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EFFECTIVE PSYCHOLOGICAL INTERVENTION IN HIGH-CONFLICT CASES: SELECTING AND DESIGNING THE RIGHT SERVICES

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Family law practitioners need to find effective strategies to assist our clients in dealing with complex custody issues – issues which are very emotional for the parties concerned and often require immediate intervention. While we are all familiar with the psychological issues presented, attorneys are not mental health professionals and often need to turn to these professionals for their expertise and guidance in navigating the difficult course of addressing and resolving custody disputes. Consulting with mental health experts can help address and stabilize a high-conflict custody situation or can help direct the course of custody litigation. Custody disputes can be expensive for clients and can be endless. The irony of the post-Elkins era is that, while litigants are entitled to evidentiary hearing, court resources are contracting, making it difficult to get prompt resolutions to very difficult issues which directly impact children.

Mental health professionals (hereafter, MHPs) have long been involved with divorcing families. Many attorneys only consider retaining mental health experts when they need a full custody evaluation, expert testimony to challenge a custody evaluation report, or an assessment of an evaluation report. Many separating parents obtain psychotherapy for themselves and for their children, in most cases provided by therapists with little familiarity with the specifics of family court process. Recently, there has been an increased recognition of the variety of psychological services that may be useful in handling custody disputes. Innovative models have been developed that may offer more effective resolutions for families at lower costs. Careful attention needs to be paid by attorneys in selecting and structuring these services to maximize the value of these services for their clients.

We review some of the areas in which mental health services can be useful, beyond the traditional roles of evaluators or experts. Our review is not exhaustive, but focuses on areas in which the service models have recently been refined or are particularly relevant to families involved in high-conflict custody disputes in the post-Elkins era.

In economically challenging times, many families cannot afford to engage multiple MHPs. Parties may commit to the expense of a child custody evaluation, but then are unwilling

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ACFLS MISSION STATEMENT

It is the mission of ACFLS to promote and preserve the Family Law Specialty. To that end, the Association will seek to:

1. Advance the knowledge of Family Law Specialists;
2. Monitor legislation and proposals affecting the field of family law;
3. Promote and encourage ethical practice among members of the bar and their clients; and
4. Promote the specialty to the public and the family law bar.

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FROM THE EDITOR'S DESK

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We launch a new year – and ACFLS, and the *Specialist,* continue to evolve, and grow.

Lynette Robe has taken the President's chair on the Board, and, in her first "President's Letter," we welcome her at the virtual editorial desk of the *Specialist*, across the fold. We all extend our thanks to Diane Wasznicky for her indefatigable efforts as President. Take a breather, kiddo.

Next, our membership, the bar and justice system at large, continue to wrestle with the financial challenges previously noted with alarm in this column. While Los Angeles County, by far the largest county in the state, closed more than ***fifty*** courtrooms county-wide in 2012, vigorous political effort so far saved all but two of its family law courtrooms from closing. Deep cuts in staff and supporting services budgets, however, had a significant impact on family law departments. Even with the new state budget, and additional revenue from the taxpayers, however, court funding will continue in the current trend through at least the end of 2013. Family law attorneys, and bar associations state-wide, it appears, will be called upon to re-double their volunteer efforts, ***again***, to keep the system functioning, and to solicit the assistance of allied professionals (accountants, mental health professionals, etc.) in that effort.

Thus, the current issue, including, but not limited to:

We feature the first of the promised series of articles by, or co-authored with, mental health professionals, in which Dr. Lyn Greenberg, and Mary Catherine Bohen, a CFLS new to these pages, provide an over-view of the menu of roles which mental health professionals can offer us, the courts, and our clients, beyond the traditional child custody psychological evaluation. Where both court budget and logistical constraints, and clients still digging out from an economic depression demand that we expand and change our use of the mental health tool-box, we will need to have a clear idea of what's in there, and which tools fit with which tasks. Additional articles from mental health professionals further examining these issues are in the works for coming issues.

Continuing the input from authors outside of our own membership, appellate specialist Greg Ellis provides a guide to appealability, an area in which even our members, a pretty learned bunch, need to look carefully before leaping, since an incautious leap can have dire consequences. Vivian Holley re-examines the tax implications on same-sex domestic partners/spouses under DOMA, a set of issues which have been troubling lawyers and accountants since when California's "new" domestic partnership act was still "new."

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President's Message

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Following the path blazed by our intrepid Immediate Past President Diane Wasznicky is indeed a formidable task. I will need more than a compass. According to a quote from Dr. Martin Luther King, "A genuine leader is not a searcher of consensus, but a *molder* of consensus." This certainly applies to Diane. A board member described Diane to me as "a shaper," and I might describe her leadership style as "transformative," both apt images of a lady who likes to get things done . . . and don't stand in her way. Under Diane's watchful hand, in her two years as president, 2011 and 2012, enormous changes have been made that will ensure the health and stability of ACFLS for years to come. Without Diane's leadership, ACFLS would not have been able to accomplish so many changes in such a short span of time.

In the fall of 2010, the transformation process began just before Diane took office in December, with the rejuvenation of our bylaws, which was completed when she was president. The biggest change was in the terms of offices. The president, vice-president, and treasurer are now elected for two-year terms, and the immediate past president automatically serves an additional two years. The number of board members was trimmed, so that there was no longer assistant treasurer and assistant secretary, as these positions had little to do. The rest of the board terms were set at only one year. The concept is that our board will be fluid, that members will rotate on and off as needed, and it will provide more leadership opportunities from among our members. We hope to strengthen the organization by not relying too heavily on the same people year after year.

The Personnel Committee, working with an employment attorney, created long-needed employment contracts for our executive director and administrative assistant. In addition, our former Webmaster, Bonnie L. Riley, has now become an independent contractor consultant, and a contract has been formalized with her. In January 2012, Diane faced the unexpected departure of our former Executive Director, Lynn Pfeiffer, and she supervised the transition to new Executive Director Dee Rolewicz, the former Administrative Assistant, and the hiring of a new Administrative Assistant, Rachelle Santiago. Thanks to Diane, and the hard work of Dee and Rachelle, the transition went seamlessly.

Our ACFLS website had become antiquated, and over the past two years, we made the difficult change to Y-M. Now we have a new, colorful website with many bells and whistles, and the capacity to grow in numerous ways. With many thanks to Bonnie Riley, our then Webmaster, and Seth Kramer, the Chair of the Technology Committee, and Dee Rolewicz, who worked tirelessly to input information into Y-M, Diane oversaw this monumental change. With Y-M, calendars and current activities now are available on the website, and all current issues of *ACFLS Family Law Specialist* (and most issues from before it became *The Specialist*!) are now available to ACFLS members on our website. Information about the Board and its activities, and bios of all ACFLS members are available on the site. You can search for our member certified family law specialists by name, location, or other information. Our legislation letters are available to read, and there is a blog where topical material is discussed. There is an online store for the purchase of our library of DVDs. Easy registration for the Spring Seminar and other CLE programs, and payment of dues is now possible on the website. In addition, monthly E-blasts with updates on the organization's activities have been implemented. Moving to Y-M truly was a major transformative accomplishment. Go explore the site and see all the information that is available!

Starting with changes made by former Treasurer, Lulu Wong, and continuing under current Treasurer, Karen Freitas, our system of accounting has vastly improved. We now are able to accurately determine our profits and losses at any given time. A bookkeeper has been engaged to perform duties previously handled by the former executive director. Today, our finances are healthy, and reporting is accurate. We also verified our tax filing status as a nonprofit 501(c) (6). According to the Internal Revenue Service, a 501(c) (6) organization is the most appropriate designation for a nonprofit professional association, and it allows us to lobby

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or unable to sustain the specialized treatment or parenting interventions recommended by an evaluator or required to make progress in the case. Parties may not be able to afford both an expert and a consultant; careful consideration is needed as to which is more effective. Therapy and parenting interventions may be available at lower cost from less qualified practitioners, but may ultimately end up costing the family or parent much more, since poorly planned or inappropriately conducted treatment can be harmful. Most mental health interventions have a greater chance of success if adequate attention is devoted to structuring the role of the mental health professional, drafting the controlling stipulation, and obtaining the necessary consents.

Selection and planning of mental health interventions deserve as much attention as other aspects of a case, and potentially offer more value to the client than many other uses of attorney time. A traditional, undirected, or "generic" use of a particular MHP may offer less benefit to the case than careful structuring of the role for the specific needs of a client. For each of the roles described below, we discuss some of the relevant issues to be addressed during the consent process or the negotiation of a stipulation and order. Each role has distinct ethical requirements and we suggest approaches for attorneys to use in selecting or assessing the conduct of experts, but there are also many common issues to consider.

In general, attorneys should be wary of MHPs who make promises that they cannot explain, offer to "short cut" the informed consent process, violate professional boundaries, or are unable to articulate alternative courses of action. The professional objectivity of the MHP provides a critical balance, and often a synergistic partnership, to the attorney's advocacy responsibilities. Each role has different characteristics, but core ethical principles underlie all mental health process and should be part of what the attorney expects when engaging with the mental health expert (Greenberg, Gould, Gould-Saltman & Martindale 2004).[1]

New Realities, Increased Attention to Professional Roles

Recent changes in family law have increased emphasis on live testimony over courts relying on letters or declarations expressing professional opinions. Conversely, the economic stresses impacting both families and the courts provide an almost irresistible temptation to rely on mental health opinions generated from the most abbreviated procedures possible, even if these procedures result in very biased or incomplete information. While the post-Elkins emphasis on live testimony provides more opportunities to challenge poorly derived opinions, the practical reality is that trial dates may be difficult to obtain and few families have the resources to pay for both the initial full custody evaluation and a rebuttal expert to challenge evaluator's conclusions.

