government in October 2003. The Israeli bond was purchased with borrowed funds, and Aaron failed to list the loan on the Schedule as a debt. Aaron also failed to timely produce documents about the loan transaction, even though Elena served a request for production of all bond certificates and documents evidencing loans. In a February 2004 update, Aaron listed the bond and loan, claiming they were acquired in December 2003, and subsequently Aaron produced documents about the transaction.

In her sanctions motion, the appellate court explained Elena argued that Aaron's nondisclosure of the bond, loan, and documents constituted a breach of his fiduciary duty under *Fam. Code § 2102(a)(1)*, which requires "[t]he accurate and complete disclosure of all assets and liabilities . . . and all current earnings, accumulations, and expenses, including an immediate, full and accurate update or augmentation to the extent there have been any material changes." The trial court agreed, stating that the nondisclosure of the Israeli bond was part of a "clear pattern that [Aaron] has no intentions of complying with the policy . . . that this information has to be shared from the very beginning." The trial court also found that Aaron's conduct was intentional, and that he was trying to "hide the ball."

The appellate court then rejected Aaron's explanation that he forgot to list the bond and debt because they were "a self-contained, symbiotic package with *zero* effect on [his] net worth." The appellate court stated that the statutory policy in favor of disclosure does not include an exception for debts and assets that offset each other. Also, in light of Aaron's other nondisclosures, the trial court rejected the explanation that Aaron's failure to disclose the bond and loan was a mere oversight. Because the trial court's inference was reasonable, the appellate court did not disturb it.

Omission of Personal Residence. Second, the appellate court examined the facts relating to Aaron's acquisition, in early 2004, of a multi-million-dollar home that became his personal residence. On March 1, 2004, the appellate court said, Elena's attorney sent Aaron's attorney a letter asking whether Aaron had acquired any assets. On April 1, Aaron's attorney replied in a letter that Aaron had moved to a new home on Calumet Avenue in La Jolla, and was leasing it for

$15,000 a month. However, on April 2, Elena learned, from answers to questions asked at a Sunroad employee's deposition, that Calumet Real Estate Holdings (Calumet), a Sunroad entity, had purchased a residence on Calumet Avenue in La Jolla for $5,797,500 in cash.

Eventually, the appellate court went on, Elena learned that the purchase contract had been executed on February 3, and that the transaction had closed on March 12. The cash for the purchase had been provided by a Sunroad entity, Sunroad Auto Holding (Auto). Although Aaron made a monthly $15,000 lease payment to Calumet, Calumet transferred the funds to another Sunroad entity, Sunroad Holding (Holding). Holding then transferred the funds to Auto to repay Auto for the property purchase. Aaron personally paid the maintenance, insurance, and property taxes on the Calumet home. Thus, Aaron had funded the Calumet home purchase with funds that could possibly be community property, because they came from a Sunroad entity. The trial court agreed with Elena that Aaron's selective disclosure of the nature of his lease was inconsistent with Aaron's fiduciary obligation to Elena under *Fam. Code § 1100(e)*.

The appellate court rejected Aaron's contention on appeal that he had actually complied with his fiduciary duty because he had disclosed the acquisition of the Calumet home within a month of close of escrow. The appellate court pointed out that Aaron did *not* disclose the transaction; rather, Elena stumbled on it at the deposition. It then reasoned that given the April 1 letter from Aaron's attorney, the trial court could reasonably conclude that Aaron, contrary to his fiduciary duty of disclosure, was attempting to *hide* or *delay* Elena's discovery of the fact that he used possible community assets to buy his Calumet home.

Furthermore, the appellate court said, the Calumet property transaction was a "material fact," which gave Aaron a duty to disclose it under *Fam. Code § 1100(e)*, for two reasons: (1) Elena claimed that the Sunroad entities were community assets, and needed to trace them; and (2) Elena was entitled to claim reimbursement for any postseparation benefit that Aaron might obtain from the use of community property. Thus, the appellate court concluded that the trial court did not abuse its discretion by finding that Aaron's lack of candor about the Calumet home purchase was part of a pattern of nondisclosure that warranted sanctions.

