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RETROACTIVITY OF FAMILY CODE SECTION 70*

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Introduction

On July 20, 2015, the California Supreme Court issued *In re Marriage of Davis*, 61 Cal. 4th 846 (2015) (*Davis*). For the purpose of determining when a couple is "separated" and thus no longer acquiring community property, *Davis* adopted the reasoning from *Norviel*[1] and construed the phrase "living separate and apart" as requiring that the parties occupy separate residences. Consistent with *Norviel*, footnote 7 of *Davis* concedes that it did not consider whether there *could* be circumstances in which a court could find that parties were "living separate and apart" even if they occupy the same residence, as it did not need to reach that question in the case. However, *Davis* has been universally interpreted as requiring separate residences as a threshold to "separation."

After the Supreme Court issued its opinion in *Davis*, the family law bar was unified in its effort to address the bright-line test announced in the decision and in seeking to overturn the threshold requirement for "separation" that parties no longer reside under the same roof to prove "separation" first announced by the Sixth District in *Norviel*. After months of meetings and discussions, a committee of family law practitioners proposed legislation to overturn *Davis* and return the law to its pre-*Davis* state, which is to give judicial officers discretion to determine a date of separation based on all relevant factors.

The committee refined its proposal, found a sponsor, and Senate Bill (SB) 1255 was introduced on February 18, 2016. After several amendments, the Governor signed it on July 25, 2016. It enacts new Family Code section 70[2] effective on January 1, 2017. This new section expressly rejects the holdings in *Davis* and *Norviel* in favor of the trial court's exercise of discretion in making a factual determination about when the parties separated based on the totality of the circumstances.

The legislative history reveals that the author of SB 1255 abandoned the automatic retroactivity language to leave retroactivity to a case-by-case determination under Family Code section 4, which was viewed as preferable to ensure that people who are currently separating would be able

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to avail themselves of the new law. As enacted, section 70's legislative history leaves the issue of retroactive application to the trial court under section 4(h). Whether this legislative intent will survive a constitutionality challenge is the subject of this article.

Section 4: The Family Code's Retroactivity Presumption

The Family Code contains an automatic retroactivity provision for additions to the Code. Section 4 was enacted effective January 1, 1994, as part of the new Family Code. Section 4(a)(2)(B) defines "new law" as, among other things, any "act that makes a change in this code, whether effectuated by amendment, addition, or repeal of a provision of this code." According to section 4(c),

> (s)ubject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action.

So, all Family Code amendments apply to cases pending as of its effective date regardless of when the actions in question took place, unless the enacting legislation specifically states otherwise. Subsection 4(h) provides an escape hatch:

> 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.

The question is, in cases pending as of January 1, 2017 in which the date of separation has not yet been decided, whether the court has the discretion to apply new section 70 to determine that they separated on some date before January 1, 2017, even though they were still living in the same residence. In other words, must the court decide all date of separation issues in cases pending as of January 1, 2017, with pre-2017 "separation facts" under *Davis,* or can it apply new section 70 "retroactively" to determine the separation issue under facts occurring prior to its effective date?

Family Code section 4(c) presumptively authorizes the court to do so unless it finds that section 4(h) applies, i.e.,

> 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 existence of this retroactivity rule and the exception means that there is the potential for two rules for the date of separation—the bright-line *Davis* rule and the totality of the circumstances specified in section 70—for similarly situated parties based on the court's factual determination of whether to apply section 4(h) and thus refuse to apply section 70 retroactively.

In *Fellows*,[3] the high court addressed whether Family Code section 4502(c) [disallowing the laches defense to a support obligation] applied retroactively and barred a payor parent from relying on laches to defend an action to enforce a child support order. In its analysis, the *Fellows* court considered the effect of section 4, holding that the Legislature enacted the section intending to change the general rule against retroactivity absent specific retroactivity language in a

statutory enactment. Thus, it held that under the section, "as a general rule, future changes to the Family Code apply retroactively." *Fellows*, 39 Cal. 4th at 186.

The panel then held that none of the exceptions to retroactivity in section 4 applied to the statute at issue. Citing *Fabian*,[4] *Bouquet*[5] and *Heikes*,[6] it analyzed the statute using the *Bouquet* factors, discussed below. It found a compelling state interest in preventing support payors from escaping justice by hiding from the child support system long enough to gain the defense of laches to shield them from paying child support. It also held that Mr. Fellows did not reasonably rely upon the former law of laches, nor did retroactivity impermissibly restrict his due process rights, citing section 4(h). Thus, the existence of section 4(h)'s "escape hatch" rendered section 4(c) constitutional where there is a compelling state interest behind the "new law" and no reasonable reliance on the "old law."

How will courts evaluate retroactivity of section 70 under these cases? Arguably, the analysis under section 4(h) is essentially the same as the *Bouquet* factors, so although there is a presumption that the section will apply retroactively, the only practical effect will be to frame the issue as a section 4(h) argument rather than simply a general challenge to retroactive application. This will shift the burden of persuasion to the party challenging retroactive application of the new statute, i.e., the party who wants the court to apply *Davis* to the facts regarding the parties' separation occurring before January 1, 2017, rather than the "traditional" burden on the party arguing in favor of retroactive application where the presumption was against such application. In sum, section 4 simply switches the burden of proof, but the standards under which the court decides the issue will most likely be the same. Therefore, it is vital that counsel be aware of these factors and consider how they play out in a date of separation context.

The History of Retroactive Application of Family Law Statutory Enactments

California intermediate appellate decisions and California Supreme Court decisions have often addressed the question of whether statutory enactments can withstand constitutional scrutiny if retroactively applied in the family law setting. In *Addison,*[7] the California Supreme Court addressed challenges to the quasi-marital property statute when applied to a division of property upon dissolution of marriage as distinguished from its application to inheritance rights. The trial court had held that the quasi-marital property statute was unconstitutional. In reversing, the *Addison* majority held that the state has an inherent interest in proceedings involving marital relations, including protection of children, protecting support and property rights, and enforcing marital responsibilities.

Husband unsuccessfully argued that the change in the quasi-community property law occurred after the filing of the dissolution proceeding and prior to judgment, and thus deprived him of property without due process. In what may be overly-broad language, the *Addison* majority held that the change in the law was being applied *prospectively* and that the law at the time of judgment is controlling, and remanded for further proceedings concerning the application of the quasi-community property law then in effect.

The next serious challenge to the retroactive application of family law statutes in the modern era occurred when the Legislature eliminated the concept of gender-based discrimination between husband and wife. The question of constitutional retroactivity that had the effect of depriving wife of a property right came before the Supreme Court when it decided *Bouquet*. Under older statutes, after separation, the wife's acquisitions became her separate property[8] but the husband's remained community property. Amended Civil Code section 5118 extended equal treatment of post-separation earnings and acquisitions to the husband. In *Bouquet*, the statute was amended after the petition was filed but before entry of the interlocutory judgment.

The court recognized the clear nexus between the issue of the date of separation and property rights, which are foundational elements of the California community property system. However, it also recognized the policy limitations on challenges to statutes based on their retroactive application. Simply put, this "hands off policy" assured that the intent of the Legislature be given effect so long as it does not offend constitutional principles. *Bouquet* opines that the older version of Civil Code section 5118 blatantly discriminated based on gender by protecting the wife's earnings as her separate property while not extending the same protection to those of the husband. Gender-based classifications are inherently suspect, so the immediate question was whether such classifications advance a legitimate state interest. The *Bouquet* court noted that in *Addison*,

> (t)he application of the quasi-community property legislation to property acquired before its effective date clearly impaired the husband's vested property rights; prior to the enactment of the legislation he had been the sole owner of certain property and afterwards the property belonged to the community. Nevertheless, we deemed the retroactive application of the legislation a proper exercise of the police power. The state's paramount interest in the equitable distribution of marital property upon dissolution of the marriage, we concluded, justified the impairment of the husband's vested property rights. [n. omitted.]

Holding that "(t)he infringement of the wife's vested property rights in this case finds support in the same state interest that justified the retroactive application of the legislation in *Addison*," the *Bouquet* panel unanimously held that the newly-enacted Civil Code section 5118 applied to the case. Newly enacted section 70 contains no gender-based classification. Therefore, it does not raise the same social interest as equal application of the law based on gender present in *Addison* and *Bouquet*. Thus, if section 70 offends constitutional restrictions, it does so on different grounds than were presented in *Bouquet*.

Bouquet did discuss the question of whether retroactive application of amended section 5118 constituted an unconstitutional deprivation of the *wife's* property rights, noting that retroactive application of this change in the law "denudes the wife of certain vested property rights."[9] To determine whether retroactivity offends the due process clause,

> we consider such factors as 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**.[10] Emphasis added.

These tests are restated in many post-*Bouquet* cases and can be summarized as:

- ***Significance of State Interest***: As demonstrated, merely affecting a property right generally does not justify retroactive application;
- ***Importance of Retroactivity:*** The change in Civil Code section 5118 cured a rank injustice in the law based on the suspect gender-based discrimination between husbands and wives;
- ***Legitimacy in Reliance upon Former Law***: While stated, no court, including the *Bouquet* court, easily addresses this factor. If reliance upon the former law constitutes reliance upon an unfair provision, the reliance may not be legitimate;
- ***Extent to which Actions are Taken on the Basis of the Reliance***: This factor calls for a factual determination, but no such determination was made in *Bouquet*. The burden to show reliance upon the former law rests with the person challenging it, and in *Bouquet,* wife was not able to demonstrate the extent to which she relied upon the prior law. This may be an important consideration in challenges to section 70's retroactive application. Counsel seeking to rely on the bright line test from *Davis* should be prepared to show the extent of their client's reliance on the prior law in the event a court is inclined to apply section 70 to a separation that occurred before January 1, 2017, under section 4(h);
- ***Extent to which Retroactive Application of the New Law Disrupts those Actions***: As with the reliance factor, the person challenging prospective application of the new "totality of the circumstances" approach contained in section 70 should be prepared to present evidence on the potential for disruption of actions undertaken in reliance on *Davis*.

Applying the *Bouquet* analysis to the retroactivity of new section 70, the question is whether couples who organized their financial affairs under *Davis* assuming that they would not be separated as long as they continued living under the same roof had a legitimate interest in relying on *Davis's* bright-line living-apart standard.[11] Can section 70 be challenged as unconstitutional as applied, or does section 4(h) give the court sufficient discretion to decide that retroactive application of section 70 offends the rights of a particular spouse in a given situation? And by what standard will the new rule be applied to earlier separations?

The next serious challenge to the retroactive application of a family law statute came in response to a fairly common problem. What happens to the separate property contribution of a spouse who invests his/her separate property into an asset taken in joint names? *Lucas*[12] permitted reimbursement to the contributing spouse only if he or she could demonstrate an agreement or understanding that his/her separate property was protected. Unsettled by this holding, the Legislature quickly enacted Civil Code sections 4800.1 (now Family Code section 2581) and 4800.2 (now Family Code section 2640).[13]

These statutes purported to overrule the portion of *Lucas* that denied reimbursement of any separate property contribution to the acquisition of a jointly titled asset in the absence of an agreement or understanding for reimbursement. *Lucas* subordinated any right of reimbursement to the title presumption absent evidence of an agreement or understanding. When the Legislature stepped into this issue and drafted proposed Assembly Bill 26 to enact section 4800.2, it asked the Law Revision Commission (LRC) to comment. The LRC ultimately issued a report noting that the new statute overruled the *Lucas* interpretation of the Civil Code section 5110 presumption and other community property presumptions by permitting a party to recover separate property contributions to the acquisition of the property through a reimbursement right at dissolution of marriage. The statutes went into effect on January 1, 1984. The legislation was classified as a legislative policy decision; there was little or no discussion of how retroactive application would impact parties' property rights.