Historically, it was not uncommon for judicial officers

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Mary Catherine Bohen, CFLS, graduated from the University of California, Irvine, in 1982 and from Hastings College of the Law in 1985. For the first 18 years of her practice, she represented attorneys in legal malpractice actions. Starting in 2003, Mary Catherine has practiced family law exclusively, becoming a Certified Family Law Specialist in 2009. For the last 15 years, Mary Catherine has been an Instructor for the National Institute of Trial Advocacy. She has been a speaker for the Association of Family and Conciliation Courts and for California Continuing Education of the Bar. Mary Catherine's practice is in Downtown Los Angeles.

or counsel to request, and for MHPs to offer, opinions beyond the scope of their role in a particular case, or based on unreliable procedures or insufficient information. Regrettably, and too often, these practices continue. MHPs have long been expected to comply with professional guidelines and standards on common mental health issues such as informed consent and protection of confidential information. Although, historically, literature on involvement of MHPs in child custody cases was limited, recent years have seen an explosion in professional discussion of these issues, via professional literature, training and development of practice guidelines and standards for MHPs in child custody cases (American Psychological Association 2002, Fidnick, Koch, Greenberg, & Sullivan 2011).[2] Recent legislation, and professional liability cases, have underscored the authority held by licensing boards in these cases, even if an MHP's behavior was at the request of a judicial officer.[3] These trends are based on solid scientific and ethical principles about the conditions that lead to reliable or unreliable opinions by MHPs, and the serious harm that can be done to children and families when courts or families rely on invalid mental health opinions (Gottlieb and Coleman, 2011.)[4] The economic pressures to do more with less are real, but MHPs have a responsibility to forthrightly assert the limits of their opinions and decline to express opinions compromised by bias or poor procedures. MHPs who ignore these obligations do so at their peril, as well as that of the family.

More effective results can be obtained for most families if MHPs are retained by counsel, or stipulated to by the parties, to provide services specifically structured to meet the needs of the specific family. Even if the MHP is appointed by the court over the opposition of a party, careful attention should be devoted to structuring the role so that appropriate services are provided. Some roles involve providing information to the court, while others emphasize providing information to an attorney or parent, assisting with decision-making, or creating problem-solving procedures that allow better functioning and resolution of problems. MHPs have a responsibility to "advertise" only what they can deliver within the bounds of ethical practice, and consistent with available science, and to provide the information necessary for informed consent. The boundaries and limits of the MHP's role should be transparent and clear. Attorneys have an essential role in the informed consent process. Clients need careful education about the type of MHP being engaged, the expectations for the client's cooperation with the process, potential benefits and risks of using a particular MHP. Counsel should also ensure that the client has reasonable expectations of what the MHP can and will provide. Counsel should also assist clients in having a clear understanding of their own responsibilities in the process.

Each of the roles described below has a historical basis, but each has also been the subject of increased professional attention, training, scholarly discussion and refinement, as professionals attempt to better serve conflicted families. While the general confines of the role may not be new to experienced attorneys, we suggest approaches for selecting, structuring and targeting the services to meet families' specific needs while preserving clients' rights and options for the future.

Parenting Coordination

Parenting Coordination (referred to as "Parenting Plan Coordination" in Southern California) has received increased attention as families need to consider alternative methods for resolving daily disputes without either resorting to litigation or engaging other MHPs inappropriately.

Parenting Plan Coordinators (PCs) can be helpful for assisting with decisions relating to time-sensitive issues that are important to a child's development, but which cannot be promptly addressed in court. From the child's perspective, conflict over daily issues such as the child's extracurricular activities may require more immediate attention than the issues that often consume parents, such as small adjustments in the custodial schedule. PCs can also be helpful in resolving complex issues for which specialized expertise may be needed, such as decisions about the best treatment plan for a child with special developmental or medical needs. Issues such as these may be better suited for the step-wise, consultative process of Parenting Coordination rather than the time-stressed atmosphere of the courtroom. Using a PC may also preserve some role for each parent in decisions about the child, whereas a trial process may lead only to a decision awarding control to one parent over the other. Studies have shown that parents who do not feel that they have a meaningful role in parenting are more likely to withdraw from the child, an outcome which may have appeal for a litigating parent, but over time, can deprive the child of an important relationship and lead to increased stress for the primary parent (Hetherington 1999, Lamb 2012).[5] PC decisions can be made on a more timely basis and, if the PC is adequately qualified, can include input from other professionals.

The process of making decisions with a PC ultimately gives more power to the parents, and may create a "track record" of cooperative decision making that will pave the way for more global settlement of the case. The non-privileged setting of Parenting Plan Coordination may also create a record of the parents' efforts and problem solving abilities which could prove useful if the parents are unable to resolve issues and return to litigation. Information gathered over time also provides a basis for decisions made by the PC, and an opportunity to test the effectiveness of agreements more gradually than in the one-shot, pressured atmosphere of a contested hearing.

Parenting Coordinators can also be of use when other interventions, such as children's therapy, have become an area of mistrust or controversy between the parents. The fact that the PC has some decision-making authority allows at least minor issues to be resolved, avoiding the paralysis that sometimes results from counseling or negotiation with no time limit or process for decisions (Greenberg & Sullivan 2012).[6] When one parent's emotional need to engage or provoke the other parent outweighs his/her interest in resolving issues for the child, such time limits may be useful.

When attorneys are reluctant to use PCs, common concerns include divergent expectations about decision-making. PCs are often accused of both making decisions too

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"I Want to Appeal This. . . . Can I?"

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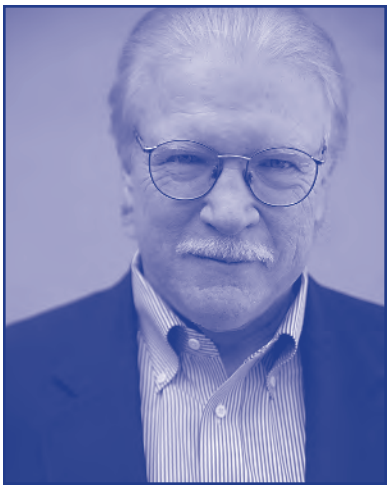

Gregory Ellis received his undergraduate degree from Amherst College in 1972, and his J.D. degree from UCLA School of Law in 1985. He is certified by the State Bar Board of Legal Specialization as a specialist in appellate law. He also holds an MFA in Writing from Vermont College of Fine Arts. After law school, Greg worked at Memel, Jacobs, Pierno, Gersh & Ellsworth, and in 1987 joined Horvitz & Levy, where his appellate career began. He has practiced with Wolff, Ellis & Clausen in San Francisco, Geragos & Geragos in Los Angeles (where he headed the firm's appellate practice) and with Esner, Chang & Ellis in Pasadena. In January 2010, he formed his present firm, the Law Offices of Gregory R. Ellis, where he continues to represent appellants and respondents in family law, civil, and criminal appeals and writs.

It's not uncommon for me to receive a call from trial counsel at the end of the day asking the following: "The court just delivered a terrible decision against my client. I want to appeal it. . . . Can I?"

That question contains both a substantive and a procedural aspect. This article concerns only the latter – that is, whether a particular ruling is "appealable" and thus ready for appellate review.[1] The answer is not always immediately apparent, particularly in family law, and will depend upon the procedural history of the case and the circumstances surrounding the ruling. But the inquiry, and conclusion, are critical for two reasons:

First, if you appeal from a *non*-appealable ruling, the reviewing court will not consider the merits of your case, but will instead dismiss your appeal. Second, if you fail to timely seek review of an *appealable* decision, you will have forever forfeited your client's right to challenge the ruling in the Court of Appeal. And the potential combination of the two – appealing from a non-appealable order while remaining unaware that a subsequent ruling by the trial court was in fact the decision you should have appealed – can result in both a dismissal and a loss of the right to appeal.

I have compiled below a bullet-point list of the baseline questions concerning appealability. Although this outline does not explore all the potential wrinkles in the analysis, it does identify, the general terrain to investigate. Most of the principles I discuss apply to civil appeals in general, but there are a few which are either unique to family law or more frequently encountered here than in other civil proceedings.

- **Is your ruling a "final judgment"?**

In California, the right to appeal is statutory. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 89-90; *Lavine v. Jessup* (1957) 48 Cal.2d 611, 613.) The primary statute governing civil appeals, including family law appeals (see *Cal. Rules of Court*, rule 5.2 (d), formerly rule 5.21) is Code of Civil Procedure section 904.1, although other statutes may provide that rulings in specialized areas of law are immediately appealable. (See, e.g., Prob. Code, §§ 1300, 1301.) First and foremost among section 904.1's list of appealable rulings are "final judgments."

An appeal may be taken from a "final judgment." (Code Civ. Proc., § 904.1, subd. (a)(1); *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 560.)[2] A judgment is "final," for appeal, if it decides the parties' rights and duties relative to each other and effectively terminates the lawsuit. If, on the other hand, further judicial action is needed to finally determine the rights of the parties, the ruling is interlocutory, *not* final.[3] (See, e.g., *Olson v. Cory* (1983) 35 Cal.3d 390, 399; *Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216-1217.) This reflects the "one final judgment rule," the doctrine which states that only final judgments are appealable, and *there is only one final judgment in a case.*[4] (See, e.g., *C3 Entertainment, Inc. v. Arthur J. Gallagher & Co.* (2005) 125 Cal.App.4th 1022, 1025; *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 963.)