Omission of 401(k) Account. Third, the appellate court observed that, according to the record facts, Aaron stated in the Schedule that he had *no* retirement or pension assets. Yet, when questioned at a July 2004 deposition, he responded that he probably participated in the Sunroad entities' 401(k) plan. Subsequently, he produced information showing that he had $8,679.20 in a 401(k) account. At trial, Aaron conceded that he had failed to disclose his 401(k) account, but explained that he never reviewed the statements and had made no contributions for 12 years. However, the trial court agreed with Elena that his failure to disclose the 401(k) account was another breach of his duty of disclosure, and part of his pattern of misconduct.

The appellate court rejected Aaron's argument that he had not breached his fiduciary duty because Elena had secretly copied his financial documents during their marriage, and had copies of some of the 401(k) statements. It explained that the 401(k) account was one of Aaron's assets, so that he was clearly required to disclose it [*see Fam. Code §§ 721(b)(2), 1100(e), 2102(a)(1), 2104(c)(1)*].

Also, the appellate court pointed out that "a spouse who is in a superior position to obtain records or information from which an asset can be valued and can reasonably do so must acquire and disclose such information to the other spouse" and should not expect the other spouse to search for the information [*quoting from In re Marriage of Brewer & Federici (2001) 93 Cal. App. 4th 1334, 1348, 113 Cal. Rptr. 2d 849]*. Furthermore, the fact that the amount in the 401(k) account was insignificant in light of Aaron's great wealth did *not* mean that Aaron had not breached his fiduciary duty of disclosure by not disclosing it, especially when the nondisclosure was part of a *pattern* of misconduct. Therefore, the trial court did not abuse its discretion by concluding that Aaron breached his duty by not disclosing the existence of the 401(k) account.

Omission of Business Entities. Fourth, the appellate court examined the facts relating to Aaron's failure to disclose that he had created several new Sunroad entities. In February 2004, Elena's attorney asked "if there have been

any financial changes with regard to [Aaron], including the acquisition of any new interests in properties, either personal or business in nature." In June 2004, Elena's attorney asked if there had been "any changes to [Aaron's] income or assets, whether personally or through Sunroad Holding Corporation or any other subsidiary corporation," and whether "[Aaron] has created any new corporations or subsidiary corporations." However, despite these requests, Aaron did *not* disclose the existence of his new Mexican subsidiary, Immobiliaria Camino del Sol (Immobiliaria), which was formed in 2003, and received a $2.52 million loan from Auto. Thus the trial court could reasonably conclude that Aaron breached his disclosure duty under *Fam. Code § 1100(e)* by failing to disclose information about Immobiliaria.

In January 2005, the appellate court continued, Aaron produced organizational charts for the Sunroad entities, and the charts disclosed the existence of several new companies that had been formed several months before Aaron produced the charts. Thus, the appellate court said, the trial court could reasonably conclude that Aaron breached his duty to give "an immediate, full, and accurate update or augmentation to the extent there have been any material changes" as to his assets and liabilities [*see Fam. Code § 2102(a)(1)*]. Also, the trial court could reasonably conclude that Aaron had breached his duty "to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest [*see Fam. Code § 1100(e)*]. On these facts, the trial court did not abuse its discretion by deciding that Aaron's tardy disclosure of the new entities was another example of Aaron's pattern of noncompliance.

The appellate court rejected Aaron's contention that he was *not* required to disclose the existence of Immobiliaria, the $2.52 million loan, or the new entities, because they were "standard business transactions" and transactions within the ordinary course of business did not have to be reported. The appellate court explained that *Fam. Code § 2102* does *not* contain any such exception that exempts a spouse from having to disclose transactions "in the ordinary course of business."

The appellate court agreed with Aaron that, as a matter of common sense, a spouse who runs a business does not have "a duty to sua sponte update every *insignificant* occurrence in the operation of a business." The applicable statutes only require immediate disclosure of "material changes" and "material facts and information" [*see Fam. Code § 1100(e), 2100(c), 2102(a)*]. However, the appellate court concluded that the facts justified the trial court's conclusion that Aaron had a duty to promptly disclose the existence of Immobiliaria, the $2.52 million loan, and the new entities. For example, after Elena specifically asked about the creation of any new corporations or subsidiary corporations in June 2004, Aaron was on notice that the creation of new entities was a significant event that he should promptly disclose.

