

# FAMILY LAW NEWS

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## Message from the Chair

*Jill Barr, Chair*

I recently attended a weekend conference conducted by the Association of Family and Conciliation Courts (AFCC). The California chapter of this international organization puts on an annual conference, consisting of several plenary sessions and numerous workshops over the course of the weekend. Whether you are a litigator, mediator, or collaborative practitioner, if your practice includes custody issues you should strongly consider attending the AFCC conference. AFCC members are bench officers, mental health professionals, and attorneys, all of whom are associated with family law across the state. The interdisciplinary programs that are presented are of the highest quality and include cutting-edge information and data.

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## Message from the Editor

*Julie Saffren, Editor*

The survey results are in! In fact, some were still trickling in as I began to write this column. Many thanks to the busy attorneys across the state who took time to complete and mail in the Reader Survey contained in the last issue of the *Family Law News*. I'm pleased to report the majority of survey participants expressed satisfaction with the publication in all the areas we surveyed.

Our survey participants were almost equally split between solo practitioners and members of small firms, though we had a few responses from attorneys who work

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## Family Law News

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The only negative is that many interesting workshops are occurring at the same time, so you have to choose which one to attend. I have attended this conference for several years and continue to feel that the programs are both educational and informative for my law practice.

This year, I felt particularly moved by the plight of individuals that have very little or no say at all in their family situation—the children. I am sure over the years I have heard similar information and statistics relating to the children of Family Court litigants, but this year, it had a much greater impact on me. I want to share a few pieces of information I learned at the AFCC conference.

Dr. Joan Kelly shared that only 5% of the children of separation/divorce are fully informed by their parents of the separation/dissolution and allowed to ask questions. A shocking 45% are only told a sentence or two about their parents' dissolution. Only 17% of the children that were told something about the separation/dissolution were told by both parents. Children want to be able to discuss the dissolution and how it will affect them. Children need reassurances from both parents, if possible. Most practitioners probably already know that children need to be told, reassured, and allowed to ask questions. But despite this knowledge, how many of us actually remind our clients of this fact? It is something that we can do very easily, since it only takes a few minutes. If you already do this, kudos to you. Of course, there can be a fine line between a parent reassuring a child and letting them ask questions and exposing them to too much information or conflict. We also need to remind clients that providing their children information doesn't mean involving them in the adult issues and conflict.

Dr. Kelly also stated that recent research confirms children are affected by what is described as "silent conflict" between their parents. Silent conflict occurs when parents are attempting to shield the children from the conflict, but children are still picking up the cues. Dr. Kelly stated that lack of explicit resolution of conflict is linked to more problems in children and adolescents. When it is "silent," children have no certainty that the conflict was resolved and it may cause children to misread their parents' behavior and fear the conflict still exists, when in fact, there is none. Thus, parents who feel their children have been

isolated from the conflict leading up to the dissolution or separation may not be correct.

The AFCC Conference also contained a great deal of information regarding domestic violence, and I attended a fascinating workshop regarding the impact of domestic violence on young children, conducted by Patricia Van Horn, Ph.D., J.D. Dr. Van Horn told a true story of a three-year-old boy who had witnessed domestic violence between his parents on at least two occasions, as well as witnessing at least two shootings outside his home on the street. This little boy was having aggression problems at his preschool and was getting into physical altercations on his way into school on an almost daily basis. Dr. Van Horn decided to walk with him into the school one day to see what he was experiencing. As she walked with him, she noticed other children playing in the schoolyard. As the little boy started across the schoolyard toward the school, she relayed that his fists started clenching, so she asked him what was happening, and he said that another little boy some distance away was going to hit him. She reassured him as they kept walking. As the other boy walked closer, the three year old stiffened and clenched his fists again, believing that the boy approaching was going to assault him. The other boy walked on by as he was going to play with another child. The three year old did not strike the other boy because Dr. Van Horn was there to reassure him that the other boy was not a threat. She explained that this child viewed danger all around him because of his prior exposures to violence. I don't believe that I had ever heard how a child can be affected by witnessing violence quite as it was explained by Dr. Van Horn. It definitely made me think about this issue in a different manner, and perhaps it will for some of you as well, which is why I felt compelled to share it.

One of the sessions included a panel of judges from different counties around our state. One of the issues the panel discussed was the Elkins Task Force. The point was made that members of the Family Law community, now more than at any other time, should be making our voices heard while the spotlight is on us. This is our opportunity, both collectively as a bar and individually as practitioners, to speak up and voice our opinions.

The Elkins Task Force is already collecting information, and hopefully many of you have responded to the survey that was sent out. The Task Force is still soliciting input as of the writing of this column. If you haven't provided your input, please do so. You can go to their website [www.courtinfo.ca.gov/jc/tflists/elkins.htm](http://www.courtinfo.ca.gov/jc/tflists/elkins.htm) and find these three questions:

1. In your experience with the California family court system, what is working well?
2. In your experience with the California family court system, what areas need improvement?
3. What else would you like to make sure the Elkins Family Law Task Force knows about the family court in California?

Please e-mail your responses to [elkinstaskforce@jud.ca.gov](mailto:elkinstaskforce@jud.ca.gov). Thanks for making your voice heard on these important questions. ■

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## Message from the Editor

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for the courts. There were almost as many Certified Family Law Specialists as non-CFLS responses. The majority of attorneys (59%) have over 20 years in practice, followed by 10 to 20 years (23%), 5 to 10 years (13%) and 1 to 5 years (5%). This indicates a wealth of expertise among our readership. It also creates an opportunity for us to reach out with content aimed at those newer to the practice of Family Law.

Most attorneys surveyed (77%) found our content to be relevant to their practice, and even more (82%) indicated each issue contains some practical content. Most attorneys (77%) indicated they'd like to see us publish even more practical content. While 86% felt our articles are written at an appropriate level, 14% indicated we sometimes miss the mark. One attorney found some articles to be "superficial" and requested more articles written at a level where they could be used as a resource for brief writing or case analysis. In a similar vein, another attorney suggested the Family Law News should be available to the general public so that its articles would be citable.

While 90% of survey participants were satisfied with each issue's content mix, an overwhelming 95% expressed satisfaction with our layout and format. That means kudos to our designer, Megan Lynch!

Survey participants gave us their "wish list" of topics they wanted to see in the Family Law News. The top vote-getters were Crossover Issues and Practice Tips. Not far behind were requests for articles about Legislation, Complex Property, and Tax Issues. Coverage of New Case law, Custody Evaluations, Business Valuations, Child

Support, and Mental Health Issues rounded out the top ten. So, we're "calling all authors!" Here's your chance to contribute the know-how our readership wants.

Your feedback is a necessary component of keeping the quality of this publication high. It was gratifying to read your positive comments and to know that many appreciate the work that goes into creating each issue. Many commented from their perspective as long-time readers, noting our improvement and praising the work of our editors in recent years. Creative ideas were suggested in some of the responses. One attorney requested each article begins with a brief summary in bold type, describing the article's main points. Another suggested more book reviews of new Family Law legal resources. This last suggestion really resonated with me, as I see the tough economic times creating more belt-tightening among Family Law practitioners. Given the high cost of legal publications, there would be real value in providing our readers with reviews of current legal resources. Which ones are "must-have" and help our readership make best use of limited budgets? This is another way the Family Law section could provide value to its members. We are already seeing a tremendous response to Judge Jeffrey Burke's excellent monthly case analyses of published and unpublished appellate cases, which are now provided as a benefit to the section. Many thanks to Judge Burke for his contributions to our profession.

The practice of Family Law is changing as our nation struggles with the severity of the economic crisis. In a December 2008 New York Times article titled "Breaking Up Is Harder to Do After the Housing Fall," columnist John Leland wrote "More couples own houses that neither spouse can afford to maintain, and that they cannot sell for what they owe. For couples already under stress, the family home has become a toxic asset." Leland quoted the president of the American Academy of Matrimonial Lawyers, Gary Nickelson, who put it much more bluntly, saying "We used to fight about who gets to keep the house, now we fight about who gets stuck with the dead cow."

I hear attorneys exchange opinions on whether divorce rates are rising (as more marriages collapse under financial stress) or falling (as unhappy couples stay together in a house they cannot afford to sell). Are you seeing more clients wanting to modify or terminate spousal support? Perhaps your clients are scrutinizing their monthly bills to a greater degree? Do you believe economic pressures will lead to an increase in litigants choosing ADR or collaborative practice? Or are more litigants going *in pro per*

in an attempt to preserve assets? At what point do *pro pers* risk what assets they have left? Does extreme financial strain contribute to an increase in domestic violence? Have you observed more attorneys frustrating settlement and “churning” fees because their own law practices are struggling? When cases that should settle aren’t settling, what more can judges do to help? And how can our legal services agencies possibly cope with the catastrophic drop in IOLTA funds? As we ride this roller-coaster in the coming months, we will see other unexpected impacts of the economy on our profession. I’m particularly interested in hearing about cutting-edge solutions to these difficult problems, in ways that assist families by preserving both their dignity and what wealth they have left. If you are interested in writing an article along these lines, I certainly hope you will contact me.

Inside this issue:

- FLEXCOM member, Certified Family Law Specialist and frequent *Family Law News* contributor Christopher Melcher returns to evaluate the enforceability of premarital agreements, with an eye towards creating agreements that will survive changes in client circumstances and challenge in the future;
- Jeffrey B. Setness, a former federal prosecutor for tax crimes, presents a cautionary tale of the warning signs of tax fraud and bank fraud within a dissolution. His article is an entertaining and informative “worst nightmare” scenario, filled with useful recommendations how to recognize and avoid the nightmare;
- Lilly Grenz, LCSW and Director of Family Court Services in Santa Clara County Superior Court, describes that county’s research-based methodology for assessing domestic violence cases, illustrating the difficulties and nuances of DV assessment and providing attorneys another lens through which to view DV clients;
- Barbara DiFranza, Certified Family Law Specialist and frequent lecturer on issues related to employee benefit plans, shares her significant experience in an article aimed at avoiding the traps associated with pensions and other types of deferred compensation; and last, but by no means least
- Through our Section’s valued partnership with Continuing Education of the Bar – California

(CEB) we are pleased to include Case and Legislation Highlights 2009, a compilation that reviews twenty cases, fourteen statutes and represents the major developments in Family Law in the last year.

Again, my sincere thanks to all those who provided feedback in our Reader Survey. Your input will assist the *Family Law News* going forward. Reader feedback is always welcome; email me at [jss@kidlaw.com](mailto:jss@kidlaw.com). Just don’t be surprised if I try to recruit you to write an article at the same time. ■

## Evaluating the Enforceability of a Premarital Agreement

Christopher C. Melcher

**P**remarital agreements are like parachutes. You never know if they will work until you hit the ground. Although premarital agreements are favored under the law, a one-sided agreement is risky. Enforceability depends on compliance with the California Premarital Agreement Act (the “Act”), which allows parties to make a valid premarital agreement provided they follow the rules. For premarital agreements executed after January 1, 2002, the Act provides that a premarital agreement will not be enforceable if: (1) The agreement was not made voluntarily; (2) The agreement is unconscionable **and** the disclosure requirements of the Act were not met; or (3) The agreement violates public policy.

### Involuntary Agreement

All premarital agreements executed after January 1, 2002, are deemed to have been executed involuntarily, **unless** the court finds that the party had independent legal counsel (or properly waived that right); waited at least seven days before signing the agreement; had legal capacity to enter into the agreement; and did not act under fraud, duress, or undue influence. (Fam. Code, § 1615, subd. (c).) Therefore, the party seeking to enforce the agreement bears the burden to prove all of these elements or the agreement will be invalidated.