In response to these enactments, the Supreme Court held in *Buol*[14] that section 4800.1 could not be constitutionally applied to cases pending on its effective date because so applied, the section impaired vested property rights without due process. The *Buol* court applied the reasoning from *Bouquet* and found that the impairment of property rights resulting from this retroactive application was not constitutional because it deprived parties of property rights that vested at the time of the *acquisition* of the property in question and that the change in the law could not permissibly be applied to adversely affect those rights at the time of the *division* of the asset. Moreover, held the court, under the *Bouquet* standards the enactment of section 4800.1 did not cure a rank injustice such as gender-based discrimination.

The Fourth District decided *Lachenmyer*[15] after *Buol*, and observed that the rule derived from *Addison* and *Bouquet* prohibited legislative interference with vested property rights absent the need to protect the health, safety, morals, and general well being of the people.[16] In *Addison,* the court permitted retroactive application of changes in the law concerning quasi-marital property while *Bouquet* upheld retroactive application of laws protecting the separate property rights of husbands with the same protection previously afforded only to the wife. In both of these settings,

the Supreme Court was satisfied that retroactive application cured a rank injustice inherent in California property division laws.

In contrast, in *Lachenmyer*, the panel held that under *Buol*, the application of section 4800.2's reimbursement right to separate property contributions made prior to its effective date would provide the contributing spouse with a "windfall to which he was not entitled when the community property interest was created," and that the non-contributing spouse's "vested community property interest not subject to reimbursement cannot constitutionally be impinged by retroactive application of section 4800.2." In other words, the non-contributing spouse had a vested right in NOT having to reimburse the other for the contribution, and would lose property if required to do so.

The *Lachenmyer* court considered how retroactive application of the statute would unsettle the actions of parties that had taken action presumably in reliance on the former state of the law. As applied retroactively, the statute would change the rules by which those acquisitions of property were analyzed and divided. The *Lachenmyer* court determined that retroactive application of the reimbursement rights under section 4800.2 did nothing to protect the state's interest in a fair division of the marital estate. It observed:

> Retroactive application of section 4800.2 only minimally serves the state interest in equitable division of marital property in cases such as this where the character of the property as community property is undisputed and the sole question is reimbursement. The section changes the rules of the game by adding a writing requirement with which it is impossible to comply and which the Supreme Court deemed constitutionally infirm in the context of section 4800.1 in *Buol*. The section's due process violation is compounded by the reversal of the presumption itself and the new requirement of an agreement for nonreimbursement where none at all was required before. This makes for a stronger case than in *Buol* where retroactive application of section 4800.1 would have vitiated the parties' oral agreement establishing the house as separate property, which the trial court found to be valid and enforceable under existing law. (*Buol*, *supra*, 39 Cal.3d at p. 763.) Section 4800.2's reversal of the presumption of gift and its addition of the requirement of a writing to waive the right to reimbursement serve to make the new 4800.2 presumption more conclusive when applied retroactively than that of 4800.1. (*See Buol*, *supra*, at pp. 757-763.)[17]

In *Fabian,* the high court commented on the history of section 4800.2's enacting legislation, stating that the section was intended to provide a fair result by reimbursing a party's separate contributions regardless of when those contributions were made, as long as the court proceeding occurred after the enactment date.[18] The *Fabian* court found this "time of division of property" rule undermined a vested property right based on the "time of acquisition."[19] For this reason, it deemed section 4800.2 unconstitutional if applied retroactively to transactions occurring before January 1, 1984, its effective date. The case was "pending" for this purpose if the issue had not yet been adjudicated, if the court expressly reserved jurisdiction to make the adjudication, or if the adjudication was still subject to appellate review.

The *Fabian* court denied retroactive application of section 4800.2, holding what *Lachenmyer* had—that because of the state of the law at the time the contribution was made, wife had a vested property interest in the asset without reimbursement and could not be deprived of that interest by subsequently-enacted legislation absent some compelling state interest, which was lacking. In sum, by applying a different set of criteria for division of property retroactively, a party was deprived of a property right for reasons that could not withstand scrutiny, and the situation was made even more unfair by the retroactive application to facts that had been determined by the trial court based on the *Lucas* standard, and which, as urged by the husband, should be reviewed under section 4800.2.

From these cases, it is plain that when the Legislature acts to cure what it thinks is a rank injustice in a family law property decision such as *Lucas,* or a property-impacting decision, a reviewing court will not necessarily agree. *Lucas* only determined the parties' property rights based on the law as found by the court. Not surprisingly, in *Buol* and *Fabian* the court did not find that a rank injustice was in fact being cured by the Legislature's attempt to overturn *Lucas;* they held that retroactive application only minimally served to advance the state's interest in property division upon dissolution (citing *Buol*, 39 Cal. 3d at 761) and refused to retroactively apply sections 4800.1 and 4800.2. To state it bluntly, to apply the statutes retroactively, the high court would have had to admit that its decision in *Lucas* perpetrated a rank injustice. Obviously, it was not willing to do so.

Does the same logic apply to the retroactive application of section 70, which was intended to overturn *Davis* where the case was tried based on the state of the law at the time of trial? More to the point, if a family law court applied the section retroactively under section 4(c), would the Supreme Court be willing to reverse that ruling and prohibit retroactive application if doing so would require it to hold that its decision in *Davis* had perpetrated a rank injustice that section 70 cured? The *Fabian* court observed:

> Retrospective legislation, however, may not be applied where such application impairs a vested property right without due process of law. (*Buol*, *supra*, 39 Cal.3d 761.) As was true in *Buol*, the unconstitutional impairment in the present case is manifest.
>
> …
>
> The legislative history reveals two concerns: the need for a community property presumption affecting joint tenancy property to aid the courts in the division of marital property, and an unexplained desire to abrogate the rule, attributed solely to *Lucas*, *supra*, 27 Cal.3d 808, that precluded recognition of the separate property contribution of one of the parties to the acquisition

of community property. (Sen. Com. on Judiciary Rep. on Assem. Bill No. 26 (July 14, 1983) 3 Sen. J. (1983 Reg. Sess.) pp. 4865-4867.) Implicit in the later concern appears to be a legislative judgment that it would be fairer to the contributing party to allow separate property reimbursement upon dissolution.

This perceived need for reform does not, however, represent a sufficiently significant state interest to mandate retroactivity. The rank injustice of former law that we identified in *Bouquet* (former law made only the wife's postseparation earnings separate property) and in *Addision* (lack of protection for the innocent spouse prior to passage of quasi-community property law) is not apparent. Prior to adoption of section 4800.2's right to reimbursement, the spouse contributing separate property to the acquisition of a community asset could readily preserve the separate property character of the contribution by agreement, either written or oral, with the other spouse. Absent such an understanding, it could reasonably be assumed that by investing in a community asset, the contributing spouse intended to bestow a permanent benefit on the community. In leaving the agreement option open to the contributing spouse, prior law was not inherently inequitable or unfair.

Absent patent unfairness in the former law, retroactivity of section 4800.2 is wholly unnecessary. As noted in *Buol*, the record is silent as to why the Legislature sought to make the statute applicable to those dissolution proceedings already underway at the time of enactment. (39 Cal.3d at p. 761.) We find no discernible benefit to the state's interest in the equitable dissolution of the marital partnership in such retroactivity.

...

The disruptive effect of retroactive application of this type of statutory change is keenly felt in this area of the law. "The net effect of retroactive legislation is that parties to marital dissolution actions cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then applicable law." (*Buol, supra*, at p. 763, quoting *In re Marriage of Taylor* (1984) 160 Cal.App.3d 471 (Sims, J. dis.).) In the interest of finality, uniformity and predictability, retroactivity of marital property statutes should be reserved for those rare instances when such disruption is necessary to promote a significantly important state interest.[20]

It is entirely possible that the high court would be equally as reluctant to hold that *Davis* perpetrated a "patent unfairness" that was cured by section 70. That would make it unlikely that it would rule against the retroactive application of section 70 under section 4(c) or uphold a trial court's denial of retroactivity under section 4(h). In short, however the retroactivity issue is presented, it is more likely that the Supreme Court will uphold retroactivity than deny it.

After *Fabian,* the Legislature attempted to articulate a basis for retroactivity when it modified section 4800.1 by adding codified language of intent calling for uniform treatment of property by returning to the separatizer the property regardless of the date of acquisition of the property. This attempt failed. This development, and the questions it left unanswered, were summarized by the Fifth District in *Griffis*.[21] *Griffis* followed *Fabian* and held that regardless of what the Legislature said or intended, the spouse of a party who made a separate property contribution to a community property acquisition prior to January 1, 1984, had a vested interest in the property being community without being subject to a reimbursement right, and that there was no state interest here compelling enough to override that interest. *Griffis* focused the analysis on when property rights accrue and recited the axiomatic principle that rights generally accrue at the time of acquisition. Is the law at the time of acquisition different in the date of separation setting?

The most recent discussion of the issue occurred in *Heikes*, in which the Supreme Court once again held that the court could not constitutionally apply Family Code section 2640(b) to separate property contributions made prior to January 1, 1984, the effective date of former Civil Code section 4800.2. It discussed *Buol* and *Fabian* as well as *Griffis* and chastised the trial court for failing to follow them and for instead finding a factual distinction because the dissolution proceeding had been commenced after January 1, 1984, although all of the contributions at issue were made before that date. It concluded that although the Legislature had amended the section to state a compelling state interest in applying the section retroactively,

> (t)he Courts of Appeal, however, held that even the expanded legislative recitals in the new version of section 4800.1 were insufficient to demonstrate the compelling state interest found lacking in *Fabian, supra*, 41 Cal.3d 440, 224 Cal.Rptr. 333, 715 P.2d 253. Accordingly, they continued to reject claims for reimbursement under section 4800.2 for contributions to community property made from separate property before January 1, 1984, as violative of due process, even in proceedings that had commenced after that date and had not culminated in any judgment before January 1, 1987.
>
> Apart from the case now under review, the foregoing six published decisions appear to be the only ones that have considered the constitutionality of requiring reimbursement of pre–1984 separate property contributions to community property under the post-*Fabian* modifications of section 4800.2. All six hold that retroactive application of the reimbursement requirement would violate due process. Yet, the present Court of Appeal refused to follow those decisions because of what it correctly characterized as "dictum" by this court in *In re Marriage of Hilke, supra*, 4 Cal.4th 215, 14 Cal. Rptr.2d 371, 841 P.2d 891 (hereafter *Hilke*).[22]

Among other things, the panel said that "to let the retroactive application of section 4800.2 depend upon factual

variations in particular parties' actual reliance on prior law would unacceptably undermine the public interest in establishing uniform, predictable rules for the division of marital property." The same argument can be made with regard to retroactive application of section 70.