It is the *effect* of the ruling, and not its name, that determines appealability. (E.g., *Kinoshita v. Horio, supra,* 186 Cal. App.3d at pp. 962-963.) Don't be fooled by labels. A judge's written decision labelled a "judgment," may be a *non-final ruling*, while a decision labeled an interlocutory judgment or order *may* be a final judgment or a severable, final adjudication requiring immediate appeal. Note also that for purposes

of appealability, the term "judgment" is understood to include appealable "orders" as well. (See Cal. Rules of Court, rule 8.10 (4); see also rule 8.104 (c) (2) & (3) [regarding what constitutes "entry" of an "appealable order"].)

The following are a few examples of rulings that are *not* final, and hence *not* appealable:

- Tentative decisions.
- Final statements of decision. *Be careful, however, that the document is not actually intended by the court to be the judgment or final order, and that it is not* ***functioning*** *as such.* Sometimes the court will combine a statement of decision and its final order or judgment. (I have only seen this happen in proceedings involving orders after judgment, but in theory it could happen in the underlying trial as well.) On the other hand, a document that merely decides the various issues in the case and states the bases for those rulings, which is what a statement of decision does (see, e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133), is not in itself a final judgment or order. (See, e.g., *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901; compare *Estate of Lock* (1981) 122 Cal.App.3d 892, 896.)
- Orders determining the enforceability of a premarital agreement where other issues remained to be tried. (See, e.g., *In re Marriage of Loya* (1987) 189 Cal.App.3d 1636, 1639.)
- Orders *characterizing* property where other issues still remained to be tried. (See, e.g., *In re Marriage of Griffin* (1993) 15 Cal.App.4th 685, 689.)

Notwithstanding the One Final Judgment Rule, however, in family law cases a party can seek and the trial court can grant a *judgment* dissolving the status of the marriage before other issues are tried. (See Fam. Code, § 2337, subd. (a); *In re Marriage of Fink* (1976) 54 Cal.App.3d 357, 360, 366.) That judgment must "expressly reserve jurisdiction for later determination of all other pending issues" (Fam. Code, § 2337, subd. (f)), and is itself immediately appealable, as is the subsequent judgment on the reserved issues. (*In re Marriage of Fink, supra,* 54 Cal.App.3d at p. 360.)[5]

But what happens if the reserved issues are themselves bifurcated instead of tried together, *with separate orders or judgments entered on each*? Does each one need to be separately appealed? For example, if the court enters a status judgment, then later enters a final judgment on custody, leaving property and support issues still to be tried, must the custody judgment be immediately appealed, or is it only a bifurcated interlocutory issue, reviewable only from the final judgment as to all of them?

Fink did not expressly reach this issue. (See 54 Cal.App.3d at p. 366 ["We need not and do not decide here whether a trial court might properly… enter more than one other 'final' and appealable judgment disposing of the other issues piecemeal"].) But generally, under the "one final judgment rule," and *absent some independent basis for immediate appealability* (see subsequent bullet points below), a ruling on a bifurcated issue which is part of the general subject matter of the litigation would not be appealable until "final" judgment. In other words, in the hypothetical raised above, it would not be appealable until a final judgment on *all* reserved issues. This reflects not only the primacy of the one final judgment rule, but is also consistent with the stated basis for the *Fink* court's decision. (See fn. 6, *supra*.)[6]

Again, however, if the court enters a ruling on one or more but not all of the reserved issues (these rulings are sometimes – often erroneously – labeled "Further Judgment") be sure that it is not separately appealable under some other doctrine discussed below. And in any event, *if you are not sure if your ruling is directly appealable*, and you don't believe you can timely resolve that uncertainty, *then file the notice of appeal anyway as a precautionary measure*. The timely filing of a notice of appeal is jurisdictional. (See Cal. Rules of Court, rule 8.104 (b); see also rule 8.104 (a) [re: filing deadlines].) But remain alert for the issuance or filing of a subsequent document which might turn out to be the actual appealable ruling in the case. Better to file two appeals in an abundance of caution – which I have done on multiple occasions over the years – and to later move to consolidate them, than to not file your notice and later discover that you have waived your client's appellate rights.

- **Is your ruling an order after an appealable final judgment?**

Section 904.1, subdivision (a)(2) states that an *order made after an appealable final judgment* is also appealable. In my experience, these appealable rulings appear more frequently in family law than in any other substantive area, given the ability of family law litigants to seek post-judgment modification of existing orders based on the court's continuing jurisdiction over them.

Post-judgment orders which fall under this subdivision must affect the underlying judgment in some fashion (even if only as to its enforcement), but must also involve issues other than those decided by the judgment. (See, e.g., *Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 497.) Thus in the family law context, these orders can include orders modifying support or custody (see, e.g., *County of Los Angeles v. Patrick* (1992) 11 Cal.App.4th 1246, 1250; *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377-1378), and orders under Family Code section 2121 (see, e.g., *Marriage of Varner* (1997) 55 Cal.App.4th 128, 136).[7]

- **Is your ruling otherwise made appealable by section 904.1?**

Section 904.1 authorizes appeals from other rulings which are not final judgments and which might occur in a family law proceeding. These include "an order discharging or refusing to discharge an attachment or granting a right to attach order"; "an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction"; "an order made appealable by the provisions of the Probate Code or the Family Code" (*I discuss the Family Code aspect below*); and "an interlocutory judgment [or order] directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." (Code Civ. Proc., § 904.1, subd. (a)(5)(6)(10)(11) & (12).)

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- **Do you have a final judgment on a collateral matter?**

When a trial court order completely resolves a matter collateral to the main action, it is immediately appealable even if there has not yet been a final judgment in the action. (See, e.g., *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1226-1227.)

More specifically, where a ruling on a collateral matter finally resolves the rights of the parties in relation to that matter, and also directs the payment of money (or, as the case law reveals, the denial of payment) or the performance of an act – that ruling is directly and independently appealable. (See, e.g., *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297-298, citing *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 561 [family law].)[8]

This exception to the "final judgment" rule can arise in family law cases because of the availability of pendente lite support and attorney's fees orders. It is an important doctrine for family law attorneys to know, for if the time within which to appeal a final ruling on a collateral matter has expired, it cannot later be challenged by appeal from the final judgment in the case. (See, e.g., *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 [pendente lite attorney's fee order].)

For this collateral judgment doctrine to apply, however, the ruling must first, by definition, be "collateral" to the issues raised by the action. A decision is "collateral" to an action if it is "distinct and severable from the general subject of the litigation" and is not a "necessary step" to the "correct determination of the main issues" in that action. (*Steen v. Fremont Cemetery Corp., supra*, 9 Cal.App.4th at p. 1227; *Lester v. Lennane, supra*, 84 Cal.App.4th at p. 561.)

Second , the order must be "final" as to the collateral matter – that is, it must terminate the litigation between the parties *on that issue*, leaving nothing more for the court to do in that regard. (See, e.g., *Steen v. Fremont Cemetery Corp., supra*, 9 Cal.App.4th at p. 1228.) And third, the order, as noted, must direct the payment of money or the performance of an act.

In the family law context, examples of rulings characterized as appealable collateral judgments include temporary spousal support, temporary child support, and awards of pendente lite attorney's fees. (See, e.g., *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368-369; *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 637-638; *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1311.) Also likely subject to immediate direct appeal under the collateral judgment doctrine are interim orders determining custody *jurisdiction* under the UCCJEA or FPKPA. (See *Lester v. Lennane, supra*, 84 Cal.App.4th at p. 563, fn. 16.)

- **Even if your ruling is interlocutory and not appealable as of right, should you seek discretionary review by certification and a motion to appeal?**

Code of Civil Procedure section 904.1, subd. (a)(10), states that a party may appeal from an order "made appealable by the provisions of the . . . Family Code." Section 2025 of the Family Code provides –

> Notwithstanding any other provision of law, if the court has ordered an issue or issues bifurcated for separate trial or hearing in advance of the disposition of the entire case, a court of appeal may order an issue or issues transferred to it for hearing and decision when the court that heard the issue or issues certifies that the appeal is appropriate. Certification by the court shall be in accordance with rules promulgated by the Judicial Council.

The Judicial Council has promulgated such rule, limited to bifurcated family law proceedings, and it establishes the procedure to seek immediate appellate review of an otherwise non-appealable interlocutory ruling. (See, e.g., *In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, 927 [date of separation]; *In re Marriage of Stevenson* (1993) 20 Cal.App.4th 250, 253 [denial of motion for alternate valuation date].)

More specifically, California Rules of Court, rule 5.392 (formerly rule 5.180), states the procedures to be followed to obtain interlocutory appeal of a ruling on a bifurcated issue in a family law action. In sum, the rule describes a two-step process. First, the aggrieved party must, "within 10 days after the clerk mails the order deciding the bifurcated issue," notice a motion asking the trial court to "certify that there is probable cause for immediate appellate review of the order."[9] (Rule 5.392 (b).) Any such certificate of probable cause must state why immediate appellate review is desirable. Suggested grounds include that appellate review "(A) Is likely to lead to settlement of the entire case; (B) Will simplify remaining issues; (C) Will conserve the courts' resources; or (D) Will benefit the well-being of a child of the marriage or the parties." (Rule 5.392 (c).)