### Independent Counsel or Waiver of Counsel

The court must find that the party against whom enforcement is sought was represented by independent counsel or, after being advised to seek independent counsel, expressly waived such representation in a separate writing. (*Id.*) The separate writing requirement means that the waiver of counsel may not be contained in the premarital agreement. The requirement that a party have “independent” legal counsel signifies that his or her counsel must be free of conflicts of interest. If one party is paying both attorneys, it could suggest a lack of independent counsel. The best practice is to give or loan funds to the party who cannot afford an attorney and allow that party to make the payment directly to his or her attorney of choice. Another issue arises when a party suggests that the other party use a particular attorney. If a referral is given, it should be made to at least two attorneys to avoid the claim that the party was directed to use his or her fiancé’s



*Christopher C. Melcher is a partner in the law firm of Walzer & Melcher LLP in Woodland Hills, California. He is a member of the Family Law Executive Committee of the State Bar of California. He is a frequent lecturer on family law issues and is a co-author of the Family Law*

*Financial Discovery Handbook by CEB.*

hand-picked attorney. Or, the unrepresented party can be directed to a list of Certified Family Law Specialists.

### Full Disclosure to Unrepresented Party

If a party waives the right to counsel, the court must find that the party (a) was fully informed of the terms of the agreement and the rights and obligations he or she was relinquishing by signing the agreement; and (b) was proficient in the language in which the explanation of his or her rights was conducted and in which the agreement is written. (*Id.*) The advice concerning the effect of the agreement must be memorialized in writings and the unrepresented party must acknowledge that he or she received it. (*Id.*) Also, if the unrepresented party is not proficient in English, the explanation of the agreement must be translated into his or her language. Giving advice as to the legal effect of the agreement might create an attorney-client relationship with the unrepresented party and will certainly invite claims by the unrepresented party that he or she was misled into signing the agreement. The best practice is never to draft a premarital agreement when the other party is unrepresented.

### Seven-Day Waiting Period

The court must find that the party had at least seven calendar days between the date he or she was “first presented” with the agreement and advised to seek independent counsel and the time the agreement was signed. (*Id.*) It is not clear whether the seven-day period runs from the date the first draft of the agreement was presented, or from the date the agreement in its final form was presented. Until the rule is clarified, the most conservative measure is to count seven days from the date the final version of the agreement was presented. No substantive changes to the proposed agreement should be made within seven days of its being executed to ensure compliance with the rule.

When a wedding date is approaching, some lawyers have been known to engage in the sharp practice of demanding changes within the seven-day waiting period—setting up a later defense to the agreement. This can only be avoided by requiring that the agreement be finalized well before the marriage.

The Act does not address whether the seven-day rule applies to any disclosures exchanged between the parties. It makes sense to exchange the disclosures in sufficient time before execution of the agreement so each party has had an adequate opportunity to review them. The agreement should recite when the proposed agreement was presented and when the disclosures were exchanged, to avoid a dispute later on about when these events occurred.

### **No Fraud, Undue Influence, Etc.**

The court must find that the party did not act under duress, fraud, or undue influence, and that the parties had the capacity to enter into the agreement. (*Id.*) Fraud is the intentional misrepresentation or concealment of a material fact with the intent to deprive another party of a legal right. (Civ. Code, § 1572.) Duress exists when a party has been deprived of the free exercise of his or her will by signing an agreement under a threat to the safety of his or her person, family, or property. (Civ. Code, § 1569; *In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 743-744.) Undue influence occurs when one takes an unfair advantage of another's weakness of mind, takes "a grossly oppressive and unfair advantage of another's necessities or distress," or uses a confidential relationship for the purpose of obtaining an unfair advantage. (Civ. Code, §1575.)

No presumption of undue influence arises in the context of a premarital agreement because unmarried persons do not owe fiduciary duties to each another. (*Marriage of Bonds* (2000) 24 Cal.4th 1, 27–29.) Prospective spouses are not presumed to be in a confidential relationship with each other either. (*Id.*) Nevertheless, a confidential relationship may, in fact, exist if a party knows that the other party has reposed confidence in him or her. (Civ. Code, §1575, subd. (1); *Vai v. Bank of America* (1961) 56 Cal.2d 329, 388.) The parties should terminate or deny the existence of a confidential relationship prior to negotiating and executing the premarital agreement. (See *In re Marriage of Connolly* (1979) 23 Cal.App.3d 590, 600.)

If a de facto confidential relationship is established and a party obtained an unfair advantage in the agreement, a presumption of undue influence will then arise. (*Johnson v. Clark* (1936) 7 Cal.2d 529, 534-535.) Undue influence

does not occur when a party uses powers of persuasion to negotiate an agreement, or when one party has a strong need to be married. For example, the mere fact that one party is pregnant with the other's child and is concerned about her financial security does not, by itself, create undue influence. (*In re Marriage of Dawley* (1976) 17 Cal.3d 342, 355.) Instead, as discussed, proof is required that a party took an "unfair advantage" of another's weakness of mind, or took a "grossly oppressive and unfair advantage of another's necessities or distress," or betrayed a trust. The overall fairness of the agreement, or failure of consideration, is not the test for its validity. (*Bonds, supra*, 7 Cal.2d at p. 28; Fam. Code, § 1611.) A court is more likely to find undue influence if threats were made to sign the agreement, or if there is a history of domestic violence between the parties, evidencing that the agreement was not freely and voluntarily made. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1520-1521.)

To protect against undue influence claims, the recitals to the premarital agreement should set forth the age, health, education, and work experience of each party, their understanding of the English language, the length of their relationship, whether there has been any domestic violence, whether they are living together or have any children together, whether each party had independent counsel or waived that right, and any other fact bearing upon their relative bargaining power. The recitals can reflect whether the agreement was negotiated between the parties directly or through their respective attorneys. The recitals can also state, if true, that the wedding date could have been postponed to allow additional time to negotiate the agreement, but the parties elected to keep their wedding date. Counsel should maintain a file showing how long the negotiations took, how many drafts of the agreement were made, and which party requested each change.

### **Any Other Factor**

Finally, the court may consider "any other factor" it deems relevant in determining whether the agreement was made voluntarily. (Fam. Code, § 1615, subd. (c)(5).) This catch-all provision is misplaced in the list of factors the court must find before a premarital agreement may be enforced. It poses great concern to spouses who seek to enforce an agreement because it appears to give the court discretion to invalidate the agreement on grounds not specified in the Act.

If the court does not make all of the findings listed above, the agreement shall be deemed to have been

executed involuntarily. Thus, as indicated above, it is the burden of the party seeking to enforce the agreement to establish each of the foregoing factors.

### Unconscionability and Inadequate Disclosure

A separate defense is available under the Act for premarital agreements that were unconscionable when executed **and** the party seeking enforcement failed to comply with the disclosure requirements of the Act. (Fam. Code, subd. (a)(1).) The burden to establish this defense is on the party resisting enforcement of the agreement. (*Id.*)

### Unconscionability

Proof is required of an absence of meaningful choice, together with contract terms that are unreasonably favorable to the other party. Unconscionability has procedural and substantive elements, both of which must be present. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071–1072; Civ. Code, § 1670.5.) Procedural unconscionability refers to oppression caused by unequal bargaining power and surprise due to hidden and unexpected provisions. Substantive unconscionability involves a one-sided, unreasonable agreement lacking in justification. The issue of unconscionability under the Act is to be decided as a matter of law as of the time the agreement was executed, except for limitations on spousal support, which are tested at time of enforcement. (Fam. Code, § 1615, subd. (a)(2).)

### Disclosure Requirements

In addition to unconscionability, the party seeking to invalidate the agreement must establish the following: (1) He or she was not provided a “fair, reasonable, and full disclosure” of the other party’s property or financial obligations; (2) He or she did not voluntarily and expressly waive a disclosure beyond that which was provided; **and** (3) He or she did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party. (Fam. Code, § 1615, subd. (a)(2).) Proof of all of these elements is required or the agreement will be upheld. It is not sufficient, for example, to show that a failure to disclose if the party seeking to invalidate the agreement knew, or reasonably should have known, of the other party’s finances. The best practice is to provide a full disclosure of all assets, debts, income, and expenses. The agreement should also state that the parties waive any disclosure beyond that provided. Otherwise, a party could claim he or she did not receive a “full” disclo-

sure because, for example, real estate appraisals or business valuations were not obtained. The disclosures can be attached as an addendum to the agreement so there is no question what was provided.

Note that proof of unconscionability or lack of disclosure, alone, is not sufficient to avoid enforcement of a premarital agreement; instead, proof of both elements is required. (*Bonds, supra*, 7 Cal.2d at p. 15.) This implies that an unconscionable agreement may be enforced, provided there was full disclosure—and that a conscionable agreement is acceptable even if there was a failure to disclose. It is not clear whether the traditional contract defense of unconscionability remains a viable defense to a premarital agreement. Counsel should anticipate that a court of equity will find a way to avoid enforcement of an unconscionable agreement, perhaps as one of those “other factors” the court may consider in determining whether the agreement was executed voluntarily.

### Violation of Public Policy

Some parties are concerned about ensuring moral or religious behavior by their soon-to-be spouse and will insist on penalty provisions in the agreement for failure to adhere to their own personal standards of conduct. Such provisions are void as against public policy, and may make the entire agreement unenforceable. (Fam. Code, § 1615, subd. (a)(7); *Marriage of Mehren & Dargan* (2004) 118 Cal.App.4th 1167, 1171–1172.) For example, a premarital agreement may not provide for liquidated damages for breach of a covenant to maintain marital fidelity. (*Diosdado v. Diosdado* (2002) 97 Cal.App.4th 470.) Agreements requiring domestic services or companionship are also void. (*Bonds, supra*, 7 Cal.2d at p. 25.) So are agreements requiring the parties to raise a child in a particular religion. (*Id.*)

Finally, premarital agreements that promote divorce are against public policy. (*Dawley, supra*, 17 Cal.3d at p. 352.) The promotive of divorce defense was developed before premarital agreements were recognized by the Act in 1986. It is questionable whether the defense is still viable, since the Act provides authority for the parties to re-order their property rights upon dissolution in a premarital agreement. (Fam. Code, § 1612, subd. (a)(3); *Marriage of Bellio* (2003) 105 Cal.App.4th 630, 633, fn. 1 (raising but not deciding issue).) Public policy favors premarital agreements, and realistic planning that takes into account the possibility of dissolution does not violate public policy. (*Id.* at pp.634-635.) Still, until this issue is

clarified, it is wise not to include a provision requiring a lump sum payment to a spouse upon divorce unless it is tied to money the spouse lost because of the marriage, such as the loss of the right to spousal support from a prior relationship.

### Special Rules for Limitations on Support

Any provision in a premarital agreement regarding spousal support, including a limitation or waiver of it, is unenforceable if the party against whom enforcement is sought was not represented by independent counsel at the time the agreement containing the provision was signed. (Fam. Code, § 1612, subd. (c).) The Act requires the party to have counsel and does not appear to allow for a waiver of that right. Furthermore, the spousal support provision will not be enforceable if it is unconscionable at time of enforcement. There is no way to predict what the circumstances of the parties will be at the time the parties separate and the spousal support is tested. The court could consider the length of the marriage, whether the parties have children, the age and health of the parties, the income and assets of each party, the marital standard of living, and the earning capacity of each party in determining whether the spousal support provision is unconscionable. The court will also consider whether the parties had unequal bargaining power and whether enforcement of the support provision would lead to an unexpected result.

To strengthen the agreement, the parties should acknowledge that there may be significant changes in their health and finances over the course of the marriage, that they might have children, and that they might have been married for many years and then divorce. This will establish their expectations when they made the agreement. Nevertheless, a court may be unwilling to enforce a waiver of spousal support when it would be inequitable to do so. Therefore, it may be better to limit spousal support rather than waive it outright.

In addition, child support may not be “adversely affected” by a premarital agreement. (Fam. Code, § 1612, subd. (b).) To avoid violating this rule, a premarital agreement should not address child support, as there is no way to tell if guideline child support is being adversely affected until the court calculates it.