Prior to January 1, 2017, under *Davis*, parties are generally not "living separate and apart" unless they live in separate residences absent application of a footnote 7 exception for couples who continue to reside in the same residence. As of January 1, 2017, under section 70, the court has discretion to hold exactly the same thing, but also has the discretion to hold that they were "living separate and apart" as a result of other considerations even though they were still living in the same residence. The core question is whether or not this change in the law, if applied to cases pending as of January 1, 2017, operates to deprive a party of vested property rights without due process, or whether this is simply an expansion of the trial court's discretion to consider various factors.

If the parties' separation date under *Davis* and its bright-line determination would be January 1, 2015, but based on the retroactive application of section 70, the trial court had *discretion* to determine the date of separation was an earlier date, say January 1, 2014, while they were still living in the same residence, does one spouse have property rights that are substantially changed and that cannot be preserved or protected by the parties themselves? Moreover, should families be subject to different rules concerning how a particular judge decides the date of separation based on his/her exercise of discretion?

Parties typically try the date of separation issue because of the financial impact of determining when the community property acquisition presumption terminates. Do property rights vest under the law differently for one family as compared to another based on which rule the trial court decides to apply? Is this uniform treatment of property rights permissible simply because the Legislature shields it under section 4(h)? There are presently no answers to those questions.

No other issue in family law better defines the status of a relationship and which presumption will apply than the concept of date of separation, because it affects all families regardless of their economic status or the size, extent, and complexity of their community estate. Acquisitions between the date of marriage and the date of separation are presumptively community property and acquisitions after the date of separation are not. These core concepts apply to things as small as a monthly contribution to a 401(k) or credited service to a defined benefit pension plan and to things as significant as an ownership interest in a family residence or as complex as a stock option. Moreover, property rights vest (in the family law sense of "vesting" as not subject to a condition precedent) at the time of acquisition.

Buol and *Fabian* both decried the attempt to change the rules concerning events that happened at an earlier time (the impact of retroactivity). Also, the *Davis* court simply interpreted legislative intent in requiring that spouses "live separate and apart" and thus announced what the law had always been, namely that physical separation was the hallmark of living separate and apart. By moving away from the bright line test *Davis* announced was the law by enacting section 70, the Legislature is redefining the method by which courts determine if a couple is separated by changing the analysis. It defines "date of separation" as

> the date that a complete and final break in the marital relationship has occurred, as evidenced by both of the following: (1) The spouse has expressed to the other spouse his or her intent to end the marriage. (2) The conduct of the spouse is consistent with his or her intent to end the marriage.

Expressing the intent to end the marriage to the other spouse has always been one of the factors cited by the courts, but it has never been *required* as it will be after January 1, 2017. Arguably, this constitutes a change in the requirements for establishing a separation date, but does that requirement, by itself, alter a party's property rights?

It is easy to imagine how parties acted differently in reliance upon *Davis*. For instance, a party is concerned about whether she is separated from her spouse because her husband remains in the residence. She is ambivalent because they are not getting along, but she does not want to be separated because he has a substantial upcoming bonus. She consults with counsel and learns that if they are living under the same roof, it is extremely likely under *Davis* that the court will determine they are not living apart and they are not separated. Because there is no other reason to press him to move out (such as domestic violence, substance abuse, or other mistreatment of her or the children), she abandons the plan to ask him to move out. She relied upon the state of the law under *Davis* and did not press her husband to move out, preferring instead to enjoy the benefit of the presumption that the bonus would be characterized as community property.

At trial after January 1, 2017, the court may choose to apply section 70 retroactively or choose to refuse to do so under section 4(h). Its decision will hugely impact Wife in that if *Davis* applies and not section 70, the bonus would be community property. If section 70 applies retroactively and the other factors indicate an earlier separation date notwithstanding that the parties remained under the same roof, the bonus would be entirely Husband's. How is this materially different from the results eschewed by the *Buol* and *Fabian* courts in applying the *Bouquet* test of reliance upon the former law? Indeed, this is the very disruptive about-face discussed by the *Fabian* court in denying retroactive application of section 4800.2 because of the effect of "turning the tables" on a party who relied on the former law.

On the other hand, parties can use the *Davis* bright-line rule as a weapon. Absent a residence exclusion order, nothing prevents a spouse who learned about *Davis* from moving back into the family residence in 2016 for the sole purpose of "re-establishing" the community and later arguing that the other spouse's acquisitions for what may have been years of living apart now belong to both of them. In this action, the other spouse may see an opportunity for a reconciliation, not

knowing the other's design, or the "moving in" spouse may actively mislead the other into believing they are reconciling. Given that there can be only one date of separation and no interim separations,[23] a court prohibited from applying section 70 retroactively would be unable to address the inequity caused by the spouse's intentional actions taken only to gain an interest in property while the other spouse remained in ignorance of *Davis*, which requires this result. Is it a breach of fiduciary duty to intentionally "resume marriage" when the existing law is clear that by doing so, he or she gains property? Probably not, particularly given the strong public policy in favor of marriage.

The essence of the argument for or against retroactivity is whether the "new law" *actually changes property rights,* or whether that is simply a consequence of a *procedural* change. The law under *Davis* defined the requirements for "separation"—move out of the residence and objectively manifest an intention to be living separate and apart—for parties who wanted to avail themselves of the protection afforded by separation (i.e., the cessation of presumptive increase in the community estate for acquisitions after separation). Section 70 does not change the parties' rights to an equal division of the community estate or the protection of their separate property. Rather, it changes the *factors* that the court can use in determining when the community property presumption no longer applies.

In reality, all that section 70 does is extend the court's discretion to hold that "residing together" is only one factor, rather than a threshold requirement, when determining "separation." Does the extension of the trial court's discretion deprive the parties of vested property rights analogous to mandating reimbursement for separate property contributions to community assets when, under prior law, no reimbursement was permitted absent an agreement? Arguably not.

What remains unchallenged in any case is whether the trial court's discretion under section 4 has the potential to result in different treatment of different families with the same facts and if so, whether that is reason enough to preclude retroactive application. By what standard is this measured? *Velez*[24] discussed the retroactive application of statutes concerning domestic partnership; and it reminded us that: "'A right is 'vested' when it is 'already possessed' or 'legitimately acquired.'"[25] Property rights presumptively vest as community or separate property based on the date of separation. "The character of property as separate or community is determined at the time of its acquisition." *See v. See*, 64 Cal. 2d 778, 783 (1966).

For a variety of reasons, parties often plan when they will separate long before the actual separation. Such reasons include the property example given above, the impact on the children or other family members, or an intervening family crisis such as a child's illness, a spouse's illness, or a death in the family. Couples have an interest in intelligently planning the settlement of their affairs regarding their financial and relational affairs with the same certitude about their date of separation. Given the social interest in finality, uniformity, and predictability, retroactivity of family law statutes should be reserved for those rare instances when such disruption is necessary to promote a significantly important state interest. Arguably there is no such interest in applying section 70 to couples who separated before January 1, 2017. Thus, trial courts should avoid the temptation of "being a rule unto themselves" by applying section 70 retroactively under section 4(c).

On the other hand, the Legislature enacted a presumption in favor of retroactivity in section 4(c). Is that sufficient notice to parties—who are "presumed to know the law"[26]—that the rules can change at any time? It appears as if the Legislature intended that the longstanding retroactivity analysis would proceed by way of an argument under section 4(h), but whether such a challenge will be successful, and upheld on appeal, remains to be seen.

Conclusion

As someone once said, there are no easy answers, only intelligent choices. Any time the Legislature changes the rules, it is our job to test those changes and seek to apply or not apply them according to the facts and our client's interests. The enactment of section 70 was widely supported by the family law bar, if only because the court's discretion in sensitive issues of marital separation is seen as better than a bright-line rule. Such rules may make outcomes easier to predict, but do not necessarily further justice. How the courts apply the new section remains to be seen, but it will surely be interesting to watch.

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* The opinions expressed herein are for educational purposes; and are not an expression of how a judge would or should rule on a particular issue.

1 *In re Marriage of Norviel*, 102 Cal. App. 4th 1152 (2002).

2 Further unspecified statutory references are to the Family Code.

3 *In re Marriage of Fellows*, 39 Cal. 4th 179 (2006).

4 *In re Marriage of Fabian*, 41 Cal. 3d 440 (1986).

5 *In re Marriage of Bouquet*, 16 Cal. 3d 583 (1976).

6 *In re Marriage of Heikes*, 10 Cal. 4th 1211 (1995).

7 *Addison v. Addison*, 62 Cal. 2d 558 (1965).

8 Among other things, the court recognized that the date of separation clearly impacted property rights.

9 *Bouquet,* 16 Cal. 3d at 592.

10 *Id.* at 593 (emphasis added).

11 A separate question is whether or not a party has a fiduciary duty to clearly announce his or her intention to be separated while still living together. Under what circumstances, and to what extent, the failure to state an intention to be separated constitutes a breach of a fiduciary duty is beyond the scope of this article, but it does raise a legitimate question for parties, and most certainly for counsel who are advising parties who continue to reside under the same roof.

12 *In re Marriage of Lucas*, 27 Cal. 3d 808 (1980).

13 A robust discussion of the property provisions of section 4800.2 and how those differ from changes in section 2640 is beyond the scope of this article. Readers are invited to consider GRAY

& WAGNER, COMPLEX ISSUES IN CALIFORNIA FAMILY LAW, Vol. D, *Tracing Separate and Community Funds*, § D3.05 (Matthew Bender 2016).

14 *In re Marriage of Buol*, 39 Cal. 3d 751 (1985).

15 *In re Marriage of Lachenmyer*, 174 Cal. App. 3d 558 (1985).

16 *Bouquet*, 16 Cal. 3d at 592.

17 *Lachenmyer*, 174 Cal. App. 3d at 563.

18 S. COMM. ON JUDICIARY REP. ON ASSEM. B. NO. 26, 3 S. JOURNAL (1983).

19 In the date of separation setting, the time of acquisition is determined based on the date of separation; and our Family Code clearly demarks the presumptive termination of community property acquisitions based on the date of separation.

20 *Fabian*, 41 Cal. 3d at 447-450.

21 *In re Marriage of Griffis*, 187 Cal. App. 3d 156 (1986).

22 *Heikes*, 10 Cal. 4th at 1221-22.

23 *See Marriage of Baragry*, 73 Cal. App. 3d 444, 448 (1977). ("The question is whether the parties' conduct evidences a complete and final break in the marital relationship.").

24 *Velez v. Smith*, 48 Cal. App. 4th 1154 (2006) (review denied). *Velez* was severely criticized for failing to extend the doctrine of putative spouses to domestic partners. *See In re Domestic P'ship of Ellis*, 162 Cal. App. 4th 1000 (2008), disapproved of on other grounds by *Ceja v. Rudolph & Sletten, Inc.* ,56 Cal. 4th 1113 (2013).

25 *Velez,* 48 Cal. App. 4th at 1171 (citations omitted).

26 See *Hale v. Morgan*, 22 Cal. 3d 388, 396 (1978). ("[A] constitutional distinction between those persons who have actual knowledge of a law and those who do not, directly offends the fundamental principle that, in the absence of specific language to the contrary, ignorance of a law is not a defense to a charge of its violation.").

Judge Lewis is the Supervising Judge for the Los Angeles County Family Law Division overseeing the operations of the sixty family law departments in the county. From 2014 to 2016 he served in a long cause family law trial department in Los Angeles; he was Assistant Supervising Judge of the Family Law Division from 2011 to 2014. Judge Lewis became a Certified Family Law Specialist in 1985. In 2014, he became the first emeritus member of the Association of Certified Family Law Specialists.