Award of Attorney's Fees Before Conclusion of Litigation. Next, the appellate court rejected Aaron's contention that the trial court erred by awarding attorney's fees under *Fam. Code § 271(a)* before the lawsuit had ended. It explained that cases cited by Aaron in support of his proposition did *not* deal with the issue presented here, which was whether a trial court must wait until the end of the lawsuit to assess *Fam. Code § 271(a)* attorney's fees as sanctions [*distinguishing In re Marriage of Freeman (2005) 132 Cal. App. 4th 1,6, 33 Cal. Rptr. 237; In re Marriage of Quay (1993) 18 Cal. App. 4th 961, 970, 22 Cal. Rptr. 2d 537* (including statement that "the statute, we think, contemplates assessing a sanction at the end of the lawsuit, when the extent of the party's bad conduct can be judged")].

The appellate court pointed out that the only procedural requirement in *Fam. Code § 271* is that an award of attorney's fees may be imposed only after notice and an opportunity to be heard is given to the party against whom the sanction is to be imposed [*see Fam. Code § 271(b)*]. "As a matter of logic," the appellate court said, "to promote cooperation a trial court must be able to apply sanctions *during the course of the litigation* when the uncooperative conduct arises in order to encourage better behavior as the litigation progresses." Therefore, the appellate court concluded, on the basis of statutory language and the express purpose of *Fam. Code § 271*, that a trial court may impose sanctions before the end of the lawsuit.

The appellate court also rejected Aaron's argument that the trial court erred in awarding $140,000 in attorney's fees, when the fees were not shown to be "reasonable and necessary." It decided that Aaron waived the argument by

failing to raise a timely objection in the trial court. In addition, the appellate court rejected Aaron's argument that the amount of the $250,000 sanction was too high. It concluded that a $250,000 sanction was "in an amount sufficient to deter repetition of the conduct or comparable conduct," pursuant to *Fam. Code § 2107(c)*, and that the record facts demonstrated that Aaron had ample means to pay the award.

Issuance of Statement of Decision. Finally, the appellate court rejected Aaron's contention that the trial court erred by refusing to exercise its discretion to issue a statement of decision after making an oral ruling, when Aaron had requested a statement of decision. It explained that the general rule is that a trial court need *not* issue a statement of decision after a ruling on a motion [*citing Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 678, 78 Cal. Rptr. 2d 225;* see *Code Civ. Proc. § 632*]. Also, there was *no* basis in statute or case law for a rule requiring a trial court to exercise its discretion to issue a statement of decision in instances in which *Code Civ. Proc. § 632* does not require it.

Commentary by Hon. Roderic Duncan, Judge (Ret.)

More than it is a review of the law of the fiduciary duty to disclose, this opinion is a chronicle of how some rich divorce litigants hide assets and fail to report large financial resources during the course of litigation. Hopefully, it will be inspirational to attorneys to dig, and thoroughly, for undisclosed assets as the case progresses. The penalties provided by *Family Code Sections 271* and *2107* should be ample incentive. In addition, the size of the community pot may increase substantially.

The excuse of the party hiding important transactions under the dodge that a transaction was "in the ordinary course of business" is disposed of neatly.

Commentary by Dawn Gray

Feldman should be required reading for all clients, particularly those who are not willing to freely provide information to the other spouse. Its overall premise is that each spouse must comply independently with the disclosure statutes, and risks sanctions for failure to do so no matter what the other spouse does or does not do. The panel calls them the "fiduciary obligations of disclosure," and states that "Section 2107, subdivision (c) indicates that sanctions are to be imposed to effectuate compliance with the laws that require spouses to make disclosure to each other." In other words, the purpose of Section 2107 is to compel disclosure, not remedy the harm resulting from nondisclosure. That is what *Family Code Section 1101* is for.