### Amending a Premarital Agreement After Marriage

The Act provides that a premarital agreement may be amended or revoked after marriage “without consideration” by a signed writing. (Fam. Code, § 1614.) However, this provision of the Act predates the fidu-

ciary statutes, which were created in 1993. Permitting an amendment to be made during marriage without consideration is inconsistent with the fiduciary duties married persons owe to each other. (Fam. Code, §§ 721 & 1100, subd. (e).) If a spouse obtains an unfair advantage in marital transaction, it will be presumed to be the product of undue influence. (*In re Marriage of Burkle (Burkle II)* (2006) 139 Cal.App.4th 712.) Although the Act does not require consideration for an amendment to a premarital agreement, an amendment that makes substantive changes to the rights of the spouses will not be enforceable without consideration. (See *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 997, fn.6.) Furthermore, there is a duty to disclose between spouses. For these reasons, amending a premarital agreement after marriage should be avoided.

### Premarital Agreements Executed Prior to 2002

There is a question whether the 2002 amendments to the Act apply retroactively. The 2002 amendments added the requirements of independent legal counsel, “fair, reasonable, and full” disclosure, and the seven-day waiting period. The general rule is that all new Family Code sections are applied retroactively. However, there is an exception when the retroactive application of a new law will interfere with the rights of the parties. (Fam. Code, § 4, subd. (h).) It is impermissible for a new law to retroactively impose duties on a party which did not exist under prior law. (*In Marriage of Walker* (2006) 138 Cal. App.4th 1408, 1427-1428; *In Marriage of Fellows* (2006) 39 Cal.4th 179, 189-190.) Indeed, the legislative history leading up to the 2002 amendments states that there is “no provision for retroactive application” of the proposed amendments. (Senate Judiciary Committee Analysis to Sen. Bill No. 78, (2001-2002 Reg. Sess.) 4/25/01, p.11.)

Voiding a pre-2002 agreement for failure to comply with the requirements of the 2002 amendments would appear to constitute a violation of due process, as the contracting parties could not have anticipated those changes in the law when the agreement was made. Parties to pre-2002 agreements have property rights that cannot be altered by a later-enacted statute. The legislature did not clarify existing law in enacting the 2002 amendments—it created new law. There was no requirement in the law before then for a seven-day waiting period, or that a party must be represented by counsel when limiting or waiving the right to support.

When the Act first became effective in 1986, it was applied prospectively to agreements made on or after

the effective date of the Act. (Fam. Code, § 1601.) Since the Act itself was given only prospective effect when it was first created, it makes little sense to apply the 2002 amendments, which made substantive changes to the Act, retroactively.

Amending an old premarital agreement to bring it in compliance with the 2002 changes to the law is not a practical solution for the following reasons:

- (a) Sufficient consideration is required to validly amend a premarital agreement during marriage, even though no consideration was needed for the premarital agreement itself.
- (b) The parties will have to incur legal fees to negotiate and prepare the amended agreement.
- (c) One of the parties may not be willing to amend the premarital agreement to fulfill the procedural requirements of the 2002 amendments because he or she is no longer satisfied with the terms of the agreement, or is planning on a divorce.
- (d) Requiring married persons to renegotiate the terms of their premarital agreement during marriage is an unnecessary intrusion into the private lives of the parties. Premarital agreements are supposed to provide certainty in the event of dissolution and avoid litigation. (See *Estate of Butler* (1988) 205 Cal.App.3d 311, 314-315; *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 53.) Legislative cancellation of agreements that were valid when executed frustrates the legitimate expectations of the parties and constitutes a violation of due process. Therefore, the 2002 amendments should be applied prospectively only.

### Conclusion

Compliance with the Act for post-2002 agreements will ensure the validity of those agreements. The challenge for counsel is to create an agreement that will survive a challenge many years in the future, when the circumstances of the parties may have changed dramatically from when they were married. A balance between protecting the rights of the client and providing an equitable result upon dissolution is the best way to pack the client's parachute. ■

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Editor Julie Saffren at:**

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## Warning Signs of Tax Fraud and Bank Fraud in a Marital Dissolution Case (and the Dangers of Ignoring Them)

Jeffrey B. Setness

**Y**ou are walking out of the courthouse after a morning hearing and you turn on your cell phone. To your surprise, there are four missed calls in the last 30 minutes from your good client, John P. He is a successful businessman you have been representing in a contentious dissolution that has been going on for the last two years. This case has turned into a discovery nightmare, John's spouse, Jane, and her attorneys have been deposing everyone in sight and it appears an amicable settlement is unlikely.

### The Search

You call John back and he is in a panic. He says that Agents from IRS Criminal Investigation and the FBI are searching his house and business and are taking all of his business and accounting records as well as all of the computers. He asks what should he do—and you are at a loss for words.

Over the last 15 years, you have developed a successful Family Law practice and have well-deserved reputation as a tough opponent who is not afraid to go to trial. Since becoming a Family Law Specialist five years ago, you are sought out by the community's well-to-do whose marriages are coming to an end and who seek to minimize the adverse financial consequences of the break-up.

After a moment of stunned silence, you tell John that you do not practice criminal law and that you will start looking for a good criminal defense attorney as soon as you get off the phone. You silently wonder if it would do any good to go over to John's business while the search is going on. You quickly dismiss that idea because you have no idea what you would do once you got there. You have never represented anyone in a criminal case and your last exposure to criminal law was during your first year of law school. As you are walking to your car, you begin to wonder—which Constitutional Amendment protects a person against unreasonable searches and seizures—is it the Fourth or the Fifth?

Once you get back to your office, you begin racking your brain on who you should call to represent John.



*Jeffrey B. Setness is a partner in the law firm of Mayall, Hurley, Knutsen, Smith and Green in Stockton, California. Prior to entering private practice, Mr. Setness was a Trial Attorney in the Tax Division of the United States Department of Justice in Washington, D.C. and later*

*became an Assistant United States Attorney with the United States Attorney's Office in Las Vegas and Reno. As a federal prosecutor, Mr. Setness' primary responsibility was the investigation and prosecution of tax offenses, currency reporting violations, and bank fraud.*

Unfortunately, most of the criminal defense attorneys you know are state court practitioners and are not experienced in federal criminal cases involving the United States Attorney's Office, the IRS and FBI.

### The Meeting with the Criminal Defense Attorney

After numerous telephone calls, you finally are able to arrange an afternoon appointment with a former federal prosecutor who is now in private practice, Angela R. Angela starts off the meeting by asking to see a copy of the Search Warrant, and John hands it to her. Angela begins to read off the criminal offenses listed on the Search Warrant—Income Tax Evasion; Making and Subscribing to False Income Tax Returns; Structuring of Currency Transactions; Conspiracy and Bank Fraud.

Angela turns to John and asks him point blank if he receives large amounts of currency in his business. John hesitates for a moment and responds "a little, not that much." Angela hardly seems satisfied by this response and proceeds to grill John for the next 30 minutes on exactly how much currency was received by the business in each of the last six years; was the currency reported on the books and records of the business; and was the currency deposited into the business' bank accounts. Each time John gives a vague response or says he doesn't remember, Angela follows up with another even more pointed question. You think silently to yourself—Angela should have stayed a prosecutor. As the minutes go by and the questioning grows more intense, the amount of currency that John admits to receiving is growing and

growing and it becomes clear that these amounts never made their way on to the business tax returns. Angela would glance at you every once in awhile as if to ask—did you know this?

As you listen to John confess his guilt, a knot is developing in your stomach—you begin thinking back to the numerous interrogatories and countless document production requests by Jane’s attorneys in the Family Law case requesting information and documentation relating to the business’ receipt of currency and the payment of personal expenses by the business. At the time you first looked over the interrogatories and document production requests, you dismissed them as a serious case of overkill by attorneys who apparently did not have anything else to do.

The knot in your stomach does not get any smaller when you recall that John told you that the business did not really receive that much currency and that it was no big deal. You recall being a little concerned but hey—John is the one signing the verification, not you. You grimace when you recall that you had prepared responses to document production requests that stated unequivocally that no documents have ever existed relating to the receipt of currency by the business in the last six years. Is that response going to come back to haunt us?

You then begin to think back to all of those depositions of the employees of John’s business—especially the people in accounting. Jane’s attorneys (especially that one who did not seem to know much about Family Law) would ask question after question about the mechanics of how monies were received by the business and how they were recorded on the books and records of the business. You felt like you were in Accounting 101 and got so bored that you would write letters regarding other cases on your laptop as Jane’s attorney would drone on and on. You had taken solace in the fact that you were earning your substantial hourly rate during these marathon depositions.

Angela begins to ask questions regarding loan applications by the business and if Jane’s attorneys had made any efforts to obtain them. You respond that Jane’s attorneys had obtained some but not all of them. Angela asks you if you had compared the amounts reported on the loan applications with the amounts reported on the tax returns. You respond no and she shoots back that it may be a good idea to do that as soon as possible. She explains that if the

amounts on the loan applications don’t match the amounts on the tax returns, John may be in a criminal “Catch-22” situation—either the tax returns are false (and he has committed tax evasion) or the loan applications are false (and he has committed bank fraud).

Angela suddenly switches gears and begins to ask questions about the attorneys who are representing Jane in the marital dissolution action. You respond that Jane was initially being represented only by Mary B., an experienced Family Law attorney who has an excellent reputation. However, about a year ago, another attorney, Mike L., was associated in as co-counsel with Mary B. When you mention Mike L.’s name, Angela looks at you and asks if you were aware that Mike L. is former federal prosecutor who used to try criminal tax cases. You cannot hide your surprise and sheepishly respond that you were not aware of that. John gives you a withering glance as if to say “why didn’t you know”?

Angela explains that the Search Warrant for John’s house and business had to be based upon a finding of “probable cause” by a United States Magistrate Judge and that this “probable cause” is usually set forth in an Affidavit prepared and signed by the investigating IRS or FBI Special Agent with the assistance of the United States Attorney’s Office. Angela explains that since John did not receive a copy of the Affidavit at the time of the search that would indicate it has been sealed. Although the Affidavit is not available, it is Angela’s guess that sometime during the dissolution, Jane went to the United States Attorney’s Office seeking immunity and is now cooperating with the federal authorities in their investigation of John and his business. With this piece of good news, the meeting comes to an end and another appointment is scheduled for later in the week.

### **A Time For Reflection**

As you drive back to your office you realize you are totally exhausted. To put it mildly, this meeting did not go well and you wonder if John is going to fire you. You begin to look back on your representation of John over the last two years and wonder if there was any way you could have seen this coming? After several days of reflection and reviewing the file, you have come up with quite a laundry list of warning signs that you either totally missed or had dismissed as no big deal.

## Warning Signs

### 1. Your Client Is Reluctant to Turn Over Documents Relating to Income of the Business

When you told John that the Family Code requires him to provide Jane with information and documentation relating to the income of the business, he would either ignore you or say he would get the records to you—and they would never come.

### 2. Your Client's Tax Returns Do Not Match His Lifestyle

When you saw John's personal tax returns for the first time, you quietly laughed to yourself—how could he afford his house, the place at the beach, the nice cars, and the trips to Europe on the income he was reporting.

### 3. The Business Tax Returns Do Not Match The Loan Applications

When Jane's attorneys went after the business loan applications; that was Warning Sign No. 3.

### 4. The Other Side Hires A Second Attorney For No Apparent Reason

When Jane hired a second attorney who apparently had no previous Family Law experience to act as co-counsel; that was Warning Sign No. 4.

### 5. Opposing Counsel Focuses Discovery on the Receipt of Currency, the Payment of Personal Expenses by the Business, and the Loan Applications

When Jane's two attorneys began to bombard you with interrogatories and document production requests regarding the receipt of currency, payment of personal expenses by the business and loan applications—their motives should have been clear—they are trying to prove that the tax returns are false.