Dawn Gray is a Past President of ACFLS. She is a solo practitioner whose practice is devoted to contract research and writing on family law issues. She is a frequent presenter on fiduciary duty and other issues throughout California.

UPCOMING CHAPTER PROGRAMS

Bay Area

February 7, 2017

Mr. Roger Lewis, CFLS

Topic TBD

March 7, 2017

Ann Fallon, CFLS, and John Madden, actuarial expert

The Perils of PERS

Orange County

Programs TBD

Sacramento Chapter:

January 24, 2017

Roger Lewis, CFLS, Lewis Family Law, Napa

Boomers Out: The Intersection of Retirement and Spousal Support

February 28, 2017

Steven R. Burlingham, CFLS, Gary, Till & Burlingham

Stepparent Adoptions

March 28, 2017

Kenneth J. Pierce, MBA, CVA, CFFA

Complex Issues with Support Programs

PRESIDENT'S MESSAGE

SETH D. KRAMER, CFLS | ACFLS PRESIDENT | LOS ANGELES COUNTY | SDKRAMER2@AOL.COM

Thirty years ago I became a certified family law specialist—a designation that was then less than a decade old. That same year, part of the soundtrack of my life was a song by the band Timbuk 3 titled "The Future's So Bright, I Gotta Wear Shades." Though its lyrics were ironic in tone, the upbeat tune became—for my peers—an anthem of undented optimism. I felt that emotion back then, as I started on my path as a specialist, and I also feel that way now, as I begin my term as president of the Association of Certified Family Law Specialists.

Back when I became a specialist, ACFLS was only six years old. That era, the 1980s, was a time of great change and growth in family law. The CFLS designation was part of a movement in the 1980s to increase specialization in the practice of law in response to the growing complexity of modern society. Back then, interlocutory judgments were the norm—a holdover from the fault era. These days, family law is much more nuanced and intricate, involving many skills from many diverse disciplines. Gone are the days when an attorney could dabble in family law and offer even close to the same level of competence that a specialist can provide.

At present, ACFLS has close to 700 members, all of whom are certified family law specialists. Our mission at ACFLS is very clear, and it can be summed up with the four key components of our mission statement.

First, the goal of the organization is to "advance the knowledge and rapport of family law specialists." Among the ways we do that are by hosting active chapter meetings in the Bay Area, Sacramento and Orange County. These chapter meetings not only encourage collegiality, they also provide sharing of knowledge through continuing legal education programs, some of which are videotaped and used by our outreach committee to foster and provide family law education in many underserved counties.

Another goal of ACFLS is to "monitor legislation and proposals affecting the field of family law." Our legislation committee was instrumental in anti-Boblitt and anti-Davis legislation, both of which have a significant impact in the practice of family law. In addition, ACFLS also has a vibrant amicus committee, which reviews California Supreme Court and appellate rulings to identify decisions which should be published (or depublished) because they are significant in the field of family law. For example, ACFLS was instrumental in getting the opinion of *In re Marriage of Brandes*, 192 Cal. Rptr. 3d 1 (2015) published.

A third key goal of ACFLS is to "encourage ethics for all members." One of the ways in which this is done is through our very active list serve, where substantive ethical questions are among the many issues raised by members throughout the state.

Seth Kramer has been a Family Law Specialist, certified by the California Board of Legal Specialization, for 30 years. He has lectured about many topics in Family Law for the California State Bar and the Los Angeles County Bar Association, and he has written scores of articles for various legal publications. Seth has been a bimonthly columnist on Family Law matters for the Los Angeles Daily Journal. He is a recipient of Martindale-Hubbell's AV rating and has had this rating since 1996.

The final goal is "to promote the importance of the family law specialty to the public and the State Bar." Perhaps our highest-profile event is our Spring Seminar—the "filet of family law CLEs." In 2017, this signature event will be celebrating its 25th year. The program is scheduled for March 24-26. I cannot stress strongly enough how valuable this program is for any practitioner interested in family law—not just those who are members of ACFLS or certified family law specialists.

On top of these organizational priorities, I also have some personal goals. One of these is to increase the footprint of ACFLS in Los Angeles County, in part by offering continuing legal education programs similar to the one we cosponsored with Levitt & Quinn on ESI discovery at Pepperdine University. There should be a clear path to entry for involvement in ACFLS for Los Angeles-based attorneys.

I'm also interested in hearing from other active members about what ACFLS should look to accomplish in the coming year. Together, let's make that future bright. I'm getting out my shades now.

EDITOR'S COLUMN

DEBRA S. FRANK, CFLS | ACFLS JOURNAL EDITOR | LOS ANGELES COUNTY | DFRANK@DEBRAFRANKLAW.COM

As the *Specialist* goes to press in early December for the first issue of 2017, I am writing my last "Editor's Column." It has been an honor to serve the organization as Editor of our acclaimed Journal. I have "termed out" and am stepping down as Editor. However, I'm not going too far because Christine Gille, our current Associate Editor, will swap positions with me, and I will remain closely involved with the *Specialist* as the Associate Editor. We both welcome your articles, suggestions for articles, and/or comments on articles.

Welcome to Seth Kramer, our incoming President. Read Seth's President's column to review his exciting organizational and personal goals for ACFLS.

Thank you to Jill Barr, our outgoing President, for an outstanding job leading our organization. Jill will serve as Immediate Past President.

Our new 2017 ACFLS Board of Directors can be viewed in the *Specialist* or on our website. Welcome to our new Board members and thank you to our departing members for your service.

Our articles in this issue of the *Specialist* include in-depth discussions of several significant topics for the certified family law specialist. In our lead article, Judge Thomas Trent Lewis and Dawn Gray analyze the retroactivity of FC 70, effective on January 1, 2017, which abrogated the decisions in *In re Marriage of Davis,* 61 Cal. 4th 846 (2015) and *In re Marriage of Norviel,* 102 Cal. App. 4th 1152 (2002), requiring the parties to have physically separated to be separated (the bright line test), in favor of a factual determination of separation based upon the totality of the circumstances. As enacted, FC section 70's legislative history leaves the issue of retroactive application to the trial court under section FC 4(h). Whether this legislative intent will survive a constitutionality challenge is the subject of this article. They raise significant issues and leave us with the comment "How the courts apply the new section remains to be seen, but it will surely be interesting to watch."

In Mediation Practice Twenty Years Later: A Cautionary Story and Proposed Reforms, by Gregory W. Herring, CFLS, and Cassandra T. Glanville, Esq., the authors acknowledge the current interest in a proposal to create an attorney-client exception to the doctrine of mediation confidentiality, and then examine some other aspects of mediation that are due for review, especially in consideration of the evolution and increased popularity of mediation and Alternative Dispute Resolution ("ADR") in general. They seek the implementation of various proposals against mediator bias and for written disclosures, notifications, and waivers that would serve the interests of justice, while still maintaining public policy favoring mediation.

Hon. Jeri Hamlin, the President of the California Court Commissioners Association and the AB1058 Commissioner for the counties of Tehama, Glenn, Colusa, and Plumas, and Hon. Rebecca Wightman, the AB1058 Commissioner for San Francisco County, provide Part II of their two-part article on the statewide child support program and its recent budget woes. The first part of this two-part series discussed the creation of the statewide child support system with specialized child support courts (aka AB1058 courts or Title IV-D courts). The truly unique aspects of this program and why funding allocation issues are so important to *all* courts, as well as to the success of the entire program statewide, are addressed here.

In "Litigator's Log—Quarterly Case Exam," by Christine Gille, CFLS, N. Lloyd Kaye, Esq., and yours truly—our new column in lieu of Dawn Gray's "Hot Off the Press" column which will be published in the *Family Law News*—we analyze recent cases from the litigator's perspective. In addition to providing a brief summary of the case, we discuss the strengths and weaknesses of the presentation of the case focusing on trial fundamentals. This is intended to provide a unique look at good litigation techniques, drawing from recent case law.

Any of you interested in providing articles, suggestions, comments, etc., can reach me at dfrank@debrafranklaw.com or Christine Gille at cdgille@gglawpas.com. I look forward to continuing to work with all of you.

Debra S. Frank is past Chair of the Family Law Sections of the Beverly Hills and Los Angeles County Bar Associations. She served on the Board of Legal Specialization, Family Law Advisory Commission and on Flexcom. Rated AV Preeminent by Martindale-Hubbell, Ms. Frank was named by Super Lawyers magazine as one of the top attorneys in Southern California for 2009-2016 and received the Spirit of CEB Award, October 2012, for her generous contributions to the Continuing Education of the Bar California and service to the profession.

The views and opinions expressed in our journal are those of the authors and do not necessarily reflect the views and opinions of ACFLS.

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MEDIATION PRACTICE TWENTY YEARS LATER: A CAUTIONARY STORY AND PROPOSED REFORMS

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In 1996 the California Law Revision Commission ("LRC") developed and proposed amendments to then-existing law, which eventually became the current mediation confidentiality statute, Evidence Code section 1119.[1] Since then, mediation confidentiality has been an ironclad doctrine in California, surviving multiple high-profile challenges, including at the Supreme Court level.[2] Currently there is interest in a proposal to create an attorney-client exception to the doctrine of mediation confidentiality. Lynette Berg Robe recently explained in this publication how the LRC is studying the issue.[3]

As the LRC's thorough process should finally be near completion, this article *refrains* from commenting on the already well-debated topic of a potential attorney-client exception. Rather, this article examines some *other* aspects of mediation that are due for review, especially in consideration of the evolution and increased popularity of mediation and Alternative Dispute Resolution ("ADR") in general.[4]

Akin to existing judicial disclosure and disqualification statutes, the reforms encouraged herein would be designed "to ensure public confidence … and to protect the right of litigants to a fair and impartial [process]."[5] As more and more litigation has flowed away from the courthouses and into ADR the past twenty years, public policy should also extend those protections to parties in mediations.

I. Catherine's Story.

This tells the story of a client, "Catherine,"[6] who believes she saw the mediation process permit her purported "mediator" to strip her of tens, if not hundreds, of millions of dollars.[7] It is told from Catherine's perception. Her former husband and her "mediator" have disputed many of her allegations. This does not pretend to re-litigate or adjudicate the cases against them—forests have already been sacrificed.

Similarly, this refrains from analyzing Catherine's potential claims against her prior attorney—she did not find him blameworthy and maybe he was not. The point is not to conduct a comprehensive *post-mortem* analysis of Catherine's prior experience, but to add a new perspective to the discussion and encourage reforms.

A. The "Mediated" Divorce and Later Discovery of Apparent Wrongdoing.

Catherine is the former spouse of John, who created a well-known asset—call it a "widget factory"—during the parties' marriage. The parties shared a business manager, who was with an accountancy and financial services firm (together, the "Firm").

When Catherine's and John's separation appeared imminent, the Firm reached out to Catherine, offering to help informally resolve the then-apparently-imminent divorce. What it did not reveal to her in inducing her into the process is that the Firm was aiming for John's lucrative post-divorce financial services business, which could follow if he received the widget factory in the division of assets. It did not reveal that the Firm felt that the divorce had to be rushed to completion in order for the Firm to begin making its pitch to John. Catherine asserts these facts based on some internal Firm emails she was initially able to obtain

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Cassie Glanville is a graduate of UC Santa Barbara and of UC Hastings College of the Law. She is an attorney with Herring Law Group. She was previously awarded the McLafferty Scholarship, provided by the Santa Barbara Women Lawyer's Foundation, in part for her dedication to the Santa Barbara community.

before her further discovery efforts were terminated by mediation confidentiality.