Even if the trial court issues the certificate of probable cause, however, the process does not end there. The potential appellant must within 15 days file a motion in the Court of Appeal requesting permission to appeal. The motion must be accompanied by specified documents including a "sufficient partial record" of trial court proceedings. (See rule 5.392 (d).) If the Court of Appeal grants the motion, the court will then establish a briefing schedule, and the appeal on the bifurcated issue will proceed. (*Ibid*.)

The trial court's denial of a motion to certify does not bar a petition for extraordinary writ relief. (Rule 5.392 (g).) Moreover, if either the motion to certify or the motion to file an early appeal is denied, such denial will not preclude review of the decision on the bifurcated issue on an appeal from the final judgment in the case. (Rule 5.392 (h).)

If you are considering seeking a certificate of probable cause from an interlocutory bifurcated ruling, study this rule. It contains specific directives and short time frames. But if the ruling at issue – for example, the enforceability or construction of a premarital agreement – is case-determinative, you may decide it is worth the effort to get a ruling now from the appellate court, rather than after an entire trial and the rendition of a final judgment.

- **Is your only actual or effective appellate remedy a petition for extraordinary writ relief?**

In deciding appealability, be sure to also evaluate whether the ruling is one that can actually, or effectively, only be challenged by way of a petition for extraordinary writ relief.

This can occur where a statute provides that writ relief is the *only* appellate remedy. (See, e.g., Code Civ. Proc., §§ 170.3, subd. (d) [disqualification of a judge]; 405.39 [expungement of lis pendens]; Gov. Code, § 6259c [disclosure of records under Public Records Act].) It can also occur where courts have held that failing to seek writ relief under a *permissive* writ statute constituted waiver of the error. (See, e.g., Code Civ. Proc., § 418.10; *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 258 [denial of a motion to quash service for lack of personal jurisdiction]; *People v. Mena* (2012) 54 Cal.4th 146, 155-156.) Furthermore, subsequent proceedings at trial may show that an interlocutory ruling was not prejudicial, whereas on a pretrial writ proceeding prejudice would have been presumed.

Lastly, in some circumstances, writ review is the only potentially effective remedy. This could be so, for example, where a discovery ruling orders disclosure of privileged matter. Similarly, a *temporary* child custody order, which is not directly appealable, can in essence only be *effectively and meaningfully* challenged by a petition for extraordinary writ relief, for by the time a final judgment is entered in the case, a *permanent* custody order will be in place, and any arguable prejudice arising from the temporary order can no longer be remedied. (See, e.g., *Lester v. Lennane, supra*, 84 Cal.App.4th at pp. 558, 564-565.)

Writ review is discretionary and is summarily denied some 90 percent of the time.[10] Nevertheless, it may be your best or only chance of effectively reversing the trial court's ruling, which could mean that your petition will be deemed suitable for immediate review.

Conclusion

To summarize – when confronted with an adverse trial court ruling you wish to challenge on appeal, ask the following questions:

1. Is this a final judgment or order under Code of Civil Procedure section 904.1, subdivision (a)(1);
2. Is it a final order after an appealable judgment under section 904.1, subdivision (a)(2);
3. Is it otherwise appealable under any other specific provision in section 904.1;
4. Is it appealable as a final judgment on a collateral matter;
5. If the ruling resulted from a bifurcated proceeding and is not directly appealable, should you seek certification from the trial judge and move for interlocutory appeal in the Court of Appeal; and
6. Is your only, or most effective, avenue of appellate review a petition for extraordinary writ relief?

Endnotes:

1. The former inquiry – whether the court made a reversible error – is fact- and law-specific. But no matter how meritorious an issue may be, if the ruling is not appealable, or if it was reviewable but not timely appealed, the appellate court will not reach it.

2. The statute qualifies, however, that a "judgment of contempt that is made final and conclusive by [Code of Civil Procedure] Section 1222" is *not* appealable. (Code Civ. Proc., § 904.1, subd. (a)(1)(B); see Code Civ. Proc., §§ 1209-1222.)

3. Rulings which are interlocutory and not independently appealable may be reviewed on an appeal from the final judgment in the case.

4. Be aware, however, that an order or judgment that does not terminate the entire action but nonetheless disposes of all issues as to one party in a multiparty proceeding is final as to that party, and is thus immediately appealable. (See, e.g., *Justus v. Atchinson* (1977) 19 Cal.3d 564, 567-568, overruled on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.) I discuss below a few exceptions to the "one final judgment" rule.

5. The *Fink* court based appealability of the status judgment on the Legislature's policy decision to permit immediate entry of such judgment notwithstanding the existence of other issues to be tried, and (apparently) on the judgment being a final ruling on what the court termed a "severable" matter. (See *id*., at p. 362.) See discussion below concerning the "collateral judgment doctrine."

6. *In re Marriage of Gonsalez* (April 30, 2009, F056780), *which is not published and hence not citable*, is nevertheless instructive on the issue of the non-appealability of bifurcated reserved issues, and is worth reading.

7. The order or judgment must actually be final – that is, it may not be preliminary to some further post-judgment proceeding. (See, e.g., *Lakin v. Watkins Associated Indus.* (1993) 6 Cal.4th 644, 652-656.] An example of a non-appealable post-judgment order would thus be a ruling on a discovery matter preliminary to an upcoming support modification hearing.

8. A minority viewpoint does not require the payment of money or performance of an act in order for a final ruling on a collateral matter to be appealable. (See, e.g., *Muller v. Fresno Comm. Hosp. & Med. Ctr.* (2009) 172 Cal.App.4th 887, 898.)

9. This assumes the court has not already included such certification in its order sua sponte. (See rule 5.392 (b)(1).)

10. The minimal showings necessary to qualify your writ petition for a hearing on the merits are beyond the scope of this article. If you do intend to file a petition, however, research whether a particular statute provides a time period within which the petition must be filed. (See, e.g., Code Civ. Proc., § 405.39 [20 days]; Code Civ. Proc., § 170.3(d) [10 days].) If no statute expressly provides a shorter time, writ petitions will generally be governed by a laches analysis, with 60 days being presumptively timely. ■

Are Tax Benefits in the Wind for Same-Sex Married Couples?

Tax Changes for Same-Sex Married Couples if Defense of Marriage Act Found Invalid

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On December 7, 2012, the Supreme Court of the United States decided to hear two cases, one challenging the federal Defense of Marriage Act (DOMA) and the other challenging California laws that define marriage as a union between one man and one woman. Under the current federal law, same-sex couples who marry are treated differently than are opposite-sex married couples. Specifically, the lack of federal recognition of same-sex couple's marriage prohibits these couples from receiving the same tax treatment as opposite-sex married couples even if they're legally married under their state's law.

The federal case comes from *Windsor v. United States* and is a challenge of Section 3 of DOMA, which precludes same-sex marriages from being recognized on the federal level. The trial and appellate courts in *Windsor* found Section 3 of DOMA unconstitutional, and the Bipartisan Legal Advisory Group of the House of Representatives made an appeal since the United States Department of Justice would not defend DOMA because the administration's position is that it is unconstitutional.

If the Supreme Court upholds the lower courts' decision and find Section 3 of DOMA invalid, the federal government would then recognize same-sex marriages in states in which they are legal.

The Supreme Court's decision to hear both the federal and California cases provides an opportunity to address tax implications for same-sex married couples, both positive and negative. Speculation as to what will occur for same-sex married couples has been in the media recently. The *San Francisco Chronicle*'s Kathleen Pender shed light on these tax issues, which include changes in tax implications upon divorce, income tax, amended returns, health benefits, social security, and estate tax. We will look at these issues in light of the Tax Payer Relief Act of 2012.

1. Tax Implications for Married Same-Sex Couples

Income Tax

Currently, same-sex married couples cannot file their federal tax returns as "married filing jointly" or "married filing separately." Rather, they must file as "single" or, if otherwise qualified, as "head of household." In California, however, same-sex married couples and registered domestic partners must file their state taxes as married filing jointly or married filing separate. Further, the federal tax returns differ from traditional "single" or "head of household" filings. In community property states such as California, instead of declaring their own income separately, **same-sex married couples must each report half of their community property income**. (IRS Supplement to Publication 555, "Questions and Answers for Registered Domestic Partners and Same-Sex Spouses in Community Property States.") This controversial rule, which originates from a 2010 Internal Revenue Service Private Letter Ruling (IRS PLR-149319-09), can be onerous and, at times, expensive for same-sex married couples and registered domestic partners.

In many cases, filing as "single" or "head of household" results in lower taxes than does filing as married. A possible rationale behind this difference in taxes is that it is less expensive to live as a married couple, i.e., sharing household and other related expenses, than it is to live single. There are exceptions to this – for example, if a married couple has a large disparity in income – however, many same-sex married couples financially benefit from filing as single or as head of household under the current law. It is, in effect, a tax return windfall for many same-sex married couples and registered domestic partners.

The higher taxation of married couples is often called "the marriage tax penalty" because it imposes higher taxes on married couples than single persons. Once the combined taxable income of couples reaches about $150,000, they begin to pay a marriage tax penalty. One of President Bush's tax cuts provided temporary relief from the marriage tax penalty, and Congress renewed this relief measure on January 1, 2013. If this tax cut expires in the future, the marriage tax penalty will return. If DOMA is invalidated, then this marriage tax penalty will apply to both opposite-sex married couples and same-sex married couples.