The *Feldman* court carries out that premise in its various holdings, including that sanctions may be imposed on a spouse who breaches his fiduciary disclosure duty *even if the other party fails to establish any harm resulting from the breach*. That is certainly a correct reading of *Family Code Section 2107(c)*, but it is good to have authority for that position. The court also tells us in *Feldman* that *Family Code Section 2107(c)*'s terms "simply do not require that before seeking sanctions for nondisclosure a party (1) seek further disclosure and (2) bring a motion to either compel further responses or preclude evidence." Thus, if a party's disclosures do not meet the statutory standard for full, accurate and complete disclosure of all material facts and information regarding all assets, obligations and income, a motion for sanctions will be available even if there are no subsequent requests for the information. The language of the discovery statutes is apparently warning enough.

There is also no exception in the disclosure obligation of *Family Code Section 2102(a)(1)* for "debts and assets that offset each other." The Fourth District also said that every litigant has an obligation to respond in good faith to the other party's request for production of documents by producing all relevant documents and to refrain from giving false answers in deposition testimony, and that this obligation applies to family law parties. This isn't big news, and it's in a footnote, but the panel must have included it for some reason.

The court also discusses what constitutes a "material fact" for purposes of disclosure under *Family Code Section 1100(e)*. This case was an affirmance, so it does not tell us the outer limits of "material facts," but here the fact that H

"caused" a business in which W claimed a community interest to purchase a very expensive home after separation, "made the property into his personal residence, and . . . funded the purchase with funds that, because they came from one of the . . . entities, could possibly be characterized as community property" was certainly material. When H told W that he was only leasing the property, he omitted material information about the transaction, not necessarily to the asset acquired, but certainly to the value of the business that footed the bill.

Even more interestingly, the court held that the fact that the requesting party already has the information does not relieve the other spouse from his or her disclosure obligation. In other words, each spouse's disclosure obligation is a stand-alone duty to provide all information required by the disclosure statutes, not simply to provide information that the other party does not have. What makes this even more intriguing is that in its reasoning the court condoned one party's surreptitious copying of documents before separation. It said that "[i]f Elena had not, without Aaron's knowledge, obtained statements from the 401(k) account, Elena may never have found out about the account, and her attorney may not have known to ask Aaron about this asset during the deposition. . . . The trial court might reasonably have inferred that Elena's demonstrated knowledge of the 401(k) account was what prompted Aaron to finally admit to the existence of the asset and that Aaron's conduct was not consistent with his fiduciary duty of disclosure."

Thus, we now have legal support for the "standard" pre-separation advice to gather and copy as much documentary information as possible before separating. Not only does that provide needed information, but it can also prove to be a trap for the other's nondisclosure.

If a party fails to disclose an asset, under *Feldman* it does not matter how much the undisclosed asset is worth in relationship to the entire estate; its nondisclosure is still a breach of duty, particularly if the nondisclosure was part of a pattern. Also, a party breaches the obligation to give "an immediate, full, and accurate update or augmentation to the extent there have been any material changes" as to his assets and liabilities if he fails to disclose material information for "several months." Transactions "in the ordinary course of business" must still be disclosed, because *Family Code Section 2102* "does not contain an exception that exempts a spouse from having to disclose transactions 'in the ordinary course of business.'" The panel said that "(w)e agree with Aaron that as a matter of common sense, a spouse who runs a business is not under a duty to sua sponte update every *insignificant* occurrence in the operation of a business," but where this line is drawn is not clear; the opinion only held that H crossed it.

Notwithstanding that each spouse's disclosure obligation is independent of the other's, the *Feldman* court also emphasized the importance of putting the other party on notice that disclosure will be expected, and also holds that the information about the creation of post-separation entities within the business even potentially owned by the community is necessary. The form of the business matters; the court said in Footnote 18 that because the business entities were privately held corporations, information regarding them was not available to W but was available to H "as a shareholder and manager of the company, giving him a duty to obtain that information in carrying out his duty to provide disclosure about community assets." The court cited *Marriage of Brewer & Federici (2001) 93 Cal. App. 4th 1334, 1345, 113 Cal. Rptr. 2d 849*, in which the Second District held that the spouse in the best position to obtain information about an asset has an affirmative duty to investigate and disclose all information regarding its value, and cannot simply write "unknown" as the value on the final disclosure declaration and thus shift the burden to the other party to do discovery on the issue.