### 6. Opposing Counsel Files Motions to Compel Relating to Information and Documents Relating to Currency

When John provided evasive responses to discovery and John produced practically no useful documents, opposing counsel filed motions to compel. You should have appreciated the significance of the motions to compel—the information contained in the motions has now become a matter of public record and anyone (including the IRS and FBI) has access to these documents. That was

Warning Sign No. 6 and, more significantly, the dispute is no longer a private matter between John, Jane, and their respective counsel. In other words, the genie is out of the bottle and there is no putting him back.

### What Could You Have Done Differently?

You are the type of attorney who learns from his mistakes and you vow to yourself that this will never happen again. You put together a checklist of the things that you have learned from John's case, which you intend to use with each new client from now on. It looks something like this:

#### Find Out if Your Client's Business Receives Large Amounts of Currency and Find Out Where It Goes:

At the beginning of your representation, sit down with your client and have him explain in detail how his business works and make sure you understand the flow of money into and out of the business. Find out what your client's gross receipts were for each of the last six years and determine what percentage of the receipts were by check and what percentage was in currency. Do not blindly accept what your client tells you. If your gut is telling you that your client is not telling the truth, you'd better dig further and demand documentation that supports your client's contentions. If your client claims that all cash is recorded on the books and records, have him show you the accounting records that support this claim.

#### If Your Client Is Reluctant to Turn Over Documents, Find Out Why:

If your client is reluctant to turn over documents, you need to find out why. If he is concerned that these documents will prove he is a criminal, you better consult with a criminal defense attorney immediately, because the marital dissolution action may become the least of his worries.

#### If Your Client's Tax Returns Don't Match His Lifestyle, You May Not Be The Only One Who

**Realizes That:** When you see your client's tax returns for the first time and you wonder how he could afford all of the houses, cars, and trips on the amounts he was reporting, you must ask your

client to explain this. If his explanation does not make sense, you should consider hiring a forensic accountant to determine what the truth really is. The bottom line is that if you don't buy your client's explanation, no one else will either.

**Compare the Business Tax Returns With Any Loan Applications:** If opposing counsel seeks discovery of business loan applications, you need to immediately compare the amounts reported on the business tax returns with the amounts reported on the business loan applications.

**If the Other Side Hires A Second Attorney, Find Out Why:** If the other side hires a second attorney to act as co-counsel, you should check out the attorney's background to figure out why he or she is being hired.

**If it Looks Like Your Client May Have Criminal Exposure, Tell Him:** If and when you conclude your client may have committed tax fraud and/or bank fraud, you need to tell your client of your concern as soon as possible. Your client needs to understand the seriousness of the situation and what his rights are. Your client must also understand that a criminal investigation running parallel with a civil case presents a host of unique problems and issues that must be addressed.

**Advise Your Client of His Fifth Amendment Privilege Against Self Incrimination:** Your client needs to understand that anything he says in discovery in the marital dissolution case can be used against him if and when there is a later criminal prosecution and that he has a Fifth Amendment privilege against self incrimination. Finally, your client must be told that exercising the Fifth Amendment privilege may have negative ramifications in the marital dissolution action.

**Explain To Your Client That Settlement Before the Commencement of Extensive Discovery May Be In His Best Interest:** At the beginning of the representation, your client tells you that his spouse does not deserve a single dime and he wants to fight this matter to the death no matter

how much it costs or how long it takes. Once it is determined that he has criminal exposure, you may want to advise him that that pursuing a "scorched-earth" policy may result in him being the one who is burned.

### Conclusion

As a Family Law attorney, you need to be aware that the next client who walks into your office seeking representation in his dissolution action may not be completely forthright regarding the fact that he has committed tax fraud and/or bank fraud and that his spouse knows where all the bodies are buried. The question is—will you find this out before the Feds are knocking at your client's door? ■

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*Authors: Roberta Bennett, Sandra Blair, Robert Blevans, Katherine Burke, Jeffrey Erdman, Michael Fisher, Hon. Barrett Foerster, Neil Forester, Robert Goodman, Terry Hargrave, Charlotte Keeley, Lawrence Leone, Sharon Mah, Christopher Melcher, Leslee Newman, Shanon Quinley, Esther Rosenfeld, Lance Russell, William Russell, Cheryl Sena, Hon. Gretchen Taylor, Michael Tobriner, Jennifer Wald, Terry Wheeler, Lynne Yates-Carter*

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## Assessing Domestic Violence in Family Law Custody Cases

Lilly Grenz, LCSW

In the past two decades, the issue of domestic violence has significantly affected the California Courts as attempts progressed to reduce violence between intimate partners and within families. As awareness of domestic violence increased, arrests also increased, resulting in more criminal DV cases and more civil Restraining Order requests. A growing knowledge of the negative impact of domestic violence on children resulted in more referrals to the Juvenile Dependency System and more filings in family court. In 2000, the Family Code added new legal mandates when domestic violence was alleged, including dictating specific processes related to mediation and evaluations in custody and visitation matters. The intent of this new approach was to equalize the balance of power between parents and to ensure the best possible and safest post-separation arrangement for victims of DV and their children.

One of those mandates is that mediators perform a domestic violence assessment and address safety planning for potential victims and children. The questions in our field became, “What is the definition of domestic violence? How do we assess it? What do we ask to determine if there has been domestic violence and, having gotten as much information as possible, how do we know what it means?”

The court system has widely viewed domestic violence as synonymous with battery and embedded in the dynamic of coercion and control. The data that led to this formulation was based on earlier seminal publications on the issue of DV and statistics from criminal justice systems, public health, local homicides, and domestic violence shelters. The National Council of Family & Juvenile Court Judges, Probation Departments and Batterer’s Treatment Programs based their approaches on this view. This understanding has greatly influenced Criminal DV, Juvenile, and Family Courts. This data indicates that men are generally much more violent than women and that women’s violence is often resistive. Informed by this perspective, intimate partner violence was generally understood as involving a clear victim and a clear perpetrator.

A parallel path of research on family violence and “intimate partner violence” was taking place in academic and research settings beginning in the 1970s and 1990s and continues today. This research was based on large representative samples of the population. Findings were



*Lilly Grenz is a graduate of UC Berkeley. Formerly a psychotherapist in public and private settings, she has been a family law mediator since 1983. She has been Director of Family Court Services for the Superior Court of California in*

*Santa Clara County since 2004.*

significantly different from the findings from specialized populations seen by the police, courts, shelters, and hospitals. In particular, the finding that women were as violent as men was so at odds with what the DV shelters and Criminal DV courts were seeing that a split began, resulting in acrimony and misunderstanding between the two groups. Only recently have the two groups begun listening to each other, as it became increasingly clear that both groups were right. It was a case of the proverbial blind men describing different parts of the elephant. It is now more widely accepted that there are different kinds of violence with generally different origins and precipitants.

This research was particularly helpful to professionals working with the family court population because the dynamics of power and coercion were evident in some couples but not in others. For instance, mediators and judges saw parents who both had initiated violence throughout the relationship without either being dominant or fearful of one another and whose children and family described them as such. Other families reported that they experienced equality during the relationship; that neither had been violent; but that one or both erupted during the breakup in an uncharacteristic outburst. A third non-battery type of violence appeared connected to mental illness or chemical use rather than an entrenched dynamic of coercion and control.

Custody evaluators are charged by the Family Code and by professional standards to craft orders that are legal, research-based and safe for all parties. In Santa Clara County, Family Court Services management has been committed to keeping staff updated on current research. Steve Baron and Sandy Clark, Directors from 1991 to 2004, created the first DV Protocol in 1996. This included assessment tools shaped by the work of three researchers: Susan Hanks<sup>1</sup> and Johnston & Campbell,<sup>2</sup> who proposed DV typologies in the early 90’s. These resulted from studies based on “high-conflict” families, which found that while battery or coercive violence occurred in some families, other families exhibited dif-

ferent patterns of violence dependent on the specific family and its history.

The Santa Clara FCS assessment procedure is in its second generation and is multi-faceted. It includes a questionnaire given to parents when they become clients at Family Court Services. Both parties are invited to fill it out, at home or in the office prior to an interview. Questions come from multiple sources, including the Conflict Tactics Scale II and Jacqueline Campbell's danger assessment work. Questions are intended to assist the parties in making safe plans for themselves and their children and to assist the assessor in determining dangerousness. They also produce a more nuanced understanding of the violence. This questionnaire is voluntary. It clearly states that completion is not required and that declining to complete it will not be held against the parent. This allows the parties to decide whether to disclose information that may place them at risk because it is non-confidential. The interviewer then reviews the responses with the parent individually. This includes addressing parties' fears about the other side's access to the responses by subpoena. Interviews also include open-ended, structured narrative questions as follow-ups to the questionnaire and other inquiries. The other parent alleged to have perpetrated the violence is also interviewed individually and permitted to offer his or her side of the story. The live individual interviews are crucial to the process because the interviewer provides perceptiveness and an appreciation for context that a paper instrument lacks.

There is much more to an assessment than the questionnaire. When the mediator makes recommendations, he or she is also required to review the Court file for declarations about violence, restraining order requests, and outcomes. Criminal histories of both parents and any adult residing with them are reviewed. Child Protective Services history must be obtained, including all narrative reports written in the past two years. Obtaining corroboration from multiple sources, if available, is also required.

Over the years and in 2006-07, Santa Clara's FCS staff had a series of workshops devoted to examining the research that expanded our understanding of the broad spectrum of domestic violence. More current research, based on general representative populations, that studied women as well as men indicated that women reported initiating violence just as, or more, frequently as their male partners, though this violence seldom fit into the "battering" category and tended to have a less severe traumatic impact on the adult victim. At the same time, some highly respected feminist researchers published papers stating

that they too were convinced that family violence research should not be dismissed. Most notably, Ellen Pence, who had done the seminal research in Duluth, Minnesota, that led to the "Power and Control Wheel," began telling students in her workshops that, while she still believed that patriarchal entitlement was at the core of battery, she acknowledged the following: that women were as violent as men in non-battering relationships; that women were responsible for most child abuse; and that not all violence was the same. Her 2006 paper, *Re-examining 'Battering: Are All Acts of Violence the Same?'*<sup>3</sup> states:

Confusion occurs when we begin to equate 'battering' to all acts of 'domestic violence.' The comparison is erroneous, as not all violence by intimate partners follows the systematic pattern of control, intimidation and domination that is typical of battering. Grasping that there are important differences in partner violence is crucial for researchers, practitioners, and advocates since this understanding would guide the forging of effective interventions for victims and perpetrators.

Other researchers, feminist and non-feminist, voiced similar perspectives, and most contemporary theorists have abandoned the "one size fits all" approach.<sup>4</sup>

In 2007, Santa Clara's FCS staff discussed these developments in a workshop devoted entirely to crafting an assessment summary that allowed for the maximum recognition of the facts within a particular family. The following caveats were included to avoid oversimplification or forcing choices that were at odds with the categories:

Check the category that appears to describe the behavior/dynamics after review and consideration of declaration, DV questionnaire, court file, intake information and collateral information (if appropriate). Overlap and continuum in categories are likely. Note nuances and cultural aspects. Accountability for violence applies to all types. Not all the elements may be present for a case to fit into a certain category more than others. The suggested interventions are not intended to be determinant or to exclude others that may more appropriately fit the needs of the case. Pick the one that most closely fits.

There is also a category for "Unable to determine."

One of the greatest frustrations in family court work is that the intense human emotions generated by a sense of loss, betrayal or rage in a couple breakup, or the presence of a psychological disorder, can lead

to false allegations. Great damage can be done with even a temporary order to a parent who is the victim of a baseless accusation. A recent research study done by Janet Johnston and colleagues suggested that 85% of DV allegations made by fathers were not substantiated and 59% of DV allegations by mother were not substantiated.<sup>5</sup> Bow and Boxer (2003)<sup>6</sup> found that 43% of their study group who alleged violence did not have supporting evidence for it. The standard of proof required for substantiation of such allegations was not uniform in these studies and may have ranged from “beyond a reasonable doubt” to “a preponderance of evidence.” Knowing this, the danger in family court work is to dismiss allegations too readily. It is critical that sound data is examined, not only to protect families from potential future violence but also to protect the innocent from false charges and children from the loss of a beloved parent.