Had Catherine been informed of the facts as she now understands them, she would not have agreed to enter into negotiations with the Firm acting as "mediator." She would not have agreed that the negotiations would be deemed "confidential." As with many litigants, though, Catherine had *no clue* about the "mediation" chapter of the Evidence Code.[8] She had *no clue* how it could substantially affect and even harm her.

In the divorce negotiations, the parties addressed the value of the community's interest in the widget factory. The Firm (and John) noted the uncertain status of future income. The community's interest in the widget factory was valued in "mediation" at $8 million, in keeping with John's representations. Catherine, who felt constant pressure from the Firm to make a deal, signed off in 2003 and was awarded half of this amount (i.e., $4 million) in the overall division of assets.

Catherine later learned that John gave members of the Firm $50,000 wristwatches in appreciation for their settlement work.

Only two weeks after Catherine signed the Marital Settlement Agreement ("MSA"), she was shocked to read a press report that John was in negotiations to sell the widget factory for *$1.6 billion*. Catherine immediately contacted her original attorney regarding her divorce settlement.

John hastily signed the MSA the day after Catherine raised the issue, and then filed a motion for enforcement of the MSA as the parties' judgment. Catherine argued that her consent was procured by fraud, and that John failed to disclose the true value of the community assets. The family law trial court ruled against her. In 2006 the ruling was upheld on appeal, largely based on her lack of admissible evidence.

B. Catherine's Subsequent Suit: Mediation Confidentiality Shields the Firm.

Following the above proceedings that upheld and enforced the MSA, Catherine filed a new lawsuit against the Firm as her remaining source of remedy. Her general theories were that the Firm fraudulently induced her into "mediation," committed professional negligence, and breached its fiduciary duties.

Catherine argued in part that there was no "mediation" and thus no mediation confidentiality. She lost that point based on the broad definition of "mediation" provided in Evidence Code section 1115, subdivision (a).[9]

She also argued that the Firm was not "neutral" and therefore not subject to the protection of mediation confidentiality. The term *neutral person*, as used in subdivisions (a) and (b) of section 1115**,** is not defined in the mediation statutes nor has it been explicitly defined in any appellate authority.

The trial court researched the legislative history of Evidence Code section 1115, subdivision (b) and ruled that *the only "neutrality" required for one to become a mediator is merely one's objective status as a non-party.*[10] The trial court found that, even though the Firm did not act "neutral" in the sense that it was free of bias, "neutral" merely refers to the "intended role of the person in the mediation."

The trial court continued:

> *[T]here is nothing in the statutory scheme governing the mediation privilege in [the] Evidence Code … that requires a mediator to disclose conflicts of interest or, more importantly, that conditions mediation privilege on disclosure of such conflicts, or on the absence of such conflicts.* (emphasis added).

It continued:

> Thus, though it may be true that it is good practice that only persons without prior relationships with both sides of a mediation act as a mediator [citations omitted], this is not a condition to mediation privilege…. And, although mediators in court-connected mediation programs must disclose conflicts (Cal. Rules of Court, rule 3.855), *[neutrality] is not a condition to mediation privilege….*(emphasis added).[11]

The trial court made the above analysis in relation to Catherine's early motion to compel discovery. Its denial of that motion prevented Catherine from obtaining information and materials that Catherine believed would have helped her prove her case. The trial court's same analysis then became a basis for its eventual granting of the Firm's motions for summary judgment that recently terminated the case in the Firm's favor. Catherine is currently appealing those rulings.

Under the broad definition of "neutral" and the strong and broad doctrine of mediation confidentiality, the Firm has to date been able to escape trial. Mediation confidentiality prevented Catherine from obtaining and presenting potentially relevant evidence toward holding the Firm accountable. It prevented her from even alluding to what occurred during "mediation."[12] Absent those abilities, she had no chance.

II. Reforms are Necessary to Protect against Biased Mediators and to Educate Litigants about the Ramifications of Mediation Confidentiality.

The state of current laws legalizes biased mediation, as mediators who are not neutral and can sway unsophisticated parties into entering unfavorable agreements are permitted to operate. It *misleads* litigants in calling mediators "neutrals" when "neutrality," as the word is commonly understood, is apparently not required and might not be provided. The breadth and depth of mediation confidentiality might not be fully appreciated by anxious litigants who often "just want to get their case done" without first knowing the doctrine's existence or potential ramifications. As such, *the current paradigm lacks express requirements for*

"informed consent," which goes to the heart of mediation policy.[13]

Indeed, these results seem to have been the Legislature's intended *purpose* in 1996.

The legislative history of Evidence Code section 1115 reveals that the Legislature originally considered and rejected a provision incorporating disclosure, conduct, and bias requirements in the mediation statute. The bill's author opposed the provision because, among other issues, the bias disclosure standard ignored the wide variety of mediation situations. They included "peer (student)" disputes, "community-based" mediations, and the resolution of neighborhood issues. The bill's author did not want those loosely defined "mediators" burdened with such regulations.

The modern reality, however, is that parties in mediation expect their mediators, like judges, to be unbiased and fair. Even represented parties expect mediators, like judges, to provide opinions on the facts and the law, and the application of the latter to the former. One of the parties is often more vulnerable than the other, and they are both conducting what might be the greatest transaction of their lifetimes while under unusual and great pressures. Emotions are typically high, reasoning can be impaired and mediators therefore have great sway.

Parties in family law mediations now have the protection of the holding in *In Re Marriage of Lappe*, 232 Cal. App. 4th 774 (2014). The *Lappe* court avoided creating an exception to the mediation confidentiality doctrine in finding that disclosures made during mediation under the Family Code's mandate fall outside Evidence Code section 1119. *Id.* at 787. An aggrieved party would now at least be able to point to those disclosures in follow-up litigation against the other party. Depending on the circumstances, that might or might not be helpful.

But *Lappe* is not a panacea. It does not apply to mediations outside of family law. It does not address mediator bias or require pre-mediation conflict disclosures or other notifications to parties. It does not allow an aggrieved party to conduct discovery into the mediation or otherwise use anything therefrom to establish liability for her damages (discussed below in relation to "fraud in the inducement" claims).

We do not advocate special treatment of family law cases. Based on principles expressed in *Elkins v. Superior Court*, 41 Cal. 4th 1337 (2007), we disfavor the prospect of differentiated treatment of family law litigants. *See, e.g., supra* note 12.

Toward reform *beyond* the issue of a potential exception to the attorney-client privilege under mediation confidentiality, we urge the following proposals.

A. Requirement of Mediator Neutrality.

Evidence Code section 1115, subdivision (b) ought to be revised to require *true neutrality* of mediators. Its current use of the term *neutral person* ought to mean more than "someone with a pulse who is not one of the parties." This should be accompanied by an express assertion of public policy *embracing* disclosure and *rejecting* bias. Even parties in peer disputes, community mediations, and neighborhood issues ought to know that, when they turn to a "neutral person" to help with an important dispute, the "neutral" is truly neutral as laypersons understand the term.

Alternatively, the requirement for true neutrality ought to at least apply to all mediations held *in contemplation of resolution of litigation*. There is no longer a compelling rationale for denying a mediator's true neutrality to prospective or actual litigants in order to encourage mediation of other types of disputes. Contrarily, a requirement of true neutrality for litigation-related mediations would not be expected to dampen enthusiasm for the mediation of other types of disputes.

As the mediator in *Kieturakis* emphasized (ironically, in arguing *for* mediation confidentiality), "neutrality [is] the life and breath of mediation. … [A] party must be guaranteed that the mediator is neutral …." *In re Marriage of Kieturakis,* 138 Cal. App. 4th 56, 68 (2006).

"The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee …." *Howard v. Drapkin*, 222 Cal. App. 3d 843, 860 (1990).

Rossco Holdings v. Bank of America, 149 Cal. App. 4th 1353 (2007) described a standard for determining whether an arbitration was biased: "[w]hether [a] person aware of the facts might reasonably entertain a doubt that the [arbitrators] would be able to be impartial." *Id.* at 1367. The same standard could apply to mediations, too.

B. Requirement of Conflict Disclosures and Mediation Notifications that Present Parties with Options.

The law should be revised to require the pre-mediation presentation to parties of mandatory *written conflicts disclosures* that identify all of a mediator's existing as well as reasonably foreseeable future involvement with either party.[14] It should have to be updated through the mediation's termination.

The recent case, *Hayward v. Superior Court (Osuch)*, 206 Cal. Rptr. 3d 102 (Aug. 3, 2016), review granted 209 Cal.Rptr.3d 30 (Nov. 9, 2016), emphasized the importance of written disclosures in the circumstances of "private judging." As participants reasonably expect mediators, as well as private judges, to be truly neutral, the retention of private judges is analogous to that of mediators. The *Hayward* opinion explained:

> Although disclosure may be onerous, matrimonial practitioners (and others who frequently participate in the … process) have a greater interest in assiduous disclosure than they may realize. … [T]he use by the "small and collegial" family law bar "of our friends, colleagues, and prior opposing counsel as private judges unwittingly exposes all of us, as a community and as individuals, to potential liability for violations of the various ethical canons, claims of cronyism, allegations of bias, complaints of self-dealing, and

> malpractice law suits. I believe that we are well intentioned, but I also believe the problems related to the inter-relationships of our bar in this way have been 'under-discussed' and 'under-examined.' "

Id. at __ [p. 39] (quoting Hersh, *Ethical Considerations in Appointing our Colleagues as Private Judge,* 31 FAM. L. NEWS 31 (Issue No. 4, 2009) (official publication of the California State Bar, Family Law Section)).

The law should be revised to require the pre-mediation presentation to parties of *written notifications* that inform them of the *existence and scope, and actual and potential ramifications* of mediation confidentiality. Among other things, it should warn that, under mediation confidentiality, any post-settlement discoveries of misrepresentations, omissions, or fraud that might have been committed in mediation would be difficult to investigate or rectify.

The written notifications should include an express *option to waive confidentiality.* Parties can and do settle their cases in non-confidential circumstances, and they should know that it is their right to try a non-confidential approach. They should be aware that "confidentiality" is *their option* instead of a tacit and apparently (to parties) unavoidable expectation of the mediation "system." It would hurt *no one* to provide parties the opportunity to make an educated choice; *choice would be good.*

Consistent with the concerns about optics addressed in the above *Hayward* opinion regarding "private judging," it cannot be ignored that mediation confidentiality currently and popularly—to attorneys and mediators—provides participating lawyers and mediators a level of insulation from scrutiny and potential recourse for mistakes and other wrongdoing not enjoyed by those practicing outside the mediation cocoon. Although the *Hayward* opinion discussed potential "liability," we are concerned about how the current mediation paradigm can "unwittingly [expose] all of us, as a community and as individuals, to potential appearances of … cronyism … bias … self-dealing, and [exposure-free] malpractice …." *See id.* at __ [p. 39] (emphasis added). Preventing even the *appearance* of these improprieties would align with the State's policy favoring ADR.

Parties should be allowed to actively choose whether they might really want confidentiality in light of the risks that have disabled Catherine in her fight for justice. The above written disclosures, notifications, and presentation of options could be accomplished through the creation of mandatory Judicial Council forms.