The *Feldman* court also held that the fact that the parties own an interest in an entity that actually owns the assets does not excuse the party holding the shares from disclosing details about the entity. H argued unsuccessfully that because he personally did not own any of the corporation's assets, including its numerous subsidiary entities, he did not have a duty to disclose their existence, although he acknowledged that he was the sole owner of the shares in the corporation and the other entities. He tried to bootstrap the primary management and control language of *Family Code Section 1100(d)* into an exception to the disclosure requirements, but the court said that "(t)he issue of which assets must be *disclosed* under section 2102 is a distinct issue from whether one spouse is permitted exclusive *management and control* of the assets of a business owned by the community."

In another footnote, the court also disagreed with H's argument that Sections 2102(a)(1) and 2104(c)(1) require a spouse to disclose only assets which he or she owns *as an individual*. The holding means that a party must disclose information regarding assets owned by a corporation in which a party owns an interest (or at least owns the entire interest), and such information is certainly necessary to value the community interest therein. That is true even if-as in *Feldman*-the parties dispute the character of the business.

The *Feldman* opinion arose out of a motion to compel compliance with the disclosure obligations, and for sanctions. The trial court granted the full amount of sanctions W requested although it refused her request to order additional sanctions suspended (in part) on the condition that H "read the statutory provisions concerning his duty of disclosure." Apparently, ignorance of the law really is no defense.

Commentary by Hugh T. Thomson

In one of the more important recent cases on the duty to disclose during an ongoing divorce, the court levied on husband $390,000 in sanctions and fees. The question is whether the duty is "voluntary"? I believe so, but in this case the lawyers for the wife were very active and attentive to the case. They took husband's deposition three times, the deposition of a financial manager for husband's corporations, requested a least one production of documents, and followed up with numerous letters, some of them very specific. Although the court in the decision frequently references that a particular letter or request for information made it clear that "Elena . . . desired the information . . ." and "[t]hese requests put Aaron on notice that he had a duty to disclose the information," I believe it would be a mistake to read this case for the proposition that Aaron did not have the duty to disclose even if Elena's attorney had done nothing-had not sent a single letter, taken a deposition, or made a request for production. I do not believe that Elena had to do any of that to be entitled to the information. The duty to disclose, as the court says, is automatic.

This is not to say that diligence is not a good thing. It certainly is better to discover the assets before the case closes than to bring a motion to divide a missed asset. It also certainly makes the obtaining of substantial attorney's fees and sanctions easier, but as counsel for the client who has the superior access to the information, the message I would take from this case is disclose, disclose, disclose. Update, voluntarily, your Asset and Debt Statement when anything of significance occurs. Don't wait to be asked. And don't forget to make business opportunities available to the other spouse before, not after, the fact.

Practice Tip: If you believe the other side is holding out, send a *Feldman* notice. It can go something like this: "Certain facts have come into our possession (you may wish to state what they are) that your client has not disclosed certain assets (real property, bank accounts, etc.) and I am requesting an immediately updated Asset and Debt Statement and an Income and Expense Declaration. This is to put you on notice that pursuant to *In re Marriage of Feldman (2007) 153 Cal. App. 4th 1470*, you have the affirmative duty, without a notice of this nature, to voluntarily and immediately inform me of any material change in your client's financial condition. Failure to do so may subject your client to sanctions and attorney's fees." Obtaining sanctions should not be conditioned upon giving such a notice, but I believe it will facilitate obtaining them.

Commentary by Stephen James Wagner

The *Feldman* opinion is a scholarly opinion addressing not only the plain meaning of *Family Code Section 2107(c)*, but also the disclosure obligations of a spouse after separation. It is a must-read opinion. The dozen holdings by the *Feldman* court are summarized by this commentator in this month's Point of View column. The significant effect and impact on the family law bar and bench will be discussed by this commentator in January 2008. In addition, the duties of disclosure and remedies for nondisclosure are discussed and analyzed in detail in Volume B of Gray and Wagner, *Complex Issues in California Family Law*, Fiduciary Duties-A Practical Approach.