An additional and important reason for a careful analysis of the domestic violence data is that different types of violence suggest different approaches by the court and by treatment providers. The FCS Differential DV Assessment Summary on the following page describes the primary elements of each type of violence and suggests appropriate interventions. The intention is not to be comprehensive but to be a “quick guide” for time-pressed assessors and for the bench and attorney community. These professionals will hopefully already have understanding of each type and its origin, and the summary provides a reminder of the typical matching intervention most likely to have a beneficial impact.

### [SEE FOLLOWING PAGES FOR DIFFERENTIAL DV ASSESSMENT]

Mental health and legal professionals working in the family law arena are likely to encounter domestic violence issues on a regular basis. A snapshot study done by the California Administrative Office of the Courts found that in 76% of the cases, at least one parent indicated that there had been domestic violence. In Santa Clara County, 52% of all mediation cases report DV when asked prior to beginning mediation and are therefore initially scheduled for mediation at separate times.

Human beings are complex, and it is likely that nuances of partner violence don't fall neatly into the categories outlined here. But categorizing violence by pattern and context is a vast improvement over the binary choice that once characterized our field; i.e., that only one parent committed “domestic violence,” that it was battery and likely perpe-

trated by a man. When confronted with possible violence, we need a variety of tools to determine what happened, to whom, and in what context. Most major professions, including the legal and medical fields, have found it imperative to have a systematic approach to assessing problems so that outcomes are less person-dependent and are more consistent, predictable and reliable. One of the greatest improvements in family court assessments in the last 15 years has been the development of an empirical approach to guide us and the incorporation of tools that minimize personal bias when forming clinical hypotheses. We are just beginning to craft a methodology in the differential assessment of domestic violence that has the confidence of various political and special interest groups and that satisfies the standards of science. There is much more to learn but we are hopeful that the approach at Santa Clara County Family Court Services will stimulate improvements in area of domestic violence assessment statewide. ■

### Endnotes

1 Hanks *Psychological Trauma in Children of Battered Women: Special Issues in Family Court, Child Custody, and Access* (1996). Paper presented at an Administrative Office of the Courts' Statewide Educational Institute.

2 Johnston *A clinical typology of interparental violence in disputed-custody divorces* (1993) *American Journal of Orthopsychiatry*, 63(2), 190-199.

3 Pence, et al *Re-examining 'Battering': Are all Acts of Violence the Same?* (2006) Praxis International. Unpublished paper.

4 See Archer *Sex Differences in Aggression Between Heterosexual Partners: a Meta-Analytical Review* (2000) *Psychological Bulletin* Vol. 126, No. 5, 651-680; Dutton *Rethinking Domestic Violence* (2006) UBC Press Vancouver, Toronto; Ellis *Separation, domestic violence and divorce mediation* (2006) *Conflict Resolution Quarterly*, Vol.23, 461-485; Frieze *Violence in Close Relationships—Development of a Research Area Comment on Archer* (2000) *Psychological Bulletin*; Kelly, et al. *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Intervention* (2008) *Family Court Review* Vol 46, No 3, July, 2008, 476-499.

5 Johnston, et al. *Allegations and Substantiations of Abuse in Custody-Disputed Families* (2005) *Family Court Review* Vol. 43 No.2, April 2005 283-294

6 Bow *Assessing allegations of domestic violence in child custody evaluations* (2003) *Journal of Interpersonal Violence* 18, 1394-1410.

## Santa Clara County Family Court Services Differential Domestic Violence Assessment Summary

CASE NAME: \_\_\_\_\_ CASE NO: \_\_\_\_\_ FCS NO: \_\_\_\_\_

ASSESSOR: \_\_\_\_\_ DATE OF ASSESSMENT: \_\_\_\_\_

**TYPOLOGY:** Check the category that appears to describe the behavior/dynamics after review and consideration of Declaration, DV Questionnaire, Court file, Intake information and collateral information (if appropriate). Overlap and continuum in categories are likely. Note nuances and cultural aspects. Accountability for violence applies to all types. Not all the elements may be present for a case to fit into a certain category more than others. The suggested interventions are not intended to be determinant or to exclude others that may more appropriately fit the needs of the case. Pick the one that most closely fits.

Primary Aggressor:  Mother  Father      No Primary Aggressor:

*[Author’s Note: For Family Court Services purposes, the term “primary aggressor” connotes the individual whose use of violence, under the circumstances, was more substantial. This terminology is distinguished from the term of “dominant aggressor” which is more often utilized by law enforcement.]*

**COERCIVE/CONTROLLING-INSTIGATED VIOLENCE/INTIMATE TERRORISM (Classic Battery):**

- Usually presence of fear by the victim
- Moderate to severe violence (e.g. black eyes, choking, punching)
- Often isolation of victim, control of the victims support system, activities and finances
- Often coercion and domination
- Often humiliation, emotional abuse, sexual coercion
- Violence occurs in the relationship
  - Dysphoric/Borderline
  - Antisocial/Psychopathy (violence also more likely outside the relationship)

*[Author’s Note: In Family Cases, it is not unusual for the physical violence to have occurred early in the relationship without repeat incidents. However, total control and emotional abuse will continue and be effective, in part, because the initial violent event(s) remain present in the memory of the victim and the family. It is a mistake to conclude that because violence took place many years ago that there is a current low risk. In some families, the threat of violence alone provides the backdrop for a pattern of control and emotional abuse. There is consensus among researchers that a majority of perpetrators suffering from an Antisocial or Psychopathic disorder are not treatable and would generally not be good parents. Victims may initially have emotional disorders like depression, post-traumatic stress disorder or substance abuse disorders. Consider temporary orders in such cases, because once safe and recovering from the abuse trauma, victims are typically the better parent in the long-term. Prevalence is not known but Michael Johnson’s research suggested it might be around 11% of the cross-section of couples in the general population who reported violence in their relationship. He indicated that men were 95% of the physical batterers but he also found there was a group of women who used emotional abuse and coercive control tactics including “using the system.”]*

**Possible Interventions**

- Batterer: 52 week certified DV program
- Parent Accountability or Parenting Without Violence
- Sole legal and physical custody to the non-offending parent
- Supervised visitation and/or supervised exchange
- If unsupervised contact, parallel parenting
- Consider individual or group counseling and/or DV support services for the victim
- Consider counseling for children

## [ ] CONFLICT-INSTIGATED VIOLENCE/SITUATIONAL COUPLE VIOLENCE

- Generally, both partners violent: may take turns or be bidirectional. May also be unidirectional
- Partners generally not fearful of each other
- Ongoing verbal provocation that becomes physical
- Poor conflict-resolution skills
- Injury to both partners although injuries often more severe to women

*[Author's Note: Results from arguments between the partners that sometimes escalate into physical violence. There is no history in these couple relationships of attempts to control or abuse the other. Violence is generally not as severe as Coercive-Controlling but the weaker partner tends to more subject to injury. These couples generally have poor conflict resolutions abilities and these couples may compromise their inner controls by use of alcohol or drugs. Prevalence is not known, but Michael Johnson initially labeled this type, "common couple violence" because it was the most frequent of all the types.]*

### **Possible Interventions:**

- 16 week Accountability Classes, or 52 week classes if violence more severe
- Parents in Conflict at Center for Healthy Development or other high conflict program
- Safe Families
- Supervised Exchanges
- Parallel Parenting

## [ ] SEPARATION-INITIATED VIOLENCE

- Partners generally not fearful of each other; may be brief period of fear after uncharacteristic or severe episode
- Either gender may initiate
- Response to specific situation (coping skills fail in response to a stressful event)
- Injury generally not as severe; can be very dangerous, even lethal, in the context of a separation
- Violence uncharacteristic, not necessarily a long-term pattern
- Generally experience remorse, guilt, shame
- Not a Coercive/controlling pattern

*[Author's Note: In this type, there was little or no violence prior to separation and the perpetrator tended to be the partner who felt abandoned. Violence was limited but could be quite severe. Both partners later described the violence as uncharacteristic. The violence stopped once the separation phase ended. In Janet Johnston's study of high-conflict separating parents, about 47% were in this category.]*

### **Possible Interventions:**

- Assess to determine if precipitated by separation. If it was, assess for "mastery" or resolution of the situation that precipitated the violence
- Consider counseling for person who may not have resolved separation or other issue
- Consider temporary supervised exchange or supervision until crisis is over
- May be appropriate to have a review
- New Skills and Choices at Center for Healthy Development

[ ] **CO-OCCURRING: MENTAL ILLNESS, DRUGS &/OR ALCOHOL, NEUROLOGICAL ISSUE**

- Presence of a severe mental disorder (in primary aggressor) and/or violence is secondary to drug or alcohol addiction
- The violence does not emanate from the relationship or power and control/coercive dynamics
- Violence generally not limited to the partner

*[Author's Note: In some cases of PTSD, paranoid, bi-polar or psychotic disorders, the violence stops when the underlying disorder is treated. In these cases, it is of little value to require the offender to take classes while not treating the illness.]*

**Possible Interventions:**

- Treatment for the mental illness or substance abuse is indicated prior to DV Intervention
- DV intervention should ideally be used after the primary disorder has been treated and remitted, and only if DV intervention then appears to be appropriate
- Referral to individual or group counseling and/or DV support services for the non-offending parent as well as referrals for Parenting Without Violence or Parent Accountability for the victim
- Therapy for the children may be appropriate

[ ] **RESISTIVE VIOLENCE** (can occur in the context of any type of domestic violence-- describe below) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*[Author's Note: At time, victims of domestic violence use violence themselves. They may resist the abuse, and use violence to defend themselves, even causing injury to their abuser. They may even initiate the violence in a particular episode, after being victims of violence in multiple prior episodes. That is why assessing the context and history of the relationship is so critical, so as not to inappropriately label a victim as a primary aggressor or label the parties as "mutual combatants". Resistive violence does not have the dynamic of mutuality because its context is defensive. That said, a victim who uses violence still needs specific interventions to ensure accountability and that better, safe choices are made in future.]*

[ ] **UNABLE TO DETERMINE** (explain):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## Avoiding Traps in Handling Pensions and Deferred Compensation on Divorce

Barbara DiFranza

### What if?

As to each decision made in pursuing an arrangement for allocation of the marital deferred compensation assets, the effective family lawyer knowledgeable in pension issues asks numerous questions before agreeing to settle any pension issue and before agreeing to relinquish the court's ability to order spousal support. Here are just a few:

1. Are asset A and asset B really equal in value?
2. What effect will a Gillmore or trustee payment arrangement have on my client's tax structure?
3. What if husband or wife is the first to die—before or after retirement?
4. Before I completely waive my client's support rights, what important protective effect could the court's ability to order spousal support confer in the future?
5. What should my client know about his/her pension rights in the future?

In cases involving such assets, the family lawyer will seek the help of an expert who can assist in asking and answering these and other critical questions.

Let's look at some cases in which such important questions were not asked while there was still time to remedy the problems—all to the detriment of one of the spouses. For ease of reading, P = Participant, employee, or plan member and A/P = Alternate Payee, non-participant spouse, or non-employee. P will be assumed to be the husband. The following hypothetical example are very simple, given that in real life, there are usually separate property interests to take into account.

### Trading Assets

Let's say that there is a 100% community interest in ABC Pension Plan, half of which is paid by the qualified pension plan trust and half by the company under a non-qualified plan. We learn that qualified plan can be paid for A/P's life but that the nonqualified plan will only pay for P's lifetime. A solution that should come to mind is to award 100% of the qualified plan to A/P and all of the nonqualified plan to P. This is a good solution—certainly



Barbara DiFranza is a Certified Family Law Specialist and practices in Nevada as well as California. Her practice focuses on the disposition of pensions and other deferred compensation plans. She is a fellow in the American Academy of

Matrimonial Lawyers and frequently lectures on issues related to employee benefit plans.

better than simply dividing each of the benefits in half. However, we are not done making sure that the community property is equally divided. A/P's awarded qualified plan asset is wholly or partially insured by the Pension Benefit Guaranty Corporation (PBGC) in the event of ABC Pension Plan's insolvency. As to the ABC non-qualified plan awarded to P, however, in the event of ABC Co's bankruptcy, P would simply be one of the numerous creditors receiving cents on the dollar—or more likely—nothing for his share. As one way to solve this potential inequality, the parties might stipulate, that in the event of a loss in the plan(s) due to a bankruptcy or other unforeseen event, the benefits would be re-equalized.