Amended Returns

If the Supreme Court finds DOMA invalid, same-sex married couples will have the option to amend their past tax returns. Married same- sex couples may choose to amend if filing their tax returns married filing jointly or married filing separately would be financially beneficial to them. Amended returns generally must be filed within 3 years of the due date – usually April 15 – or from the date filed if an extension was granted. The Supreme Court's decision is expected in June of 2013, so married same-sex couples that want to amend their 2009 tax return should consult their tax preparer for more information regarding how to preserve their ability to amend their tax return. Of course, if a same-sex married couple benefitted from filing as single or head of household, amending past returns may not be financially advantageous for them, especially if their taxes increase due to the marriage penalty tax.

Health Benefits

While many employers allow same-sex married spouses or domestic partners in their group health insurance plan, same-sex married or domestic partner employees must pay income tax on the value of the insurance that their partner receives. Opposite-sex married couples do not have to pay this tax. If DOMA is found invalid, same-sex married couples will not have to pay this tax. Same-sex married couples or registered domestic partners may be able to amend their past tax returns to reflect this change in the event DOMA is invalidated; however, the cost of amending the tax returns may outweigh the financial benefits.

Social Security

Changes to social security benefits for same-sex married couples may be both positive and negative. Under current law, same-sex married couples cannot get spousal benefits under social security. Spousal benefits provide that while each spouse is alive, he or she receive a benefit based on their work record, but if one spouse has a lower benefit than the other, they may receive up to one-half of their spouse's benefit instead of taking their own. Moreover, when the spouse with higher benefits dies, the spouse with lower benefits may get up to 100 percent of the other's benefits. If DOMA in found invalid, then same-sex married couples may be entitled to the same spousal benefits under social security that opposite-sex married couples already receive.

The downside of this treatment lies in the increased tax married couples will have to pay on their social security benefit if they file a joint return. As of 2012, tax payers who file as single or head of household pay tax on up to 50 percent of their benefit if their income is above $25,000, and up to 85 percent of their benefit if their income is higher than $34,000. Those who file jointly, however, pay tax on up to 50 percent of their benefit if their combined income is higher than $32,000 and pay tax on up to 85 percent of their benefits if their income is higher than $44,000. By combining incomes, same-sex married couples may ultimately be subject to tax on more of their social security benefits than if they were to file as single or head of household.

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HEADS UP!

THE RULES FOR NON-DV EX PARTE APPLICATIONS HAVE CHANGED

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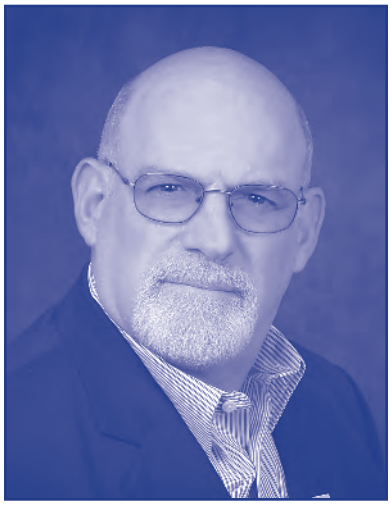

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Additions to the Rules of Court that took effect on January 1, 2013 governing non-domestic violence ex parte applications. Under new Rule of Court 5.4, these new rules supersede all local family law rules and forms in conflict with the Rules of Court. Many California courts, however, continue to maintain local rules, forms, and customary procedures in effect which govern non-DV ex parte applications that differ from the procedures mandated by the new Rules of Court. *To the extent that these local rules, forms, and procedures conflict with the new Rules of Court, they no longer apply.*

On February 28, 2012, the Judicial Council adopted the recommendations for changes in the family law Rules of Court made in the report dated February 14, 2012 of the Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force. The changes took effect January 1, 2013.

Effective January 1, 2013, except under exceptional circumstances, notice of non-DV ex parte applications must be given by 10:00 a.m. one court day before the application is to be considered by the court. Notice may only be given by telephone, in writing, or by voice mail message. *After* providing notice, each party is to be served with the documents requesting the orders "at the first reasonable opportunity." If your local rules or informal procedures provide otherwise, they have been superseded to the extent that they conflict with the new rules.

The new rules refer to what we have always called "requests for ex parte orders" as "requests for emergency orders" but acknowledge that such requests are also known as "ex parte applications."

Examples of How the New Rules Apply

Pursuant to your long-established local rules, you give four hours advance notice before submitting your non-DV ex parte application to the court. Unless the reviewing bench officer finds that you have demonstrated extraordinary circumstances justifying notice later than 10:00 a.m. one court day before the application is to be considered, you have given inadequate notice as a matter of law.

Perhaps, pursuant to your local rules, you give telephone notice at 10:00 a.m. one court day before your non-DV ex parte application is to be considered by the court. You do not specify in your telephone notice the relief you intend to seek. You do, however, as required by your local rules, follow up within hours of giving notice with delivery to the other side of copies of all the paperwork that will be submitted to the court the next day. Unless your bench officer finds that you have shown extraordinary circumstances justifying your failure to include in your notice the specific relief you intend to request, you will have given inadequate notice of your intent to apply for the order.

Assume a bench officer is reviewing a non-DV ex parte application. The local rules of that bench officer's court require that notice of non-DV ex parte applications must be given by 10:00 a.m. *two* court days before the application unless such notice is excused by the court. The Declaration re Notice regarding this particular application recites that notice was given at 10:00 a.m. one court day before the application was to be considered by the court. No excuse for the "late" notice is provided. The bench officer denies the application due to the "late" notice. The denial on the basis of the notice having been given later than allowed under local rules is wrong. As of January 1, 2013, notice of non-DV ex parte application may be given up to 10:00 a.m. one court day before the application is submitted to the court. The new Rule of Court supersedes any local rule to the contrary.

The New Rules Preempt Conflicting Local Rules

Preemption of local rules and forms by the new Rules of Court is referred to above. Rule of Court 5.4 "Preemption; local rules and forms" provides:

> *Each local court may adopt local rules and forms regarding family law actions and proceedings that are not in conflict with or inconsistent with California law or the California Rules of Court. Effective January 1, 2013, local court rules and forms must comply with the Family Rules.*

Under Rule 5.4, local courts may have their own local rules and forms but these rules and forms may not conflict with the Rules of Court.

Application of the New Rules

The new non-DV ex parte rules appear in Chapter 7 "Request for Emergency Orders (Ex Parte Orders)." Consistent with the new rules, applications for non-DV ex parte orders will be referred to below as requests for "emergency orders."

The rules governing requests for emergency orders commence with Rule 5.151 of Chapter 7 "Request for emergency orders; application; required documents." Rule 5.151(a) sets out the application of the rules that appear in Chapter 7. It provides:

> *The rules in this chapter govern applications for emergency orders (also known as ex parte applications) in family law cases, unless otherwise provided by statute or rule. These rules may be referred to as the emergency orders rules. Unless specifically stated, these rules do not apply to ex parte applications for domestic violence restraining orders under the Domestic Violence Prevention Act.*

Rule 5.151(c) "Required documents," (d) "Contents of application and declaration," and (e) "Contents of notice and declaration regarding notice of emergency hearing" will be addressed below.

How and When Notice Must be Given – Delivery of Documents to Parties

New Rule 5.165 "Requirements for Notice" sets forth the new method of notice of request for emergency orders mandated for all courts of the State of California. Rule 5.165(a) "Method of notice," provides:

> *Notice of appearance at a hearing to request emergency orders may be given* ***by telephone, in writing, or by voicemail message.***

In comments on Rule 5.165(a) appearing in their February 14, 2012 report to the Judicial Council, the Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force recommend, "…that additional discussion and public comment be sought before considering a rule that is more detailed than the version that was circulated for comment." What constitutes notice "in writing" is not defined. Does notice in writing include, for example, notice by fax? The answer awaits clarification by future amendment to the rule. Query: may local courts define "in writing" by local rule?

Rule 5.165(b) "Notice to parties," provides:

> *A party seeking emergency orders under this chapter must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court. After providing notice, each party must be served with the documents requesting emergency orders as described in rule 5.167 or as required by local rule. This rule does not apply to a party seeking emergency orders under the Domestic Violence Prevention Act.*

The authors of this article believe that any local rule or informal procedural requirement that does not permit telephone notice or voice mail notice or that authorizes notice of intent to apply for emergency orders by means other than telephone, writing, or voice mail has been superseded to the extent that such rules or informal procedures conflict

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with the new rule 5.165(b). Likewise, any local forms that purport to provide for notice other than notice by telephone, in writing, or by voicemail are invalid to the extent that they conflict with the new rule.

Rule 5.165(b) provides that the documents requesting the emergency orders are to be served *after* providing notice as described in rule 5.167. The authors believe that any local rule or informal procedure that currently requires that the requesting documents be served *with* the notice is superseded. Likewise, the authors believe that any local rule that provides, for example, that documents must be served by 10:00 a.m. one court day before the application is to be considered, is invalid in that, under Rule 5.165(b), notice may be given up to that time and the documents may be served *after* notice.

Exceptions to the Notice Requirements

Rule 5.165(b) sets forth the showing necessary if shorter notice is given or if waiver of the notice requirement is sought.