For further discussion

California Family Law Practice and Procedure, 2nd ed., §§ 24.11 (fiduciary duty of spouses, generally), 62.03[4]

(awards of attorney's fees under *Fam. Code § 271*), 92.11, 111.20 (preliminary and final declarations of disclosure), 121.02 (necessity for statement of decision in family law matters); *California Family Law Trial Guide*, Units 2 (drafting initial pleadings), 34 (attorney's fees and costs); *Complex Issues In California Family Law, Volume B, B8.03* (scope, nature, and extent of postseparation fiduciary duties), B11.03 (mechanisms available for enforcing disclosure obligations).

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42 of 42 DOCUMENTS

Wolf, Wagner, Kalemkiarian and Zolla on In re Marriage of Fellows

2008 Emerging Issues 858

Wolf, Wagner, Kalemkiarian and Zolla on In re Marriage of Fellows

By Bernard N. Wolf, Sharon L. Kalemkiarian and Marshall S. Zolla

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SUMMARY: In a unanimous decision, the California Supreme Court relied on a previously unnoticed code section to move the issue of retroactive application of amendments to existing law or the addition of new law to the forefront of consideration by Family Law practitioners. In re Marriage of Fellows is one of the major family law cases of 2006: Bernard N. Wolf, Stephen James Wagner, Sharon L. Kalemkiarian and Marshall S. Zolla provide guidance in assessing how far and how wide the newly important role of Family Code Section 4 will stretch.

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ARTICLE: Amendments to California Family Code Apply Retroactively

Bernard N. Wolf: Section 4 now of Enormous Importance. Prior to *Fellows*, Section 4 was a sleepy provision that had remained quietly nestled in the law books ever since 1994, when the Legislature enacted the Family Code. In light of the Supreme Court's ruling, however, Section 4 will now assume a role of enormous importance for all of us. The big question is how far and wide Section 4 will stretch. We do not know for sure, but we have a few clues:

Exclusion of new mate income in support calculations. In *In re Marriage of Wood (1995) 37 Cal. App. 4th 1059*, one Court of Appeal took note of Section 4 but refused to apply it in the context of new mate income and support under *Family Code Section 4057.5*. The appellate panel wrote that the section was not '...a model of clarity....' The Supreme Court in Fellows has expressly disapproved of this part of Wood. So, we can safely assume that Section 4057.5 applies retroactively.

Amendments to the statutes governing pre-marital agreements. At about the same time the Supreme Court granted review in Fellows, our high court also granted review in In re Marriage of Rosendale, S126908, a case that involved retroactive application of *Family Code Section 1612(c)*. Section 1612(c) currently imposes strong limitations on provisions in pre-marital agreements regarding spousal support. In its order dismissing review of Rosendale, the Supreme Court wrote: 'In light of *Family Code Section 4* and Section 1612, subdivision (c), review in the above-entitled matter is dismissed.' Therefore, we can safely assume that section 1612(c) applies retroactively. In fact, it is likely that all of the amendments to the Uniform Premarital Agreement Act (UPAA), and not merely section 1612(c), apply retroactively as well.

Amendments to the fiduciary duty and disclosure statutes. Several Court of Appeal decisions have refused to apply amendments to the fiduciary duty statutes retroactively. *[In re Marriage of Walker (2006) 138 Cal. App. 4th 1408;* see also *In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428.]* These decisions did not consider the impact of *Family Code Section 4*, nor did they forecast the Supreme Court's interpretation of that statute in Fellows. Therefore, it is possible, although not certain, that the 1. 2. 3. ever-occurring amendments to the fiduciary duty statutes and the disclosure statutes operate retroactively.

Fellows opens up a whole new arena for advocacy, argument, and concern. We must now re-examine the potential retroactive application of specific family law statutes and their amendments in each of our cases.