A similar issue arises with respect to “tax sheltered assets”—as not all of these are created equal. Plan benefits accumulated under 401, 403 and other sections of the Internal Revenue Code (e.g., profit sharing plans, 401(k) plans, tax sheltered annuities) may usually be rolled over to an IRA—a feature which enhances their economic value. Nonqualified deferred compensation, however, when paid, is immediately taxed and cannot be rolled over. Moreover, payment dates are often mandatory, paid out in a short time span that cannot be delayed or manipulated. Thus, in structuring a settlement involving such a plan, giving them to P and giving A/P qualified plan assets with similar current balances would produce an unequal division.

### Gillmore gaffes

Let's say that A/P makes a *Gillmore* demand. Under *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, the non-employee spouse has a right to receive retirement equivalent value on P's retirement eligibility.<sup>1</sup> A motion must be filed prior to the effective date of the *Gillmore* demand, under *In re Marriage of Cornejo* (1996) 13 Cal.4th 381.

P agrees to pay A/P the equivalent monthly amount of the pension payments she would have received on P's retirement. Nothing is said in the agreement about taxes. A windfall is achieved by A/P at P's expense because P cannot deduct the pension payments and A/P gets them free of tax. This is because, under Internal Revenue Code section 1041, unless the payments made pursuant to divorce fall into some exception, they are tax free to A/P and non tax deductible to P.

Assume the same fact situation as above, except that the agreement says that P will pay the payments as alimony/spousal support and that if A/P dies, he will make the payments to A/P's heirs. P deducts them as alimony, is audited for some reason and the IRS reads the agreement. If the payments don't stop on A/P's death, P's payments won't qualify for the alimony deduction. This loss of the alimony deduction and corresponding tax-free effect is illustrated in *Comm'r v Dunkin* (9th Cir., 2007) 500 F.3d 1065.

An experienced *Gillmore* order drafter will find a way to draft around these tax and other problems, so that A/P receives the equivalent of (and not more than) what A/P would have received on P's retirement. Other problems may include COLAs. For example, CalPERS retirees lose the COLA on the first year after retirement. Thus, the A/P must be protected against a double loss of the COLA in the *Gillmore* order. It goes without saying a properly drafted *Gillmore* order requires skill and understanding of how pension plans operate.

A different payment arrangement is appropriate during any period wherein P is receiving the retirement payments and paying A/P's share over to A/P. A properly drafted order will provide that such payments be removed from P's and added to A/P's income, as *Comm'r v Dunkin* indicated would have been the case had P transferred the payments to A/P as taken from actual retirement payments. Careful drafting is called for in these situations.

### Death Of A Spouse Before/After Retirement

Pension plans are as diverse in design and features as the mind of the ingenious pension attorneys who create them. One courts disaster by attempting in any way to deal with such assets without a thorough analysis and understanding of their features.

Let's say that, prior to the parties' separation, P retired under a California municipal plan wherein a surviving spouse receives a continuance benefit on P's death. On

divorce, the parties agree to equally divide the benefit, with the survivor to take what is left after the other's death. Unfortunately, however, this California pension plan eliminates the survivor continuance benefit on P's divorce. Faced with the rule that a court cannot order the plan to continue survivor protection to an individual who no longer meets the definition of "surviving spouse", an equal division and 'survivor take all' order will not effect an equal division. (See *In re Marriage of Nice* (1991) 230 Cal.App.3d 444.)

Where plan terms cause A/P to lose benefits upon P's death, A/P must be compensated, either by receiving more than 50% of the community interest during A/P's lifetime (based on an evaluation of actuarial present value) or having the order provide that, on her death before him, A/P's share will be paid to her chosen successor—by the plan, if it can be compelled to do so—and otherwise by P. Practitioners should be totally conversant with California Family Code section 2610 which requires that the court achieve an equal division of the community portion of all retirement benefits, including those paid after P's and A/P's lifetimes.<sup>2</sup>

As another example, a practitioner must determine the nature and extent of pre-retirement protection that a court order may secure for the A/P. If the coverage is insufficient or unavailable, what about keeping the A/P covered by P's employer-provided life insurance as part of the A/P's claim for spousal support under Family Code section 4360? If the spousal support issues have already been resolved in the divorce judgment, it may be too late to make such a claim. This is another reason to get the pension arrangement included in properly drafted orders before or at the same time as the property division and support issues are resolved in the divorce.

### Support—Avoid Burning Bridges

The availability of spousal support jurisdiction can be critical in protecting or diminishing a spouse's retirement expectation. In the case just discussed where a spouse's interest can be cut off by P's death, the court, under its spousal support jurisdiction, can order A/P protected by employer provided life insurance. But, as demonstrated by the following examples taken from real cases, there exist more situations in which the spousal support jurisdiction can be invoked to protect or to—in effect—take away pension interests.

Example One: **P "Buys" Pension Without Guarding Against Having to Pay it Back in Support.**

A divorce judgment of two 55-year-olds with equal incomes contains a provision reserving jurisdiction for each party's future support. A/P wants to receive the house and P the pension; this equal division of property is also made a part of the judgment. Five years later, P retires and receives his pension of \$3,000; A/P, however, becomes disabled and has a very small income. Based on this "change of circumstances," A/P files a spousal support motion. P, in response, asks the court to terminate spousal support due to his being limited to receiving the retirement that he already "purchased" from A/P in the divorce settlement. Result: P pays a third of his pension back to A/P in spousal support. This is the basic situation which arose as reported in the case of *In re Marriage of White* (1987) 192 Cal.App.3d 1022. *White* held that income from a pension that a spouse received in exchange for other assets on divorce thereafter remained fully available for a future spousal support award. To avoid the "double dip" that Mrs. White got to enjoy, knowledgeable specialists won't agree to such a property division without demanding the termination of support or an "anti-White" clause immunizing the purchased pension from future support consideration.

#### Example Two: **Support Terminated Before Expected Pension Received**

Parties are age 50 and were married for 25 years. While negotiating the divorce judgment, P tells A/P that he's going to retire in 18 months. In their settlement, A/P receives a time rule share of the pension plan and irrevocably waives spousal support, effective 18 months hence. 16 months later, in response to A/P's demand for a pension benefit statement, P announces he intends to keep working.

A/P now faces expensive litigation to pursue a possible undoing of her support waiver (an uphill battle especially since more than a year has passed) or, in the alternative, to obtain pension payments from P under the *Gillmore* case.

In a long-term marriage, A/P will usually be better off to continue to receive significant support while P continues to work, allowing A/P's interest in the retirement plan to improve with P's continued salary increases. Thus, the thoughtless termination of spousal support rights on a fixed date (rather than on occurrence of the retirement event), will probably cause A/P to suffer a significant economic loss even if the *Gillmore* remedy is preserved. A forensic actuary or experienced Certified Family Law Specialist with pension expertise can determine how the

receivable spousal support compares with an election of *Gillmore* benefits at various ages that will result in the loss of that support. No case holds that *Gillmore* can be imposed on an A/P and the cases seem to indicate that the choice is the A/P's.

#### Example Three: **Support Terminated While *Gillmore* Threat Remained**

Under *Gillmore*, A/P may demand payment from P of an equivalent to her retirement share once P becomes eligible to retire. Consider a situation in which the parties divided all property and entered a pension order saying what share A/P would get when P would retire. In the same settlement, P waived spousal support from A/P, as their incomes were comparable. One year later when P became eligible to retire, A/P demanded *Gillmore* payments.

In *Gillmore*, the court opined that any resulting inequity in the parties' incomes caused by *Gillmore* may be remedied by spousal support modification. (*Gillmore, supra*, 29 Cal.3d at p. 428.) In this example, however, the spousal support deterrent effect and offset has been lost. As a result, for several years until P retires, P must pay monthly payments to A/P, resulting in A/P's having 70% more income than P.

#### **Attorney's Ignorance No Bliss for Client**

Many attorneys see their job as taking care of today's pressing concerns: identify and equally divide the community property, fix the support, arrange for the children's custody. Attorneys with some foresight will write a letter at the end of the case, reminding their clients to re-register the automobile that was transferred; not to forget to change their wills and life insurance beneficiaries, and to keep the pension plan informed of changes of their address. Nevertheless, many represented clients leave the process without being told that they have important rights they may wish to protect or exercise in the future.

Counsel frequently omits to tell the client who is awarded his pension benefits to remove the former spouse as *named* beneficiary in the pension plan records for an ERISA pension plan. How surprised will be P's children to find out Dad forgot to replace their stepmother as named beneficiary on that \$2 million 401(k) plan and that recent federal case law indicates that the terms of the plan and ERISA require that the plan ignore the judgment under which stepmother waived her interest in the plan benefits. Such is the holding of *Kennedy v. Plan Admin'r for DuPont Sav. & Inv. Plan*, U.S., No. 07-636, cert.

granted 2/19/08). Agreement with this holding is indicated by *Carmona v. Carmona* (9<sup>th</sup> Cir., 2008) 2008 U. S. App Lexis 19724. Interestingly, the warnings in the form of dissolution judgment fail to urge the holder of such an asset to take the simple steps required to remove his former spouse as beneficiary.

Another less obvious but as important task for the attorney is to inform A/P of her potential *Gillmore* right to compel P to pay A/P if P chooses to keep working after the optimum date for A/P to receive a share of the retirement.

Let's look at an example. P is in the Civil Service Retirement System (CSRS). A QDRO (actually "Court Order Acceptable for Processing") correctly provides A/P with her time rule share of the benefit *when P retires*. A typical pension order preparer will not bring these issues up, as being beyond the service they offer. This is like selling the traveler paddles for the canoe but failing to warn of the rapids one mile downstream.

At age 60, five years after the divorce in which spousal support has been waived by both parties, P has earned the right to retire at a time when A/P's time rule share of the CSRS benefit is \$1,500 per month. A/P waits for ten more years and when P is age 70, A/P consults with a specialist. What result?

The specialist tells A/P that she must file an immediate *Gillmore* motion if she wishes to avoid further loss of her benefit. A/P says, "But my attorney said that if I waited, my benefit would go up with his salary, so I haven't lost anything, have I?" But under *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, *Gillmore* relief may not be made retroactive before a motion is filed seeking that relief. Thus, while negotiating for *Gillmore* rights, an A/P can lose thousands of dollars per month in benefit value.

With a bit of arithmetic, the specialist shows A/P that her losses have been dramatic. Because the A/P gave up the COLAs averaging 2.3% per annum added to the initial \$18,000 a year in foregone payments, even taking into account the higher monthly amount she will receive in year 11 based on P's 4.5% annual salary increases. Even so, A/P will have lost more than \$200,000 in today's present value.

In order to compensate an A/P for lost payments and interest during the potential *Gillmore* period (from date retirement eligible to date of actual retirement), P would have had to have maintained an increase in salary of about 9% each year in that period (the 3.5% retirement COLA plus about 6.5% per year to compensate for later start of payments).

Again, A/P's loss could have been avoided had A/P's attorney (or the referred QDRO drafter who supposedly is aware of A/P's rights) alerted A/P to the need for a *Gillmore* review to occur six months prior to P's retirement eligibility.

There are other traps that an expert in community property pension divisions will include such as giving A/P up to 100% of the community portion of any available survivor benefit in order to insure no diminution in A/P's benefits on P's death. As another example, one drafting a CalPERS order will ensure that a different treatment is given to disability pensions in order to protect the P's separate property interest in same as opposed to the treatment given by the CalPERS model order.