Those provisions are:

> *Rule 5.165(b)(1) Explanation for shorter notice. If a party provided notice of the request for emergency orders to all parties and their attorneys later than 10:00 a.m. the court day before the appearance, the party must request in a declaration regarding notice that the court approve the shortened notice. The party must provide facts in the declaration that show exceptional circumstances that justify the shorter notice.*
>
> *Rule 5.165(b)(2) Explanation for waiver of notice (no notice). A party may ask the court to waive notice to all parties and their attorneys of the request for emergency orders. To make the request, the party must file a written declaration signed under penalty of perjury that includes facts showing good cause not to give the notice. A judicial officer may approve a waiver of notice for good cause, which may include that:*
>
> *(A) Giving notice would frustrate the purpose of the order;*
>
> *(B) Giving notice would result in immediate and irreparable harm to the applicant or the children who may be affected by the order sought;*
>
> *(C) Giving notice would result in immediate and irreparable damage to or loss of property subject to disposition in the case;*
>
> *(D) The parties agreed in advance that notice will not be necessary with respect to the matter that is the subject of the request for emergency orders; and*
>
> *(E) The party made reasonable and good faith efforts to give notice to the other party, and further efforts to give notice would probably be futile or unduly burdensome.*

Rules Governing What Must Be Included in the Notice

The rules governing what must be included in the notice given appear in Rule 5.165(e), "Contents of notice and declaration regarding notice of emergency hearing." Rule 5.165(e)(1) "Contents of notice," provides:

> *When notice of a request for emergency orders is given, the person giving notice must:*
>
> *(A) State with specificity the nature of the relief to be requested;*
>
> *(B) State the date, time, and place for the presentation of the application;*
>
> *(C) State the date, time, and place of the hearing, if applicable; and*
>
> *(D) Attempt to determine whether the opposing party will appear to oppose the application (if the court requires a hearing) or whether he or she will submit responsive pleadings before the court rules on the request for emergency orders.*

Whether given by telephone, in writing, or by voice mail, the notice must include not only the details of when and where the application will be presented but also the specific nature of the relief to be requested. The applicant must also attempt to determine whether the opposing party will appear to oppose the application or submit responsive pleadings before the court rules on the request. Notice that does not "state with specificity" the nature of the relief requested, is defective.

Rules Governing What Must Be Included in a Declaration Regarding Notice

The required contents of the Declaration regarding Notice appear in Rule 5.165(e)(2). That rule provides:

> *An application for emergency orders must be accompanied by a completed declaration regarding notice that includes one of the following statements:*
>
> *(A) The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under rule 5.165, the applicant informed the opposing party where and when the application would be made;*
>
> *(B) That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or*
>
> *(C) That, for reasons specified, the applicant should not be required to inform the opposing party.*

Any local rule or form that does not require the information required by Rule 5.165(e)(2) would appear to the authors to be superseded by the new rule to the extent that such a local rule or form is inconsistent with the rule. The authors believe that local forms and local rules cannot require more, different, or less information than is required by Rule 5.165(e)(2).

Local Rules May Require Additional Notice to Court

Rule 5.165(c) authorizes local courts to adopt a local rule requiring that a party requesting an emergency order provide additional notice to the court that a request for emergency orders will be submitted the next day. The rule provides:

> *The court may adopt a local rule requiring that the party provide additional notice to the court that he or she will be requesting emergency orders the next court day. The local rule must include a method by which the party may give notice to the court by telephone.*

Service on the Other Parties of Requesting and Opposing Documents at "the First Reasonable Opportunity"

As discussed above, Rule 165(b) provides that the documents requesting emergency orders are to be served "after providing notice" as provided by Rule 5.167 or as required by local rule. Rule 5.167(a) "Service of documents requesting emergency orders," provides:

> *A party seeking emergency orders and a party providing written opposition must serve the papers on the other party or on the other party's attorney at the first reasonable opportunity before the hearing. Absent exceptional circumstances, no hearing may be conducted unless such service has been made. The court may waive this requirement in extraordinary circumstances if good cause is shown that imminent harm is likely if documents are provided to the other party before the hearing. This rule does not apply in cases filed under the Domestic Violence Prevention Act.*

Rule 5.167(a) provides that both parties seeking emergency orders and parties providing written opposition must serve the papers on the other party "at the first reasonable opportunity before the hearing." The new rules do not define what is meant by "at the first reasonable opportunity before the hearing" nor do they clarify what is meant by the statement appearing in Rule 5.165(b) to the effect that documents are to be served after giving notice as described in Rule 5.167 "or as required by local rule."

The provision in Rule 5.167(a) requiring service "at the first reasonable opportunity before the hearing" does not mean that there must be a hearing upon an application for emergency orders. The orders may be made upon the documents. Rule 5.169, "Personal appearance at hearing for temporary emergency orders," provides:

> *Courts may require all parties to appear at a hearing before ruling on a request for emergency orders. Courts may also make emergency orders based on the documents submitted without requiring the parties to appear at a hearing.*

Rule 5.167(b), "Service of temporary emergency orders, governs service of the signed orders," provides:

> *If the judicial officer signs the applicant's proposed emergency orders, the applicant must obtain and have the conformed copy of the orders personally served on all parties.*

Required Contents of a Request for Emergency Orders

The documents that must be included with a request for emergency orders are set forth in Rule 5.151(c). Note that the described documents are to be included "*when relevant to the relief requested*." Rule 5.151(c) provides:

> *A request for emergency orders must be in writing and must include all of the following completed documents when relevant to the relief requested:*
> *(1) Request for Order (form FL-300) that identifies the relief requested;*
> *(2) A current Income and Expense Declaration (form FL-150) or Financial Statement (Simplified) (form FL-155) and Property Declaration (form FL-160);*
> *(3) Temporary Orders (form FL-305) to serve as the proposed temporary order;*
> *(4) A written declaration regarding notice of application for emergency orders based on personal knowledge; and*
> *(5) A memorandum of points and authorities only if required by the court.*

Contents of Declaration and Application

Rule 5.151(d), "Contents of Declaration and Application" describes in detail the information and documents that must be included with an application for emergency orders. See Rule 5.151(d)(1)-(4) and 5.151(d)(5)(A)-(E). Note in particular the requirement of Rule 5.151(5)(D) to include a copy of the current custody orders, if available, and, if not, a statement of where and with whom the child is currently living.

Conclusion

This article is intended as a "heads up" to both practitioners and bench officers. We strongly suspect that many California family law attorneys and bench officers are not aware of the new rules governing requests for emergency orders and that some local rules and forms have been superseded.

We do not address the policy reasons behind the changes in the procedures governing applications for emergency orders.

Significant questions remain as to the extent to which courts may adopt local rules that "define," specify" or "clarify" provisions of the CRC. May courts adopt, for example, a local rule that defines what constitutes service of notice of intent to apply for emergency orders "in writing"? Are courts free to define by local rule the meaning of service of the requesting documents "at the first reasonable opportunity before the hearing?"

The family law rules will be revisited in another round of proposed revisions in the future. Just when that might be, the authors do not know. As was the case with the rules taking effect January 1, 2013, there will be an opportunity to comment on proposed rules at that time. The introductory comments of the Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force make clear that our comments are carefully considered. Family law practitioners may well want to speak up when the time comes so their voices on these important rules may be heard. ■

Continued from page 5

quickly, and of being too reluctant to make them. Counsel may be concerned about giving too much power to a PC, or about noncompliance by one of the parties. Most of these issues can be effectively managed if the order is structured carefully. Orders for PC should be carefully structured to manage the risks that can reasonably be foreseen based on the history of the case. Does one parent delay in providing necessary information? Consider an order that allows the PC to set reasonable deadlines and then make decisions. Worried that your own client will create problems with the PC process? Consider having your client see a therapist who specializes in family law disputes, or engage a consultant to help you mobilize the client toward cooperation, along with education reaching for the best aspects of a parent who wants to help the child. (These services are described in greater detail below.)

Counsel may be able to assist initially resistant clients by conceptualizing the PC process as a potential win-win strategy if the client makes a true effort. Either both parents will cooperate and the situation will improve, or the other parent's weaknesses will be clearly demonstrated. Parents who feel that the other parent will discuss matters endlessly may find the Parenting Plan Coordination process helpful as a time-limited process for minor decisions. Good PCs will both congratulate parents for the attempt and include parenting education as part of the process.

Nevertheless, the PC is neither a mediator nor a therapist; no privilege applies. The PC's "loyalty" is to the children's developmental needs – which, at least in initial stages, may not be the same as the child's expressed wishes. In the best of circumstances, the parents can adopt or learn better problem-solving skills and the PC will no longer be needed. In other cases, the PC can serve as a buffer to redirect conflict away from the child and resolve enough daily issues to give the child "space" to grow up.

Use of a PC is unlikely to be helpful when one or both parents has untreated mental illness, is actively abusing substances, or has enduring personality traits that cannot be managed by structured interventions. A history of failed interventions, or of repeated violations of court orders with no consequences, raise caution about the possibility of success. Practically, if a parent is convinced that prolonged conflict, or litigation, is likely to create a clear "victory" without the need for negotiation, that parent is less likely to engage in any alternative dispute resolution procedure. Counsel have an essential role in educating parents as to what can reasonably be expected from either course.