Stephen James Wagner: Fellows has Far-Reaching Fiduciary Duty Implications. The California Supreme Court has moved to the forefront the issue of retroactive application of amendments to existing law or the addition of new law. *Section 4 of the Family Code* went virtually unnoticed until the appellate decision in *Fellows*. When review was granted, that decision fell off the family law radar; until now. The high court's decision in *Fellows* may have a profound effect on recent legislation, or not. On its face, it certainly creates a 'presumption' that all new legislation and amendments relating to the Family Code are applied retroactively, subject to the exceptions set forth in Section 4 and the *Buol* and *Fabian* lines of cases. This can have far reaching implications, particularly as it applies to the amendments to the family law fiduciary statutes which took place effective January 1, 2002 and 2003. [See Gray and Wagner, *Volume A, Complex Issues in California Family Law, Fiduciary Duties--Nature and Extent*.] In analyzing the effect of *Fellows* and Section 4, the family law bench and bar should pay careful attention to subdivisions (f) and (h) of Section 4. These subdivisions provide:

(f) No person is liable for an action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and the person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences. [Emphasis added.]

(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply

either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference. [Emphasis added.]

In addition, the Supreme Court's holdings in *Buol* and *Fabian* regarding vested property rights must be considered. In *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 224 Cal. Rptr. 333, 715 P.2d 253,* the high court stated:

Thus, retroactive application of section 4800.2 would impair Kathleen's vested property interest.

Impairment of a vested property interest, alone, does not invalidate retroactive application of a statutory measure. Retroactivity is barred only when such impairment violates due process of law (Cal. Const., art. I, § 7). (*Buol, supra, 39 Cal.3d at p. 761; Bouquet, supra, 16 Cal.3d at p. 592.)*

In holding in *Buol* that application of section 4800.1 to dissolution proceedings commenced prior to January 1, 1984, impaired vested property interests without due process, we focused on the considerations first outlined in *Bouquet*: 'the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.' (*Buol, supra, 39 Cal.3d at p. 761.)* Taken as a whole, these factors weigh heavily against retroactive application of section 4800.2.

Retroactive application is not 'necessary to subserve a sufficiently important state interest.' (*Bouquet, supra, 16*

Cal.3d at p. 593) In *Buol*, we surveyed the legislative history of Assembly Bill No. 26, which contained both sections 4800.1 and 4800.2, and concluded that the significant state interest that compelled retroactivity in *Bouquet* and *Addison*, that of promoting 'equitable dissolution of the marital relationship' by curing a 'rank injustice' in the law, was lacking. It is also absent in the instant case. [Emphasis added.]

Given the significant legislation passed in 2001, effective 2002 (AB 583), and in 2002, effective 2003 (SB 1936), affecting the fiduciary duties and disclosure obligations of spouses, *Fellows*, *Buol*, *Fabian* and *Section 4 of the Family Code* promise to create interesting issues in the years to come.

Sharon L. Kalemkiarian: Child Support Judgments Will be Enforced! Pay your child support. Pay your child support. Pay your child support. The message of the Supreme Court in *Fellows* is this: all of you 'fellas and gals' out there who owe support--your judgment will be enforced if you have not paid. You cannot escape your obligation to pay support--even if 17 years have passed, and you have some facts supporting your contention that you paid, and the trial Court finds that the payee slept on his or her rights or behaved badly. There are some very interesting points of statutory interpretation here, and for those practitioners who were engaged in the practice of law in domestic courts when the Family Code was enacted in 1992, you will enjoy the historical perspective. The facts of the case gave the Supreme Court a perfect platform to extend the enforceability of child support judgments and get the money to kids when the trial court finds that someone has not paid. In this case, a child support order had been made 17 years before. A New York court ordered Father to pay $ 50 a week in child support to Mother. Mother registered the order 17 years later in California, claiming that $ 26,000 was owed plus interest. Father sought to vacate the order, and also claimed that he had made all payments. Mother said no--and the Court ordered arrearage payments of $ 20,800. Father sought to raise the laches defense, and the trial court opined that he had met his burden of proof as to laches. However, the Court pointed to *Family Code Section 4502*, indicating that the defense of laches, since 2002, was only available as to any portion owed to the State. In this case, the money was all owed to Mother. Father claimed that since his obligation occurred before that date, he should be able to raise the defense of laches--after all, the law did not change until 2002 and his obligation arose from a 1985 order. Both the Appellate Court (3rd District) and the Supreme Court disagreed. They concluded that the Legislature intended the 2002 change in the law regarding the defense of laches to be retroactive, relying upon *Section 4 of the Family Code*. I guess you had to be there when the Code was enacted--because I find the language of Section 4 hopelessly circular. But it is clear what result the Supreme Court thought was consistent with the Legislature's consistent message that child support should be collected, and the judgment can be enforced at any time until paid in full. In fact, the recent change regarding enforceability of Family Code judgments (see discussion of AB 2126, chaptered legislation, in this issue as well) is in keeping with the direction of the law in this area. If there is a judgment in family court--it is going to be enforceable, especially if it goes to child support. And so it should be.