III. Potential Post-Mediation Discovery and Proceedings.

A. Set-Asides.

Advocacy for the above reforms leaves open the question of how to investigate and enforce them. As to the latter proposed requirement for conflict disclosures and mediation notifications that present parties with options, the recommended analysis would be binary. If all the requirements are objectively met, then the settlement proceeding would be a "mediation" under Evidence Code section 1115(a). *Absent* all the requirements being met, the settlement proceeding should not be deemed a "mediation" or otherwise be subject to mediation confidentiality. A party seeking to set-aside an agreement under either scenario could utilize existing legal avenues.[15]

A party asserting an unjust settlement agreement due to mediator's bias would have a more complicated path. Investigating and proving bias would likely involve attempting to reach into the mediation proceedings, thereby triggering mediation confidentiality. How might set-aside actions based on mediator bias be investigated and prosecuted?

One option could be to provide *no* special procedure. In this scenario a litigant would have a much better chance of investigating and proving her case if she might have originally appreciated and *rejected* confidentiality under the above proposed reforms. The litigant could proceed unfettered by confidentiality.

As Catherine found, it is nearly impossible to proceed under mediation confidentiality. But, a litigant who might have *chosen* confidentiality and then suspected bias would have at least given her informed consent to confidentiality under the above proposed reforms. She could still try to prove her case "around" mediation confidentiality. But the doctrine would be justly applied in this alternative scenario.

Or, special procedures could potentially be established.

For instance, the LRC, in its work concerning the potential attorney-client privilege exception to mediation confidentiality, has already considered possibilities including *in camera* judicial review of claims of wrongdoing during mediation. Another avenue could be for litigants to assert initial declarations, as allowed by the trial court but then rejected by the Supreme Court in *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 11 (2001). The trial court in *Kieturakis* allowed, before being reversed, a "closed courtroom" procedure.[16] Current anti-SLAPP statutes require special motions where plaintiffs must meet an evidentiary standard before being allowed to proceed.[17]

B. Claims Made Directly against Mediators.

Apart from actions to set-aside agreements reached in mediation, claims made directly against mediators run into the doctrine of quasi-judicial immunity.

In *Howard v. Drapkin*, 222 Cal. App. 3d 843, 852-853 (1990), the court held, "[u]nder the concept of 'quasi-judicial immunity,' California courts have extended absolute judicial immunity to persons other than judges if those persons act in a judicial or quasi-judicial capacity …." Mediators accused of wrongdoing in mediation would be entitled to such immunity. "[T]here should be entitlement [for mediators] to the same immunity given others who function as neutrals in an attempt to resolve disputes." *Id.* at 860.

Recently *JAMS Inc. v. Superior Court (Kinsella)*, 205 Cal. Rptr. 3d 307 (July 27, 2016), addressed the situation where a party (the "plaintiff" in the published case) in an underlying "private judging" setting filed civil claims against JAMS and the judicial officer. The claims were based not on the

judicial officer's actions in the actual proceeding, but on asserted false advertising of the judicial officer's background and qualifications, which had induced the plaintiff into the private judging setting. Although the substantive "misrepresentation" issues were beyond the scope of the anti-SLAPP proceedings that its opinion addressed, the court expressed that "all allegations of wrongdoing relate to information [the plaintiff] specifically viewed on defendant JAMS' [Web site] *before* he agreed to select [the private judicial officer]." *Id.* at 311 (emphasis added). Judicial immunity was on its mind.

Similarly, Catherine asserted a cause of action against the Firm for fraudulent inducement *before* it began its substantive work. This was expected to avoid quasi-judicial immunity. But the trial court barred this, holding "any alleged harm is based upon what actually occurred at the mediation." As such, mediation confidentiality blocked her under the prior inducement theory, too.

Under this logic, a litigant who might be tricked, coerced, or otherwise fraudulently induced into a biased mediation is automatically rendered unable to establish damages, and thus her case as a whole, because of the mediation, itself.

Why should a party asserting fraudulent inducement in the private judging context be allowed to try to prove his damages, and thus his case as a whole, whereas a similarly situated one in the mediation context is barred by mediation confidentiality? We presently advocate no particular solution but, rather, raise the point for discussion.

IV. Conclusion.

A respected family law judge recently emphasized, "[T]he fact is that anyone can hold themselves out as a family law mediator regardless of skill, training and expertise. … Lawyers are bound by lawyer ethics, but former auto mechanics holding themselves out as family law mediators are not held to any specific ethics."

Mediators are unregulated by the State Bar. Toward maintaining justice and the public's trust, mediator ethics and transparency are critical.

ADR, including mediation, is more popular than ever and public policy should continue to support it. However, under the current laws, the potential bias of mediators as well as the ignorance of participants can unwittingly and otherwise expose all of us, as a community and as individuals, to potential appearances of "cronyism … bias … self-dealing, and [exposure-free] malpractice …" as the recent *Hayward* opinion discussed in the context of private judging. Catherine's experience emphasizes how the current paradigm expressly countenances the potential bias of mediators, ignorance of parties, and major abuse. Twenty years following the implementation of the current mediation statutes, implementation of the above proposals against mediator bias and for written disclosures, notifications, and waivers would serve the interests of justice, while still maintaining public policy favoring mediation.

The burden on scrupulous mediators and mediation-oriented counsel would likely be minimal. It would be outweighed by policies against unjust results arising from biased mediators or ignorant and unprepared parties. We urge these points without offering an opinion in the debate over an exception to attorney-client privilege in mediation. We encourage their inclusion as part of the overall discussion toward enhancing public confidence in mediation and to protect the right of litigants to a fair and impartial process.[18]

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1 Section 1119 provides,

> [e]xcept as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled be to given. (b) No writing … that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

2 "There are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports. Neither a mediator nor a party may reveal communications made during mediation." *In re Marriage of Woolsey*, 220 Cal. App. 4th 881, 901 (2013) (quoting *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 26 Cal. 4th 1, 4 (2001)).

3 The LRC is an independent state agency, which functions to recommend to the Legislature and the Executive Branch changes to the law to eliminate "defects, anachronisms, or need for clarity." Lynette Berg Robe, *Another way of Making Sausage … The California Law Revision Commission Studies and Exception to "Mediation Confidentiality"*, ACFLS FAM. L. SPECIALIST, No. 2 (Spring 2016).

4 *See, e.g.*, Zachary G. Newman & Yoon-Jee Kim, *The Increasing Popularity and Utility of Mediation*, A.B.A. SECTION OF LITIG. NEWSL. (Feb. 13, 2012).

5 *See, e.g., Peracchi v. Superior Court*, 30 Cal. 4th 1245, 1251 (2003).

6 Catherine is not her real name. This also refers to her former spouse as John (not his real name either). I represented Catherine in certain post-judgment matters that are not discussed. I also carefully followed the civil court litigation described herein.

7 As discussed below, Catherine unsuccessfully argued that her settlement proceeding was not a "mediation" since the "mediator" was not a "neutral person" pursuant to Evidence Code section 1115, subdivision (b), and for other reasons.

8 The mediation chapter begins at Evidence Code section 1115.

9 Section 1115, subdivision (a) provides, "[m]ediation means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."

10 Section 1115, subdivision (b) provides, "[m]ediator means a *neutral person* who conducts a mediation." The section also includes assistants as "mediators." (emphasis added.)

11 Actually, "[t]he mediation confidentiality statutes *do not* create a 'privilege' in favor of any particular person. [Citations omitted.] … The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context." *Cassel v. Super. Ct. (Wasserman, et al.)*, 51 Cal. 4th 113, 132 (2011) (emphasis added).

12 Evidence Code section 1128 makes any reference to a mediation in any later civil proceeding "grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief." *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56, 62, n.2 (2006).

13 "Informed consent is vital to the self-determination principle at the heart of mediation. Client decisions must be informed and voluntary." Hon. Thomas Trent Lewis, Elizabeth Potter Scully & Forrest S. Mosten, *Late Nights and Cancellation Rights: Bolstering Enforceability of Mediated Settlement with a Cooling off Period,* 38 FAM. L. NEWS 1 (Issue No. 1, 2016) (official publication of the California State Bar, Family Law Section). That article suggested a "cooling off" period for parties to potentially reconsider and revoke agreements made in family law mediations. Based on principles expressed in *Elkins v. Superior Court*, 41 Cal. 4th 1337 (2007), we, however, disfavor the prospect of differentiated treatment of family law litigants. Further, an arbitrary "reconsideration" period of some few days, as suggested by that article, would not have helped Catherine, who learned of the prospective billion dollar deal two weeks after she signed her deal.

14 For instance, canon 6D(5)(a) of the California Code of Judicial Ethics provides that in "all proceedings" temporary judges must "disclose in writing or on the record information as required by law, or information that is reasonably relevant to the question of disqualification under canon 6D(3), including personal or professional relationships known to the temporary judge … that he or she or his or her law firm has had with a party, lawyer, or law firm in the current proceeding, even though the temporary judge … concludes that there is no actual basis for disqualification." We advocate this for mediators, too.

15 *See, e.g.*, CAL. FC § 2120 *et seq.*; CAL. CIV. PROC. CODE § 473.

16 *Kieturakis,* 138 Cal. App. 4th at 68.

17 *See* CAL. CIV. PROC. CODE § 425.16. Plaintiffs attempting to proceed against anti-SLAPP defenses must first establish a high burden of "probability" of prevailing, although that is not particularly advocated here.

18 *See, e.g., Peracchi v. Superior Court,* 30 Cal. 4th 1245, 1251 (2003) (in the context of the judicial disqualification process).

THE IMPORTANCE OF AB1058 FUNDING TO FAMILIES AND PROGRAM SUCCESS*

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[Part 2 of a two-part series]

[The Bench] Editor's Note:
Due to its importance to all trials courts, the authors chose to write a two-part series. Part 1 provides background information surrounding the creation of a statewide child support program that is supported by federal grant funding and discusses recent budget woes. Part 2 will explore in more detail the unique aspects of the program and its evolution, as well as potential program impacts when revising funding allocations to each of the counties' grants.

In the first part of this two-part series, we wrote generally about the creation of the statewide child support system with specialized child support courts (aka AB1058 courts or Title IV-D courts). The truly unique aspects of this program and why funding allocation issues are so important to *all* courts, as well as to the success of the entire program statewide, are addressed here.

Unique aspects of an AB1058 program

Child support cases are paper-intensive and very dynamic, with parents' employment status, income, insurance, family composition, location (parents and minors), custody, and visitation, among other things, changing often over the life of a case. Case workloads can last well beyond the eighteen years of a child's minority, with enforcement activities ongoing until arrears are fully paid. DCSS also provides services, and files cases, on behalf of other states and countries.

Further, California's population is highly transient, with parents often moving between counties, and to other states and countries. DCSS cases move constantly between counties, and beyond. Despite current overall number of active statewide DCSS cases (1.106 million in FY 2015) being fairly similar to what they were almost twenty years ago (1.157 million in FY 1997), numbers within counties have shifted—dramatically in some cases. For example, Los Angeles has just a slightly higher number of cases than when the program started, while case numbers in Sacramento and San Bernardino have steadily increased, more than doubling during that same time.[1] They have also increased in some smaller counties and decreased in others.