### Parting Remarks

How should attorneys avoid these traps? First, we must accept our responsibility to our clients for understanding how all aspects of the settlement affect the others. Knowing this, we must protect our clients from current and potential future adverse effects and educate them regarding the potential significant value of future rights that may be invoked.

Be aware there are attorneys who do not like the *Gillmore* remedy. Defending the *Gillmore* right is beyond the scope of this article. However, counsel's personal biases about the state of the law should never interfere with giving clients full and proper advice as to their lawful alternatives. ■

### Endnotes

- 1 Nevada adopted the *Gillmore* principles in *Gemma v. Gemma* (1989) 105 Nev. 458.
- 2 See "Actuarial and Legal Considerations" by forensic actuary Donald W. Parkyn at [www.justpensions.com](http://www.justpensions.com) for an extensive discussion how to accomplish this mandate.

## Case and Legislation Highlights:

### The Year in Review

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The Family Law Section is grateful for its partnership with CEB and appreciates the assistance of our CEB Liaison, Jon Heywood, to bring *The Year in Review* to our readers.

**D**uring the past year, significant new cases were decided and legislation enacted that affect family law. Except as indicated otherwise, all legislation discussed is operative January 1, 2009. All cases are final.

#### 2008 FAMILY LAW CASES

The California Supreme Court, the appellate courts, and the Ninth Circuit Court of Appeals issued important decisions during the past year affecting family law. Some of the key rulings during 2008 include the following:

- Sexual orientation is a suspect classification and Family Code provisions limiting marriage to a man and a woman discriminate without having a rational basis, rendering them unconstitutional (*In re Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683);
- An individual with a reasonable, good faith belief in the validity of his or her registered domestic partnership is entitled to protection as a putative registered domestic partner, even if the partnership was not properly registered (*Domestic Partnership of Ellis & Arriaga* (2008) 162 CA4th 1000, 76 CR3d 401);
- A spouse's intent from the outset of marriage to ignore his or her marital obligation of fidelity may support a finding of fraud sufficient to grant a nullity of the marriage under Fam C §2210(d) (*Marriage of Ramirez* (2008) 165 CA4th 751, 81 CR3d 180);
- The court of appeal imposed both appeal costs and sanctions against a family law litigant and his attorney in an appeal from a postdissolution child support matter when the appeal was brought solely for the purpose of delay (*Marriage of Gong & Kwong* (2008) 163 CA4th 510, 77 CR3d 540);

- A dissolution litigant whose motions for contempt and other relief were found to be “reckless, baseless, and frivolous” was properly sanctioned some \$64,500 under CCP §128.7 and Fam C §271 (*Marriage of Falcone & Fyke* (2008) 164 CA4th 814, 79 CR3d 588);

- A trial court that awarded custody of a child having Indian (Native American) heritage to a nonparent custodian erred in concluding that the child's constitutional right to a stable home was paramount, when the court failed to apply the substantive provisions of the Indian Child Welfare Act (ICWA) (*Erika K. v Brett D.* (2008) 161 CA4th 1259, 75 CR3d 152);

- A supporting party's decreased ability to pay his or her support obligations because of a change in employment that makes the party dependent on an annual bonus to meet those obligations may represent a change in circumstances (*Marriage of Mosley* (2008) 165 CA4th 1375, 82 CR3d 497);

- A request to modify a visitation or parenting schedule that does not amount to a change of sole to joint physical custody (or vice versa) does not require a showing of “changed circumstances,” but that the modification is in the best interest of the child (*Marriage of Lucio* (2008) 161 CA4th 1068, 74 CR3d 803);

- An annuity purchased from an undifferentiated and unallocated personal injury settlement should be excluded from child support calculations under Fam C §4058 (*Marriage of Rothrock* (2008) 159 CA4th 223, 70 CR3d 881);

- When one parent seeks to modify an existing child support order to have income imputed to the other parent under Fam C §4058(b), the parent seeking imputation bears the burden of proof of showing ability and opportunity to earn (*Marriage of Bardzik* (2008) 165 CA4th 1291, 83 CR3d 72);

- Despite provisions in a marital settlement agreement and judgment for a parent to continue payment of support after the parties' child becomes an adult and for the parties to share in paying the child's college expenses, when neither parent retains “primary physical responsibility” for the child it is inappropriate to apply the child support guideline (*Edwards v Edwards* (2008) 162 CA4th 136, 75 CR3d 458);

- When there is no agreement for the payment of child support, a third party, including a relative, with whom a child lives has no right to receive support for a child from his or her parent, and a county has no basis on which to establish a support order in favor of such a third

party (*Plumas County Dept. of Child Support Services v Rodriguez* (2008) 161 CA4th 272, 74 CR3d 285);

- A separated spouse who files and then abandons a marital dissolution action in which there has been no adjudication of rights qualifies as a “surviving spouse” in probate and therefore has priority to be (or designate a nominee to act as) the administrator of his or her deceased spouse’s estate—over the claim of the decedent’s child by a former marriage (*Estate of Garrett* (2008) 159 CA4th 831, 71 CR3d 864);

- A party to a marital dissolution whose property and support rights are adjudicated before the death of the other party lacks the status of a “surviving spouse” for probate purposes, even if he or she was still a “legal spouse” because the other party died before their family law judgment became finally effective to terminate the marriage (*Estate of McDaniel* (2008) 161 CA4th 458, 73 CR3d 907);

- A former wife who, after a marital dissolution, remained the named beneficiary of her former husband’s life insurance policies was entitled to the insurance proceeds, except to the extent that the (new) surviving spouse’s community funds paid for the final 31-day policy term (*Life Ins. Co. of North America v Ortiz* (9th Cir 2008) 535 F3d 990);

- A trial court erred in awarding the entirety of a PERS “option 2” survivor benefit to a nonemployee spouse when her community property share of the underlying retirement benefits was under 7% (*Marriage of Cooper* (2008) 160 CA4th 574, 73 CR3d 71);

- A transmutation agreement and trust that a couple prepared during marriage as part of their estate plan were held to be a valid transmutation of the husband’s separate property to community property on marital dissolution (*Marriage of Holtemann* (2008) 166 CA4th 1166, 83 CR3d 385);

- A trial judge must evaluate a request for a continuance by a person whose disabilities are claimed to be covered by the Americans With Disabilities Act of 1990 to determine if a reasonable accommodation of those disabilities merits a continuance (*Marriage of James & Christine C.* (2008) 158 CA4th 1261, 70 CR3d 715);

- A trial judge in a family law action may not act arbitrarily and unreasonably in prescribing a time for trial, and therefore a judge’s premature termination of trial that denies a party the right to present relevant evidence amounts to a denial of due process (*Marriage of Carlsson* (2008) 163 CA4th 281, 77 CR3d 305);

- A trial court’s inherent authority to correct its errors applies even when the court was prompted to reconsider its prior ruling by a motion filed in violation of CCP §1008; the court must, however, rely on evidence in the original motion (*Marriage of Barthold* (2008) 158 CA4th 1301, 70 CR3d 691);

## 2008 FAMILY LAW LEGISLATION

### Child Custody

#### Evaluations

AB 1877 (Stats 2008, ch 215)

**As of January 1, 2010, a court may impose monetary sanctions for the unwarranted disclosure of a written, confidential report in connection with a custody evaluation against the disclosing party. The legislation, AB 1877, amends Fam C §3111.**

Under preexisting law, if directed by the court, a court-appointed child custody evaluator must file a written confidential report on his or her evaluation. Fam C §3111(a). Under AB 1877, operative January 1, 2010, if the court determines that an unwarranted disclosure of the report has been made, it may impose a monetary sanction against the disclosing party. The sanction must be in an amount to deter repetition of the conduct, and may include reasonable attorney fees, costs incurred, or both, unless the court finds that the disclosing party acted with substantial justification or that other circumstances make imposition of the sanction unjust. In addition, the court must not impose a sanction that imposes an unreasonable financial burden on the sanctioned party. Fam C §3111(d). For these purposes, a disclosure is unwarranted if it is done recklessly or maliciously, and is not in the child’s best interests. Fam C §3111(f).

The Judicial Council is to adopt a form by the above date that is to be served with every child custody evaluation report that informs the recipient of the confidentiality of the report and potential consequences of unwarranted disclosure. The Judicial Council must also adopt a court rule to require that, when a court-ordered child custody evaluation report is served on the parties, this new informational form must be included with the report. Fam C §3111(e).

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §7.49 (Cal CEB Annual).

#### Factors

AB 2960 (Stats 2008, ch 54)

**Legislation clarifies that in determining whether a court should grant an ex parte custody order on the**

basis of a showing of “immediate harm to the child,” such harm includes sexual abuse of the child if the acts of abuse are of recent origin or are part of a demonstrated and continuing pattern of such abuse. The legislation, AB 2960, amends Fam C §3064.

**Under preexisting law, courts must refrain from making an order that grants or modifies child custody on an ex parte basis unless there is an immediate risk the child will be removed from California or there has been a showing of immediate harm to the child. Fam C §3064. “Immediate harm” under the statute has included having a parent who has committed acts of domestic violence—when the court determines that these acts are of recent origin or are a part of a demonstrated and continuing pattern of acts of domestic violence. Fam C §3064.**

AB 2960 amends Fam C §3064 to divide the statute into subsections and clarify that the stated definition of “immediate harm to the child” includes, but is not limited to, the domestic violence situation described above, or sexual abuse of the child—if these acts are of recent origin or are part of a demonstrated and continuing pattern of acts of sexual abuse. Fam C §3064(b)(2).

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §11.2 (Cal CEB Annual).

*SB 1255 (Stats 2008, ch 57)*

**Legislation extends the effective date of Fam C §3041.5, which authorizes a court to require testing for illegal drugs or for alcohol under certain circumstances, to January 1, 2013. The legislation, SB 1255, amends Fam C §3041.5.**

Family Code §3041.5 previously was set to be automatically repealed on January 1, 2009. SB 1255 provides that the section now will remain in effect until January 1, 2013, unless a later enacted statute (enacted before that date) deletes or extends that date. Fam C §3041.5(b).

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §7.25 (Cal CEB Annual).

## Child Support

### Enforcement

*AB 1279 (Stats 2008, ch 759)*

**Legislation indefinitely extends authorization for the Department of Child Support Service’s program of “offers in compromise” of child support arrears. The legislation amends Fam C §17560 and numerous other**

**statutes, and became operative September 30, 2008 as an urgency measure.**

Statutory authorization for a Department of Child Support Services (DCSS) program to accept offers in compromise of the payment of child support arrears (with interest) under Fam C §17560 for amounts due the State for reimbursement of public assistance aid was originally set to end on July 1, 2008. AB 1279, enacted as urgency legislation, deleted that sunset date and made other changes to Fam C §17560. As before, however, the DCSS is precluded from accepting an offer in compromise of any child support arrears owed directly to a custodial party unless that party consents to the offer in writing and participates in the agreement. Fam C §17560(d).

AB 1279 made numerous other statutory changes that are beyond the scope of this publication (*e.g.*, involving post-adoption sibling contact, adoption fees, and transfer of certain duties associated with California’s child support automation system from the Franchise Tax Board to DCSS—with varying effective dates).

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §20.97 (Cal CEB Annual).

## Discovery

### Depositions

*AB 2193 (Stats 2008, ch 231)*

**Legislation has created the Interstate and International Depositions and Discovery Act (CCP §§2029.100-2029.900), which will govern depositions taken outside of California. The legislation becomes fully operative January 1, 2010.**

As of January 1, 2010, the Interstate and International Depositions and Discovery Act (CCP §§2029.100-2029.900) will become fully operative and control procedures for depositions in a variety of discovery contexts outside of California. The Judicial Council is required to promulgate a special application form and new (or modified) subpoena forms on or before January 1, 2010, to facilitate implementation of the new law. CCP §2029.390.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §13.19 (Cal CEB Annual).