Marshall S. Zolla: Fellows may Change the way Family Law Statutes are Interpreted. *Family Code Section 4* is not customarily high on the checklist of most family law practitioners. It is now. *Fellows* is about retroactivity. It is a California Supreme Court case. It is important. *Consider In re Marriage of Rosendale (2004) 119 Cal. App. 4th 1202*, in light of the *Fellows* holding. The Court of Appeal in *Rosendale* held that *Family Code Section 1612(c)* precludes enforceability of a waiver of spousal support in a Pre-Nuptial

Agreement if the waiver is unconscionable *at the time of enforcement* and applied to a Pre-Nuptial Agreement executed before its effective date. *Rosendale* reasoned that a statute may apply retroactively if it clarifies, but does not change, existing law. On October 13, 2004, the California Supreme Court granted review in the *Rosendale* case. The grant of review vacated the Court of Appeal opinion. On July 13, 2005, the Supreme Court dismissed review in *Rosendale* in light of *Family Code Section 4* and Section 1612. After an order dismissing review, appellate opinions remain unpublished unless the Supreme Court orders otherwise, which it did not. Has *Fellows* brought *Rosendale* back to life? Does *Family Code Section 1612(c)*, which precludes enforcement of a waiver of spousal support in a Pre-Nuptial Agreement if unconscionable *at the time of enforcement*, apply to Pre-Nuptial Agreements executed before January 1, 2002, the effective date of the statute? The legislative history of Section 1612(c) reveals that the Legislature intended to *clarify*, rather than change, existing law. *Fellows* reaffirms prior case law that provides that a statute that *clarifies*, rather than changes, existing law 'may be applied to transactions pre-dating its enactment without being

considered retroactive' because it 'is merely a statement of what the law has always been' *[Riley v. Hilton Hotels Corp. (2002) 100 Cal. App. 4th 599, 603.]* This can be interpreted to mean that the 'Anti-Pendleton' legislation, encompassing amendments to *Family Code Sections 1612* and *1615*, all effective January 1, 2002, could arguably now be applicable to Pre-Nuptial Agreements executed prior to that date. The Supreme Court opinion in *Fellows* can be read to change the way family law statutes are interpreted. *Fellows* reaches beyond its application of *Family Code Section 4502(c)*, retroactively disallowing a laches defense to payment of child support. The unanimous *Fellows* opinion authored by Justice Corrigan could be, should be, and will be, one of the major family law cases of 2006. Put it on your checklist.

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Bernard N. Wolf, a Certified Family Law Specialist, maintains a law practice in San Francisco (*Law Offices of Bernard N. Wolf*) concentrating on family law and civil appeals. Among the published decisions in which he has appeared as counsel before the California Supreme Court are: *In re Marriage of Epstein*; *Kumar v. Superior Court*; *In re Marriage of Assemi*; and *In re Marriage of Lehman*. Among the published decisions in which he has appeared as counsel before the California Court of Appeal are: *In re Marriage of Kieturakis*, *In re Marriage of Nelson*, *In re Marriage of Green*; *In re Marriage of Cream*; *In re Marriage of Bergman*; *In re Marriage of Macfarlane & Lang*; *In re Marriage of Biddle*; *In re Marriage of Horowitz*; and *In re Marriage of Anderson*. He is a regular consultant to Matthew Bender's *California Family Law Monthly*.

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