Parenting Plan Coordination is more likely to be engaged, and effective, in situations less well resolved in the litigation context – complex medical or educational issues, long-distance parenting, or parents who never lived together and have little shared history before becoming parents. PC's can help decrease the emotionality, provide a buffer for the child, and assist parents in adjusting to the fact that they will not be permitted to micro-manage the other parent's time with the child. In ideal situations, parents master these issues and the PC is no longer needed. In other cases, the PC continues to be needed but redirects conflict to that setting, providing enough of a buffer to give a child a chance at healthy development.

PCs may be able to assist in crafting stipulations appropriate for the issues to be addressed, in terms of issues such as the duration of the appointment and the scope of authority. The PC may advise on the minimum duration necessary to provide the services being requested. Often, however, PC's may be effective with a more limited scope of authority than parents or counsel fear they are surrendering.

Expert Testimony

In an arena focused on advocacy, the attorney's first instinct may be to present a counter-argument to the recommendation of an evaluator or an order made by a PC by presenting expert testimony. An expert can provide psychological information to the court about the procedures engaged in by another professional or the current status of psychological research on a specific issue. Contesting parties may engage in selective presentation of psychological literature or make overly broad generalizations about psychological research. An expert may be needed to articulate the connections, relevance, limitations and distinctions among psychological research, theory, and clinical information in order to assist that court in applying the information most relevant to the case (Greenberg, Drozd & Bohen 2012).[7] When a custody evaluator or PC's findings or recommendations are not sufficiently specific and problems arise as a result, an seasoned expert may be able to provide possible solutions or intervention plans that have been successful in similar cases. In such situations, the attorney would be wise to seek an expert with experience in actually enacting solutions with families who can articulate practical applications and implications of various outcomes being considered by the court.

While an ethical and effective expert may be able to provide valuable information to the court, expert testimony may be limited by the inescapable fact that the expert has been retained by one of the parties. While ethical experts would never "sell their opinions" and are aware of the dangers of having a reputation for doing so, experts have both a human and professional desire to be helpful to the attorneys who retain them, and may unwittingly form too close an alliance, based on incomplete information and/or the demands of the advocacy role. Psychologists are responsible to, and in some cases protected by, ethical principles and standards requiring they have adequate information to substantiate their reports, opinions and testimony. They are urged to avoid conduct that condones or contributes to unjust results, and to clarify the limits of their opinions, information and testimony. While it is understandable, and ethical, for an attorney to make the most persuasive presentation possible and to retain an expert who will take a strong position on behalf of the client, an expert is required to clarify the limits of information and research results. Experts are also considerably more credible when they acknowledge such limitations up front (after all, the court already knows that there is more

than one side to the case) rather than waiting to do so until challenged on cross examination.

Attorneys must properly vet experts to make sure that they are not retaining an expert compromised by a professional or personal agenda. Invaluable information can be obtained through talking to other family law practitioners and MHPs regarding the reputation and experience of the proposed expert, including experiences opposing or working with that expert and information regarding how that expert presents as a witness. When interviewing a potential expert, it may be helpful for the attorney to ask the expert to identify research or information that is contrary to the expert's initial opinion or may support an additional interpretation of research or events. Experts should be able to identify more than one plausible interpretation of events, as well as the information that supports one interpretation over others. This ability to form "multiple hypotheses" is the basis of professional objectivity and, increasingly, is the standard used to evaluate the conduct and qualifications of mental health experts. This also allows the attorney to properly prepare for the challenges that may be made to the opinion expressed by the expert at the time of trial.

An expert may consult on the best use of his or her own testimony and the types of information that may be helpful, although the attorney ultimately needs to make the strategic determinations in the case. The expert's testimony may be emotionally satisfying to the client and provide the evidence necessary to impact the court's opinion, but may also be limited in impact based on the court's time constraints, preference for relying on a neutral expert, or skepticism toward retained experts. Where resources are limited and the client is likely to need other services after the conclusion of litigation, the attorney may wish to consider limiting the scope of the expert's testimony to what is needed to lay the groundwork for the next phase of the case.

Mental Health Consultation

Historically, mental health consultants have been employed either to prepare a client for evaluation or to confidentially review a report completed by another professional. Consultants can be effectively used far beyond these contexts and may be most effective when they are engaged early in the legal process.[8]

Consultants may be able to assist parents in identifying and addressing psychological issues that may be relevant to children's adjustment or to the parent's success in the custody case. While it is not uncommon for parents to ask a consultant to "coach" them on what to say to a custody evaluator, this process is both unethical and, in most cases, ineffective since it is difficult for parents to maintain an illusion over time and under stress. Consultants can, however, provide a mix of educational and strategic information that addresses a parent's contribution to the process, provides information about children's needs, and engages the client's desire to prevail in the conflict. A consultant can also serve a vital function when a parent has had difficulty with another MHP, or when the conduct of another MHP has raised concern (Hobbs-Minor & Sullivan 2008).[9]

Consultants can also assist attorneys in developing strategies for communicating with clients who have challenges with the family law process. Consultants can provide helpful information to attorneys as to how best structure the presentation of information to the client and to the other side and to come up with a workable and realistic plan for the presentation of the case.

The role of the consultant can overlap with that of a forensically sophisticated therapist, who can also assist a parent in coping effectively with the conflict and mobilizing to support the children. Traditional therapists, however, may adopt a supportive role and have difficulty confronting a litigant/parent. The consultant typically has greater involvement with the legal process, and may have greater freedom to confront dysfunctional behavior, because the parent perceives the consultant as assisting with the client's desire to prevail in the litigation. The consultant is employed by the attorney, provides services under the work-product privilege, and may be less constrained by the requirements of therapeutic alliance. It is important to note, however, that direction and strategic advice provided by a consultant may be undermined if a client is simultaneously seeing a therapist who uncritically supports the client's anger or dysfunctional behavior. Consultants may be useful in assisting less sophisticated therapists to provide more consistent and realistic assistance to clients, if counsel determines that it is appropriate to allow the consultant and the therapist to confer. Counsel must be mindful of the fact that allowing the consultant to speak to the client's treating therapist could lead to a waiver of the attorney work-product privilege. Also, if counsel allows the consultant to speak to the treating therapist and the client waives his or her psychotherapist privilege as part of the custody evaluation, the fact that the client is using a consultant would be out in the open, which could compromise the client's position in the custody evaluation and the litigation.

Specialized Treatment

Divorces and parenting conflicts are distressing and destabilizing situations; parents often present to their attorneys in emotional distress. Referrals to therapy are not uncommon and are often appropriate. Therapy may provide a safe place for the parent to vent and express feelings that should not be shared with children. To be effective and avoid harm, however, therapy must be adapted to the client's life situation, which includes involvement in a legal conflict, and the expectation that the parent will shield the child from the parental conflict. Parents may be in crisis and may need specific behavioral skills for managing their own emotions, assisting their children, addressing any safety concerns and, in most cases, supporting the child's relationship with the other parent. It is essential that the therapist maintain therapeutic objectivity, including the ability to critically evaluate incoming information and the client's perceptions, and to confront and assist the client in changing

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dysfunctional behavior. When a therapist confuses his/her role with that of the attorney and becomes a blind or over-zealous advocate of the client's expressed desires, that therapist may fail to address crucial clinical issues and may also undermine the attorney's attempts to manage the client's expectations.

For example, it is not uncommon for a separating parent to express the wish that he/she never have to interact with the other parent again. The parent may not believe that the other parent has anything of value to offer the child and, based on the client's information, the therapist may agree. Nevertheless, in most situations, parents are expected to support the child's relationship with the other parent; failure to do so may have real consequences to the parent and child. A forensically sophisticated therapist must be able to both empathize with the client's desires and provide realistic expectations and coping skills for what is actually going to be expected of the parents by the court. This may include discussing with the parent behaviors that will not serve the parent well in resolving the custody dispute, and how others are likely to perceive the parent's behavior. Failure to do so sets up the client for failure when he or she is confronted by an evaluator, or in cross examination, about issues that the therapist did not address.

Parents may already be involved in therapy before engaging an attorney, and may selectively seek a therapist who supports their own perspective, or is untrained in the intricacies of court-related therapy. Again, careful attention to consent and privilege issues is needed. Many conflicted parents may not need the services of other MHPs if they receive appropriate therapy from the beginning. Parents who are resistant to appropriate therapy may be assisted by use of a mental health consultant as described above, or with some of the same arguments useful in motivating a client's cooperation with Parenting Coordination – i.e., if the client can learn to address issues with his/her own behavior, the other party's faults will become more evident.

Children's Therapy

Children's therapy presents a unique set of opportunities and challenges. Proper procedures are essential. Parents are often eager to be the first to contact a child's therapist, and may sincerely believe that the other parent poses a risk to therapy and should be excluded. It is not uncommon in intact families for one parent to be primarily involved a child's treatment, although this is arguably less effective than involving both parents. Once parents separate, however, a therapist's involvement with only one parent can seriously bias treatment and escalate family conflict.