## Domestic Violence

### Evidence

*SB 1356 (Stats 2008, ch 49)*

**Legislation provides that if a court finds a victim of domestic violence in contempt of court for refusing to testify the court may not imprison the victim. The legislation, SB 1356, amends CCP §1219.**

When a court finds an individual in contempt of court, it has authority under CCP §1219 to order that person's imprisonment under certain conditions, but preexisting law has excepted a victim of a sexual assault from imprisonment for refusing testify regarding the assault. Preexisting law also has excepted victims of domestic violence who refused to testify from initial incarceration, but authorized the court to require the victim to attend up to 72 hours of a victim's program or perform an equivalent amount of community service, and gave the court the option of incarceration for a subsequent contempt finding. CCP §1219(b)-(c).

Under SB 1356, CCP §1219 has been amended to remove the provisions regarding a domestic violence victim-contemnor attending the victim's program, performing community service, and being subject to possible incarceration on a later contempt finding. Instead, the legislation simply now places domestic violence and sexual assault victims on the same footing, by stating that when either type of victim refuses to testify and is found in contempt for that reason, no court may imprison or otherwise place in custody or confine the victim. CCP §1219(a). It also provides that the term "domestic violence" as used in the statute has the meaning given in Fam C §6211.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §20.50 (Cal CEB Annual).

### **Restraining and Protective Orders**

*AB 2068 (Stats 2008, ch 153)*

**Legislation authorizes a sheriff or marshal who serves certain protective or restraining orders that are excepted from the prepayment of fees to notify the person protected of the details of service by telephonic or electronic means within 24 hours after service of such an order. The legislation, AB 2068, adds Govt C §6103.3.**

Certain protective and restraining orders may be served by a sheriff or marshal without the prepayment of fees for service. These include orders and injunctions concerning harassment, workplace violence, domestic violence, and elder abuse. Under AB 2068, a sheriff or marshal who serves such an order (see Gov C §6103.3(d)) may notify the person protected of the details of service by telephonic or electronic means within 24 hours after service, if the

protected person has requested this notification and has registered a telephone number or e-mail address at which he or she may be contacted. Gov C §6103.3(a).

In addition, AB 2068 permits the sheriff to provide this information by an "automated statewide victim information and notification system" if the sheriff has access to that system and the involved county both participates in and has funds available to operate the system. Govt C §6103.3(b). If a marshal provides service of process the marshal is to notify the sheriff's office, which in turn is to provide the notification to the protected person. Govt C §6103.3(c).

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §11.34 (Cal CEB Annual).

*AB 2553 (Stats 2008, ch 263)*

**Legislation requires a court that denies a petition for an ex parte order under Fam C §6320 to state its reasons for the denial, and provide a petitioner who has presented a "jurisdictionally adequate" petition the right to a noticed hearing on the earliest date that court business will permit and within a prescribed time from the date of the order. The legislation, AB 2553, adds Fam C §6320.5.**

Under Fam C §6320, a court is authorized to issue various orders on an ex parte basis to prevent the occurrence or recurrence of domestic violence. Preexisting law, however, contained no requirement that the court state reasons for denying ex parte relief in issuing an order denying a party's application for that relief. Under AB 2553, a court that denies an ex parte petition must state its reasons in its order denying the petition. Fam C §6320.5(a).

In addition, under AB 2553, if the ex parte petition is "jurisdictionally adequate," an order denying the petition must provide the petitioner with a noticed hearing on the earliest date that court business will permit, but not later than 20 days, or on a showing of good cause, 25 days from the date of the order. Further, the petitioner must serve on the respondent, at least five days before the hearing, copies of all supporting papers filed with the court (including the application and any affidavits). Fam C §6320.5(b). The petitioner has the option of waiving the right to a noticed hearing, and if he or she does so, the petitioner is not precluded from refileing a new petition, without prejudice, at a later time. Fam C §6320.5(c).

Finally, AB 2553 directs the Judicial Council to develop a form to implement new Fam C §6320.5 no later than January 1, 2010 (though the statute is operative as of January 1, 2009).

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §11.6 (Cal CEB Annual).

## Marriage

### Validity

*Proposition 8 (Voter Initiative)*

**Only marriage between a man and a woman is valid or recognized in California, under an initiative measure to amend the California Constitution. The measure, adding §7.5 to Article 1 of the California Constitution, became effective on passage.**

On November 4, 2008, California voters narrowly approved Proposition 8, the “California Marriage Protection Act,” an initiative measure that amends the California Constitution to declare that only marriage between a man and a woman is valid or recognized in California. The measure was initiated in response to the *In re Marriage Cases* (discussed in this publication under Recent Cases, Marriage).

Within days of its passage, however, petitions were filed with the California Supreme Court requesting a stay of its effective date and challenging its legality on, among other grounds, that it is a revision to the Constitution requiring legislative approval.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §3.1A (Cal CEB Annual).

## Parentage

### Confidentiality of Proceeding

*AB 1679 (Stats 2008, ch 50)*

**Legislation authorizes an agent, acting pursuant to written authorization from the parties to a paternity action under the Uniform Parentage Act or their attorneys, to inspect papers and records pertaining to that proceeding that are part of the court’s permanent record. The legislation, AB 1679, amends Fam C §7643.**

In parentage proceedings held under the Uniform Parentage Act, papers and records pertaining to the proceeding that are part of the permanent record of the court are subject to inspection by the parties to the action and their attorneys pursuant to Fam C §7643(b). This legislation extends the authority to inspect these records to an agent “acting pursuant to written authorization from the parties to the action or their attorneys.” Before an attorney authorizes an agent to do so, he or she must obtain consent from his or her client, and state that such consent was

obtained on the written authorization.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §8A.46 (Cal CEB Annual).

### Presumptions

*SB 1726 (Stats 2008, ch 534)*

**Legislation clarifies the statutory rule that applies when two or more presumptions on parentage conflict with one another, confirms that the artificial insemination statute (Fam C §7613) applies with respect to donations to a licensed sperm bank and in connection with in vitro fertilization, and makes numerous changes to laws affecting adoption and adoption facilitators. The legislation, SB 1726, amends Fam C §§7612-7613, 7630, 7660.5, 7662, 8632.5, 8700, 8714.5, 8802, and 8814.5, amends Prob C §1510, and adds Fam C §8639.**

Preexisting law governs the presumptions that apply in a proceeding to determine parentage, including which presumption controls in a case in which two or more presumptions arise. SB 1726 amends Fam C §7612 to clarify that if two or more presumptions arise under Fam C §7610 or Fam C §7611, or if a presumption under §7611 conflicts with a claim under §7610, the presumption that on the facts is founded on the weightier considerations of policy and logic controls. Fam C §7612(b). Previously, §7612(b) did not make reference to §7610.

Under the preexisting version of California’s artificial insemination statute (Fam C §7613), the husband of a woman who is inseminated with his consent with donor sperm under the supervision of a licensed physician and surgeon is treated as the resulting child’s legal father, and the sperm donor is treated as if he were not the natural father. SB 1726 clarifies that this rule applies not only if the donor has provided semen to a licensed physician and surgeon but also to a licensed sperm bank and for use either in artificial insemination or in vitro fertilization. Fam C §7613(b).

In addition, SB 1726, which is primarily directed at adoption matters, makes numerous changes to laws affecting adoption and adoption facilitators, which are beyond the scope of this publication.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§8A.25, 8A.28 (Cal CEB Annual).

### Set Aside of Paternity Declaration

*SB 1333 (Stats 2008, ch 58)*

**Legislation authorizes the reconsideration of the**

**denial of a motion to set aside or vacate a judgment of paternity if certain requirements are met. The legislation, SB 1333, amends Fam C §7646.**

A judgment establishing paternity may be set aside or vacated upon a motion by the previously established mother of a child, the previously established father of a child, the child, or the legal representative of any of these persons if genetic testing indicates that the previously established father of a child is not the biological father of the child, pursuant to Fam C §7646(a). SB 1333 adds authorizes the reconsideration of the denial of a motion filed under Fam C §7646(a) if the following requirements are met: (1) the motion was filed between September 24, 2006 and December 31, 2006; (2) the motion was denied solely on the basis that it was untimely; and (3) the request for reconsideration of the motion filed under amended Fam C §7646(c) must be filed on or before December 31, 2009.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §8.4 (Cal CEB Annual).

### Procedure in General

#### Guardians Ad Litem

SB 1612 (Stats 2008, ch 181)

**Legislation permits a minor whose own child is the subject to parentage, dependency, guardianship, or “any other proceedings concerning child custody, visitation, or support” to appear in court without a guardian ad litem. The legislation, SB 1612, amends CCP §372 and Fam C §7635, and adds Welf & I C §326.7.**

Preexisting law permits a minor to appear in a court proceeding without a guardian ad litem to pursue certain remedies or oppose the imposition of certain injunctive relief. See generally CCP §372. Under SB 1612, a minor whose own child is the subject of parentage, dependency, guardianship, or “any other proceedings concerning child custody, visitation, or support” may appear in the proceeding without a guardian ad litem. If, however, the court finds that the minor-parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case, the court may appoint a guardian ad litem. See CCP §372(c); Fam C §7635(b); Welf & I C §326.7.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §8A.40 (Cal CEB Annual).

#### Waiver of Court Costs

AB 2448 (Stats 2008, ch 462)

**Legislation establishes new provisions governing proceeding in forma pauperis, requiring the court to grant an initial fee waiver at any stage of proceedings at both the appellate and trial court levels, if an applicant meets specified standards of eligibility and application requirements. The legislation, AB 2448, repeals Gov C §68511.3 and adds Gov C §§68630-68641.**

Government Code §§68630-68641 provide that the court must grant an initial fee waiver at any stage of an appellate or trial court level proceeding, if an applicant meets the criteria for eligibility and application requirements. The application requirements vary depending on whether the applicant seeks to qualify under the provision set out in Govt C §68632(a),(b), or (c). The legislation sets out guidelines for the processing and determination of fee waiver applications in the trial courts and appellate courts separately. Govt C §§68634, 68635.

The legislation permits the court to grant a partial initial fee waiver if it finds that some equitable arrangement would permit the applicant to pay a portion of the fees, or to pay them over time. Gov C §68632(c). The legislation also includes a number of mechanisms for reimbursement to the court of waived fees and costs, including a lien against any civil recovery. Govt C §68636.

*Reference:* Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §10.69 (Cal CEB Annual). ■

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### EXECUTIVE EDITOR

Lynette Berg Robe  
Law Office of Lynette Berg Robe  
E-mail: Portia1000@aol.com

### EDITOR

Julie Saffren  
Schlepphorst & Emede, P.C.  
E-mail: jss@kidlaw.com

### ASSISTANT EDITOR

William Ryden  
Jaffe & Clemens  
E-mail: wryden@jaffeclemens.com

### CONTRIBUTING EDITORS

Harold J. Cohn  
E-mail: hjcesq@gmail.com

Debra S. Frank  
Law Offices of Debra S. Frank, APLC  
E-mail: debrasf@aol.com

Bonnie Riley  
Continuing Education of the Bar  
E-mail: Bonnie.Riley@ceb.ucop.edu

Marc Olson  
Style Editor  
E-mail: molsona@earthlink.net

### EDITORIAL BOARD ADVISOR

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Megan Lynch  
Sublime Designs Media  
E-mail: meganalynch@gmail.com  
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Goodman & Metz  
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Encino, CA 91436  
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Fax: (818) 986-2889  
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Fax: (310) 207-7299  
E-mail: fern@wgn.net  
Liaison: Lynette Berg Robe

### Bay Area Regional

Chair: Bonnie L. Riley  
Principal Editor, Family Law CEB  
300 Frank H. Ogawa Plaza,  
Suite 410  
Oakland, CA 94612-2001  
Phone: (510) 302-2163  
Fax: (510) 302-2001  
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Tel: (415) 538-2341  
Fax: (415) 538-2368

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