Additionally, unlike any other program, federal grant funding requires each state's program to perform at certain minimum levels in five areas, called "performance measures."[2] DCSS expects each county's LCSA to strive to meet and improve these measures.[3] Because the counties' respective performances vary, the LCSAs are driven to work on improving their performance measures. This often translates into *very different* types and amount of work brought to the courts for the same number of cases; e.g., one LCSA may focus more on modifications, or bring more enforcement actions to court if lagging in a particular performance measure, while another LCSA aggressively reduces litigation by obtaining more stipulations.

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Rebecca Wightman is currently the AB1058 Commissioner for San Francisco County, was CCCA's 2015 Commissioner of the Year recipient, and is a member of the AB1058 DCSS/JC Judicial Stakeholders Committee.

Traditional funding methodologies may no longer be a good fit—the funding "problem" needs better solutions

The AB1058 program has had almost twenty years to develop operationally. In that time, some counties have become more efficient than others, and found ways to carry their workload. E-filing, for example, has helped reduce the

cost of case processing. A number of courts have streamlined work-flows, prepared orders in court, and developed specialized calendars, among other things, working collaboratively with their family law facilitator's office and LCSA.

This has been extremely beneficial to the overall program, and has helped create "right-sized" orders, reduce defaults, get money to families faster, and improve the state's overall performance.[4] It also helps explain why some courts are able to process DCSS cases with comparatively fewer commissioners handling more cases with less staff. Many differences between the courts have emerged, rendering the concept of an "average" case, including time and cost to process, no longer reliable.[5] **Identifying and capitalizing on these efficiencies makes more sense than simply re-distributing monies based on active case numbers.**

Also over the last two decades, courts have *annually* submitted funding allocation requests and had the opportunity to participate in mid-year reallocation of funds unspent or returned by other courts. Some counties have repeatedly turned back monies to the point where their base funding has consistently been adjusted downwards—"self-adjusting" even below the original minimum floor. Others have always requested greater allocations, yet intermittently and/or regularly leave money on the table.

The evolving historical spending requests and spending patterns of the courts should be analyzed. They are a good illustration of the highly unique nature of the program, and also show why relying upon traditional funding methodologies, whether WAFM (workload allocation funding methodology), or an averaged snapshot of DCSS active cases by county, does not accurately capture the true workload of AB1058 commissioners, family law facilitators, or support staff.[6] Indeed, use of such a traditional methodology for such a unique program—even with "adjustments" for cost of living and minimum funding floors—may actually be detrimental to the program overall: it will cause many *more* counties to lose funding (with a limited number gaining funding), rendering them unable to meet the needs of their population, adversely affecting their performance measures, and in some instances, re-distributing money to counties that historically don't really need it.

Even small cuts, especially to the smaller counties that already have difficulty in meeting their minimum infrastructure costs to administer the program, can often have a greater negative impact on access to court issues, a drop in services, and consequently a drop in money going to families. And if the funding methodology is tied similarly to the family law facilitators' program, the impact can be even greater for smaller, rural counties. This will negatively affect the federally imposed performance standards in multiple counties, and consequently affect the entire state's program.[7]

Now is the perfect opportunity to develop and strengthen good program practices, and help all counties achieve greater efficiencies. As noted, DCSS is currently doing their own funding reallocation evaluation, decidedly *not* focusing on just active case numbers, but on a variety of other metrics they are able to pull from their statewide system (e.g., number of motions, default rates, case types, how long it takes to get a filed court order, etc.), broken down county by county. The latter approach better captures the true need and workload of each county's child support program while focusing on program improvements. As DCSS reallocates its own LCSA funding, this will inescapably have a *corresponding* effect on the amount of work LCSAs bring to their respective courts. Thus, DCSS's study, and its determination of reallocation of funding on the LCSA side, is crucial to adopting a fair and accurate funding methodology for courts.

In summary, tackling funding allocation issues is always difficult. Finding the right balance of the relevant and varied factors required to ensure successful implementation of the program in all fifty-eight counties is a tall order. A program as unique as AB1058 deserves a funding approach that addresses the needs and requirements of this very important federally funded grant. The families of California are counting on it.

Note: Detailed information on the last proposal and recommendations considered by the Judicial Council in February 2016, can be found at: https://jcc.legistar.com/View.ashx?M=F&ID=4250437&GUID=98FC98F3-0679-40FA-B131-22432724CC27.

A report on the progress of the Joint Sub-Committee re: AB1058 Funding Allocation is due to the Judicial Council in December of this year.

[Authors' correction: In Part 1 of this article, it was noted that implementation of a new funding methodology was to begin in FY 2017-18; the correct date is FY 2018-19.]

FY 2013-14 FULL TIME EQUIVALENT POSITION AND COMMISIONER TO SUPPORT STAFF ALLOCATION

COURT	# of FTE CSC (Comm.)	# of FTE CSC Support Staff	Support Per 1.0 CSC	DCSS Caseload FY 13-14
Los Angeles	4.0	53.1	13.27	249,046
San Bernardino	2.3	24.3	10.56	101,109
Riverside	0.3	13.5	45.00	71,605
San Diego	3.0	17.4	5.8	66,431
Sacramento	1.7	10.7	6.29	70,017
Orange	2.5	18.45	7.38	60,881

1 Active DCSS cases between 1997–2015: Los Angeles has fluctuated, increasing over 100,000—up to 358,422 in 2007—but declining ever since—down to 233,647 in FY 2015; Sacramento and San Bernardino have steadily increased over that time with Sacramento going from 35,237 (1997) to 79,866, and San Bernardino going from 41,584 (1997) to 99,287 in FY 2015.

2 1) Paternity Establishment; 2) Percent of Cases with a Support Order; 3) Current Collections; 4) Arrears Collection; and 5) Cost Effectiveness.

3 California as a state does relatively well in most of the measures, but ranks near the bottom on cost effectiveness. The reasons are complex, but in large part due to vastly different program implementations: a number of other states have either a non-judicial system and/or require *all* support payments—even private cases—be counted in their collections process, thereby increasing their performance statistics. In California, cases where the parties are paid directly are not counted or serviced by DCSS; leaving DCSS with harder to collect cases and all welfare cases.

4 For example, San Francisco has managed to reduce its default rate from approximately 60% down to 20%, after working collaboratively with their LCSA. It has been shown that cases where orders are established by default do not perform as well in terms of payment to the families. A number of counties—too many, quite frankly—have regularly reported default rates in excess of 50%, some over 60%, and even up to 80% (Los Angeles). Here is one area where limited targeted funding may very well help. Rather than fund a county to help process defaults, funding should be directed to those counties that could use help to reduce the number of defaults. E-filing is another example where targeted shifting of funds should be done: helping to bring all counties up to such functionality will help the statewide program, not just one county at the expense of another.

5 Indeed, no reliable data exists on what it costs a court to process a DCSS case.

6 A comparison of full-time equivalent (FTE) number of commissioners to support staff shows vast differences. *See infra* SIDE CHART. The initial 1997 report by the Family & Juvenile Law Advisory Committee to the Judicial Council, which established some minimum standards, indicated a support staff of seven FTE staff to one FTE commissioner. The initial funding allocation was based on this formula, yet in looking at the six largest counties, the ratio now varies greatly, despite the fact that a number of these counties had relatively similar DCSS "caseload" numbers that year. All caseloads in those counties have gone down since then, except for Sacramento.

7 If only relatively minimal changes are made to the proposed recommendation put forth by TCBAC (the Trial Court Budget Advisory Committee) in the last Judicial Council report, it would have drastic consequences, with an anticipated approximately forty counties to receive less funding.

Volunteer for the ACFLS Outreach Committee

ACFLS is seeking volunteers for its Outreach Committee, tasked with helping to bring high-quality family law continuing education programs to remote and underserved counties in the state. These programs are presented to all family law attorneys, and are not limited to certified specialists or members of ACFLS.

We are looking for volunteers to join the committee. If you would like to join or can help introduce people who might have an interest, please contact:

Outreach Director/Outreach Committee Co-Chair **Rick Cohen** at rick.cohen@familylawlitigators.com; or

Outreach Committee Co-Chair **Linda Seinturier** at L4linda@aol.com.

ONLY YOU can help present regular CLE programs to counties that need it most!

LITIGATOR'S LOG – QUARTERLY CASE EXAM

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Introduction

This log is by litigators and for litigators. There are many case analysis articles, including the best, "Hot Off the Press," previously featured in the *Specialist* for many years by our own esteemed Dawn Gray. Dawn is now the editor of the *Family Law News*, the official publication of the State Bar of California Family Law Section, and is taking her case analysis to that publication. Dawn, we will miss your quarterly analysis in the *Specialist* but look forward to visiting you at your new home.

Because we did not want to merely provide another case analysis article when so many good ones exist, the ACFLS *Specialist* has decided to offer case analysis specifically helpful to litigators. Each quarter this log will discuss good litigation technique, drawing from recent case law.

Every case we undertake will contain an analysis broken into four parts: An opening sentence, Factual Summary, Commentary addressing the litigation issue, and Litigator Tips. Whether a reader has time to examine the entire case analysis, merely reads the tips, or later, searches by hashtag for a particular litigation category online at the ACFLS website, the intent of this quarterly case exam is to make us all better litigators.

All cases will be marked with one or more LitLog hashtags for later meta-data searches, and will include: #LLBoP, #LLConLaw, #LLCredibility, #LLElementsLaw, #LLEthicsMalp, #LLEvidCode, #LLEvDocPhotoDemo, #LLMitigation, #LLPrivilege, #LLProcedure, #LLWtnAdmissions, #LLWtnExpert, #LLWtnLay, and/or #LLWtnProfessional.

For our first LitLog we have selected several of the best evidence-oriented cases of 2016, and will cover: expert witnesses and the double hearsay problem; use of declarations at trial; and proving change in circumstances. After this, we will continue to select recent cases, delaying in our reporting only long enough for notice of further appeal, late publication, or de-publication.

***People v. Sanchez*,** 204 Cal. Rptr. 3d 102 (2016).
#LLWtnExpert, #LLConlaw

Absent a stipulation, litigators must prove all underlying facts and testimony in an expert report, even if the expert had the right to rely on those facts as the basis for the expert opinion.

FACTUAL SUMMARY: The prosecutor in this precedent-setting California Supreme Court criminal case sought gang sentencing enhancements to defendant's felony

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Debra S. Frank is past Chair of the Family Law Sections of the Beverly Hills and Los Angeles County Bar Associations. She served on the Board of Legal Specialization, Family Law Advisory Commission and on Flexcom. Rated AV Preeminent by Martindale-Hubbell, Ms. Frank was named by Super Lawyers magazine as one of the top attorneys in Southern California for 2009-2016.

Lloyd Kaye is a family lawyer with the Law Offices of Goldberg and Gille. He is a litigator and mediator with an interest in financial issues, including business valuation, property division and separate property protection.

charges, including possession of a firearm and possession of drugs with a loaded firearm. The requested gang sentencing enhancements required proof of defendant's gang affiliation. To establish that proof, the prosecutor called to the stand a "gang expert," who provided testimony, including "facts" specific to his determination of gang affiliation, which were derived largely from previous police reports containing testimonial hearsay statements that were not independently admitted into evidence. The California Supreme Court, reversing both the trial court and the appellate court, overturned defendant's enhanced sentence, holding that admitting multiple hearsay statements contained in the police reports was not harmless error beyond a reasonable doubt. Although the court reaffirmed that an expert may rely on inadmissible hearsay in formulating an opinion, and may testify thereto, the expert may not repeat said hearsay as fact, absent a hearsay exception that would make admissible the underlying hearsay statement.

Going even further in this important case, the Supreme Court disapproved its own prior decisions "that an expert's basis testimony is not offered for its truth," *Id.* at 118, n.13, reasoning that "[w]hen any expert relates to the jury case specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay [and] it cannot logically be maintained that the statements are not being admitted for their truth."

Finally, the court held that the admission of hearsay to, in essence, introduce facts crucial to establishing gang affiliation that were not properly established elsewhere in the proceeding, ran afoul of the Confrontation Clause. This provided an additional mandate to overturn the trial and appellate courts' decisions.

COMMENTARY: In family courts throughout the state, expert reports are often introduced into evidence without objection or by stipulated hearsay waivers. Technically, there are two paths to admission of the report. First, hearsay waivers from the parties are risky but ensure admissibility of the often-costly report. *People v. Sanchez* reminds us however, that even when we stipulate to allow into evidence some or all of the report, as the first step to challenging the expert's conclusions, we must be prepared to offer or overcome objections to the multiple hearsay within the report. Secondly, when no previous hearsay waivers have been made by the parties, the first step to admitting an expert's report into evidence is to properly authenticate the report via the preparing-expert's testimony, whereby credentials are established, methodology is validated, and the basis of the expert's factual knowledge used to formulate an opinion is explained.

Whether by waiver or by authentication, the report itself may be admitted into evidence, but much of its basis may still remain objectionable, if the report contains more than just the expert's opinion, such as statements by the expert or others which attempt to introduce facts not properly admitted during, or prior to, the present proceeding. If the facts embedded in the report are crucial to the case, they must be properly introduced into evidence by other means or by way of exception to each layer of multiple hearsay, ideally before introduction of the expert report, to minimize grounds for sustaining objections.

LITIGATOR TIPS: Litigators seeking to have the court accept the conclusions of an expert who has relied on the out-of-court statements of witnesses must not assume the other party will fail to object to the underlying facts used in forming the expert's opinions. Do not be unprepared. Just because the report comes in, or just because the evaluator testifies that a certain witness told the evaluator a key piece of information, does not mean that the underlying evidence should also come in. If the basis for the opinions in the report are missing at trial, upon objection, the entire report may be found less credible, and a favorable report may, worst case scenario, become useless to prove the expert's recommendations or findings.

Litigators challenging the report should always look to whether the expert's reliance on hearsay specific to the case should be challenged due to failure of the supporting party to bring in the underlying witnesses or facts.

A stipulation to accept the expert's reliance on a subset of otherwise hearsay statements is a good move when both attorneys want to limit the controversy to a few material witnesses. In family law, if attempts to mutually limit less-necessary testimony are rebuffed, both attorneys will be forced to consider the inclusion of the full list of collateral witnesses.

In re Marriage of Shimkus, 198 Cal. Rptr. 3d 799 (2016). *#LLEvDocPhotoDemo, #LLProcedure, #LLWtnAdmissions.*

Litigators must be prepared to either request and win the admission of hearsay declarations or put on all the underlying testimony and related attachments afresh.

FACTUAL SUMMARY: At the Family Code section 217 evidentiary hearing, held to evaluate respondent's post-judgment requests for support modification and attorney's fees, petitioner's attorney mistakenly assumed there would be automatic admissibility of Request for Order declarations, limited only by prior Motions to Strike and the court's orders thereon. However, after the court made it clear that it would receive live testimony, per Family Code section 217, because attorney did not move to admit the pertinent Request for Order declarations into evidence, the court did not fully consider the evidence the attorney believed was offered. Affirmed on appeal because the record did not indicate that the overlooked Request for Order declarations had ever been properly admitted into evidence.

COMMENTARY: This case is a cautionary tale for all family law lawyers. Although the Evidence Code makes clear that declarations are hearsay, because the family law judge is both the trier *and* finder of fact, we take for granted that all pleadings and exhibits will be considered, absent objections from opposing counsel (which may paradoxically draw more of the court's attention to the objectionable filing). However, this case reminds us that the family

court is a court of law requiring the same adherence to evidentiary procedure as its civil and criminal counterparts. Although CCP section 2009 permits admissibility of non-trial affidavits, this case demonstrates that simply attaching a declaration to a Request for Order does not properly place said declaration for consideration before the court, especially in a hybrid proceeding, such as a Family Code section 217 evidentiary hearing, where the court may consider both filed declarations and witness testimony. In this case, despite not putting on all facts in her case, the attorney did not move for the admission into evidence of the underlying declarations, and their exhibits. Therefore, they were not available as evidence when the court made the final ruling, and several assumed facts were not considered.

LITIGATOR TIPS:

DECLARATIONS: When a lawyer wants a declaration admitted at an evidentiary hearing (an "affidavit" under CCP section 2009) a lawyer has only two choices:

a) Absent a stipulation, if the lawyer wants declarations to come in as direct testimony, the lawyer must expressly move that the declarations and all, or a subset, of the exhibits, be admitted into evidence.

b) If the court sustains a hearsay objection and the motion is denied, the lawyer must instead be prepared to elicit declarant testimony, authenticate, and have the exhibits marked and admitted into the record.

Absent admission into evidence of the declaration, by stipulation or by offering a hearsay exception sufficient to overcome opposing counsel's objection, the court would likely be in error if its decision included consideration of a declaration not properly admitted into evidence.

EXHIBITS: Exhibits imbedded in declarations that are used for direct or cross examination at hearing, after being admitted by the above steps, should be identified consistently with the exhibit numbers of the filed declarations, "by reference." For example, if examining the petitioner on a photo of a broken door frame in a domestic violence case, originally attached as Petitioner's Exhibit C, reference must be made to Exhibit C. If the court, for clarity sake, wants to change the numbering (e.g., three "Exhibit Cs" exist in the underlying declarations), a discussion may be had on the record, and a new numbering system may be assigned, but still starting with the reference to where the exhibit was found in the admitted declaration.

Anne H. v. Michael B., 204 Cal. Rptr. 3d 495 (2016).

#LLBoP, #LLCredibility, #LLEvDocPhotoDemo, #LLProcedure, #LLWtnLay

Litigators beware—no "automatic" change of circumstances, and regardless of previous orders, when a change of circumstances must be proven, a complete record must be established and all elements must be demonstrated by the party with the burden of proof.

FACTUAL SUMMARY: Less than a year after a final move-away order, in which father received primary custody of the child during the school year based on stability, a military mom filed for modification. She relied on what she presumed was a court-ordered automatic change of circumstances, but provided suspicious evidence. Her request was denied without factual findings. She was ordered to pay sanctions and later lost on appeal.

At the original move-away trial, a previous judicial officer found that a significant, but not exclusive, factor for child to be in father's primary care was the fact that mother's family, whom child enjoyed, still lived near father in the Bay Area and could house mother when she returned for a visit from Virginia. The father had no such inexpensive method of visiting the child wherever the mother would be stationed in the future. The initial judge held, among other rulings, that moves by the parties or mother's family members would be a change of circumstances, "requiring a new analysis of the ongoing custodial timeshare…." This ruling appears to have given mom false hope that her burden would be easy to accomplish.

When mother filed for a modification, she had already moved from her initial post to a new city on the East Coast for a ten-month course, and anticipated yet another location change after her training was complete. Ignoring the effect of these transitions on the child, and to prove a change of circumstances, mother attached a grant deed to her declaration showing that a residence had been purchased in her parents' names near her post-training location. At the hearing she also made an offer of proof, never entered into evidence, of a utility bill at the East Coast address in her parents' names. Father offered competing evidence, such as the fact that the address on the grant deed was listed as mother's own new address in an application, the fact she never gave the court a different new address for herself, and the fact that the grandparents visited with the child at their alleged former residence in the Bay Area *after* mother's request for orders was filed. It appears that no acceptable testimony was given by mother on why the change away from father was in the child's best interests.

COMMENTARY: Family Code section 3087, as interpreted by the California Supreme Court in *In re Marriage of Brown and Yana*, 38 Cal. Rptr. 3d 610, 616 (2006), reiterates the "changed circumstance rule," wherein "custody modification is appropriate only if the parent seeking modification demonstrates 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's best interest."

Mother asserted on appeal that the trial court abused its discretion in not finding that her parents' move was a court-mandated change of circumstances. The appellate court dispensed with the automatic change of circumstances argument in a carefully detailed examination of the law. Briefly, in an extension of appellate law to the trial court level, any previous court's non-essential, also called unnecessary, ruling on what would constitute a future change of circumstances cannot bind a future judge's decision. *Anne H.*, 204 Cal. Rptr. 3d at 504.

For analysis by litigators, is whether mother offered enough evidence to prove that a significant change of circumstances had occurred. In essence, she had to prove

that her parents actually moved and did not merely buy a home in Virginia. The appellate court found her proof insufficient and called into question her credibility. In addition to the impeachment offered by father, "oddly," there was no declaration or testimony from her parents to prove that they had actually moved. *Id.* at 506.

Finally, "nothing in the change of circumstances claimed by Mother caused school year custody with her, rather than Father, to be a clearly preferable situation in furthering [child's] best interests." *Id.* Merely showing a change in circumstances does not prove the second element, that a different custody arrangement would be in the child's best interests.

LITIGATOR TIPS:

NO AUTOMATIC CHANGES IN CIRCUMSTANCES: Litigators must make sure that any mixed signals from past rulings are not exclusively relied on when bringing in a post-judgment modification. The specific elements changes of circumstances must be shown—no automatic change of custody! *See also Heidi S. v. David H.*, 205 Cal. Rptr. 3d 335 (2016), for a discussion of automatic changes due to dirty drug tests. Even in that case, the principle stands that a person resisting a proposed change is always allowed to have his or her day in court if he or she files with sufficient evidence to disprove an inciting event. For another recent case on proving the non-essential element while skipping the material one, *see In re Marriage of Evilsizor and Sweeney*, 189 Cal. Rptr. 3d 1 (2015), where the husband asserted that it was his legal right to obtain his wife's text messages, but derailed when he offered no argument against why his inappropriate use of those messages made him susceptible to a domestic violence restraining order.

LAY WITNESS TESTIMONY: When a witness is crucial, even if they are out of town, fly them in! Or get a stipulation that they may testify by phone.

CREDIBILITY: Partial proof when proof is easily obtainable often establishes for the trier of fact that the party offering partial proof lacks credibility. Two other recent cases demonstrate how the poor credibility of the presenting party diminished the effect of at least part of their proof: *A.G. v. C.S.*, 201 Cal. Rptr. 3d 552 (2016), and *Heidi S. v. David H.*, 205 Cal. Rptr. 3d 335.

In Closing

Almost all of us in ACFLS are litigators, and each of us has a set of professional techniques learned from practical experience and research. The Litigator's Log is meant to stir discussion. If a case or topic in the LitLog makes you think of a particularly successful litigation tip, please email one of the authors. We may publish your comments here.

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April 1 - April 3, 2016

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Christopher C. Melcher, CFLS and Andrew L. Hunt, CPA, ASA (4/1/16) 2.1 Hours

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Hon. Patti C. Ratekin and Michele Brown, CFLS (4/2/16) 2 Hours

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