With increased emphasis on "children's voices" and their potential participation in the legal process, adults' responses to children's feelings become increasingly important. Conflicting parents may model and reinforce dysfunctional behavior in children, due to their own emotional issues or agendas in the custody conflict. An ethical and qualified child's therapist refrains from expressing opinions regarding parenting plans or other psycho-legal issues, keeping focus on helping the child to master the behavioral and coping skills necessary for the child to achieve healthy emotional development. This may require that the therapist suggest changes in *each* parents' behavior to better support the child, including developmentally appropriate responses to the child's behavior or statements. Therapists who are not knowledgeable about family law dynamics can easily be drawn into the conflict or uncritically support the statements of a child who is not responding in a developmentally healthy way. There may be extraordinary pressures on the MHP to alter the child's treatment to support the agenda of a parent, or to express opinions that are beyond that therapist's role. Many specialized therapists will accept these cases only with a detailed stipulation and order, addressing the common issues that may complicate such treatment. Counsel should use equal caution in structuring these agreements, perhaps considering a conference call with the therapist to agree on the terms of the order. Counsel should be alert for, and avoid, therapists who are willing to abandon structured methodology or offer opinions beyond the therapeutic role.

While many community therapists can treat lower-conflict families, cases involving high-conflict and complex allegations often require therapists with specialized training. Families and even attorneys may be unfamiliar with the differences among therapists, or may direct resources to litigation rather than higher-quality treatment. While this may reduce costs in the short term, the result can be an escalation of conflict and costs associated with litigation, evaluation, or the need to engage additional experts or more complex services. Counsel should look for therapists who have careful consent processes, balanced and clear methods, familiarity with the relevant literature, and careful attention to role boundaries. Therapists for both adults and children should have knowledge of family systems and the ability to confront and redirect dysfunctional behavior. Therapy orders for children should be specific as to the behaviors to be addressed, and the rules regarding privilege issues and parents' cooperation should be clear. Sophisticated therapists often set structures that require both parents' participation in treatment, including bringing the child to sessions, as children may behave very differently depending on which parent is present. One-sided procedures may lead to biased and inappropriate treatment. Detailed guidelines for court-involved therapy have been produced by the Association of Family and Conciliation Courts, which are consistent with other professional ethics codes. (Fidnick, Koch, Greenberg, & Sullivan 2011, Greenberg, Doi Fick & Schnider 2012)[10] The damage from poorly conducted treatment can escalate quickly; counsel concerned about inappropriate treatment would be wise to engage a consultant or otherwise address the issue promptly. This issue has been addressed in greater detail in other literature. (Greenberg, Gould, Gould-Saltman & Stahl 2003, Greenberg & Sullivan 2012).[11]

The recent attention to the role of testimony from

children and the potential participation of children in custody litigation has raised complications regarding the role of children's treatment and the use of information generated in therapy. While one always hopes that children's statements during a child interview or testimony will be accurate, and developmentally healthy, the stresses on a child from the custody conflict may lead to much less reliable results. A therapist's observations of the family over time may provide a more realistic picture of the child's and family's functioning, but obtaining this information in the litigation context may compromise the child's privacy and the effectiveness of therapy. There is research to support the contention that children benefit from participating, in an age appropriate way, in the decisions that affect their lives (Dunn 2002).[12] The best path to accomplishing this is for the therapist to assist children and parents in addressing feelings over time, in the context of therapy, with clear messages as to which choices are available to the child and which decisions are made by adults. Therapists often wait too long to address issues with parents or to assist children in talking directly with parents. In high-conflict families, specialized skill may be needed to accomplish this.

Managed information sharing may help to avoid intrusions into the child's treatment or the child's involvement in litigation. (Fidnick, Koch, Greenberg, & Sullivan 2011). Where this does not occur, complex issues may arise as to how to assess, and respond to, preferences or even consents/waivers expressed or opposed by the child. These are areas in which parents need clear information about the potential implications of their decisions, children need coping skills, and the profession needs procedures and guidelines reflecting both the requirements of the law and psychological research about children's needs and development. Given the newness of the revision of Family Code 3042, such developments are just beginning.

Conclusion

Developments in both mental health practice and family law have impacted both the available types of mental health services and the factors to consider in matching the service to the family.

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Orange County Chapter
Year in Review, 2012

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January 2012: The Orange County Chapter's Core Group had several planning sessions in January, for the coming year, both via telephone meetings and in-person group meetings. After Wilma Presley attended the Board meeting in Sacramento, she reported back to her core group and attempted to recruit more members of ACFLS Orange County to become core group members to assist in the OC Chapter growth.

As a result of these efforts our core group expanded from the initial number of six attorneys to twelve attorneys.

Further, it was decided to have regular monthly teleconferences with our core group. After trying several days and times, it finally seemed that in order to accommodate as many members of the core group as possible the monthly teleconference was changed to 5:30 p.m. on the second Thursday of each month in order to have more participation. In addition to our monthly teleconferences, in-person meetings were planned, to be held on an "as needed" basis throughout the year, which has been done in the past and will continue.

Alternate monthly brown bag "Lunch and Learn" noon meetings were planned on Mondays, at no cost and to be expanded to monthly as soon as demand for monthly meetings expanded. At present, these are held in the large lobby conference room where the Presley & Goodrow offices are located, as it is conveniently located across the way from The Betty Lou Lamoreaux Justice Center, where most of the family law cases are heard. Throughout the year, these were well received, but somewhat sporadic, because they are new to the local family law bar. However, it is expected in the coming year this educational project will be expanded and will be much more well attended. We do need input as to which of the DVDs available are best in terms of content and sound, etc. for use from time to time at the Lunch and Learn meetings.

February and March 2012: Core group planning sessions continued. The MCLE program "Tango of the Experts:" (E.C. Section 730 vs 733 Custody Evaluators) was developed, with Drs. Russell Johnson and Robert Simon having agreed to speak at an evening MCLE Dinner on April 23, 2012. Putting this together took quite a bit of group effort, and we learned a lot in the doing, e.g., picking a hotel, preparing flyers, getting the flyers out, planning the budget and so forth. Of course, this did not compare with our ACFLS Spring Seminar, but we had our eyes opened as to how much effort does go into planning events, even on this much smaller scale, and have more appreciation for all the work that others have put in to make the wonderful Spring Seminar such a success! Dorie Rogers, who moderated our "Tango" event, especially devoted much time and effort during these months toward making this event a sold out success.

In February, we also had a "Lunch and Learn" meeting to discuss new cases. March was skipped.

April 2012: The "Tango" event did turn out to be very successful. However the room at the Ayers Hotel could only accommodate 50 attendees. We had to turn away attorneys who wanted to attend. In retrospect, we should have contacted Sterling Myers and discussed video/recording. However, the room was rather crowded and a bit noisy, so it might not have worked. We had at least six family law bench officers attend this event. Some of them sent letters to our group afterward thanking us and expressing how much the presentation was appreciated. Doctors Johnson and Simon jointly prepared a helpful handout. Moreover, they both agreed to give this presentation again, if desired, and I believe we should consider doing it again in 2013, at a larger venue and with videotaping.

May 2012: We had a monthly free flowing Lunch and Learn event to discuss new cases. Our monthly core group telephonic meeting was also held and the success, as well as the mistakes made, in planning the "Tango" event were discussed.

June 2012: We had an in-person core group meeting, as well as our monthly teleconference, to discuss and plan an annual Summer Social for members and non-members as a "recruiting" event. Various core group members took on assignments, such as ordering food, drinks, preparation of flyers, etc. Wilma and Dorie agreed to recruit a speaker.

July 2012: We had a Lunch and Learn meeting where we viewed the DVD from ACFLS borrowed from Barbara Hammer on the topic of Evidentiary Presumptions. More attended this lunch meeting and all thought the educational video was extremely informative and helpful to trial preparation and tactics at trial.

In the coming year we plan to have more showings of DVDs for our Lunch and Learn meetings.

August 2012: We had our Summer Social, which was held at Barbara Hammer's home, in her and her husband's beautiful patio, with Retired Judge Kenneth Black as Honored Guest and Speaker. The topic was "Ask Judge Black." This event, in spite of the summer heat and many members on vacation, was well attended, with lively interaction, good food and good company.

Judge Black was very generous with his time and the question/answer part of the program was lively and informative.

Later that month, our core group met

to further discuss our planned judge's night, "Clash of the Judicial Titans," which planning had begun in July, and was held at Dave & Busters restaurant. Dorie Rogers, Associate Chapter Director, was able to recruit, with the help of the Honorable Clay Smith, our Family Law Supervising Judge, nine other judges on our family law panel as speakers. Our panel of judges consisted of about half being very experienced family law judges and commissioners, with the others being relatively new to the family law bench. All of the participating judges were gracious with their time, and showed deep caring for family law.

We prepared provocative and timely hypotheticals to present to the judges, and to attendees. All who attended looked forward to learning more about how each of the judges might approach some of the more sticky issues we are facing, e.g., the upside down home and whether it should be placed on the marital balance sheet at a negative value, how to handle the child witness, double dipping, vocational examination experts, and imputation of income issues, etc. As anticipated, this was a very informative, educational and lively event. Moreover, the dinner was nice as well. There were over 125 attendees. The program was three hours, allowing for the buffet dinner. Following dinner, Dorie Rogers did a fantastic job of moderating the remaining two hour MCLE event. The Honorable Supervising Judge, Clay Smith, indicated the family law bench was looking forward to this becoming an annual event (as we are) and that the other family law judges would enjoy participating as well, in the future.

October 2012: We did not plan a Lunch and Learn meeting for this month due to the Bar Convention and our Judge's night on October 29. We had several telephonic planning sessions for this event and the preparation of hypos during October.

November 2012: We had several informal telephonic conferences in November to discuss the October 29th event and some of the issues discussed, especially the judge's tentative opinions on some of the hypotheticals they discussed.

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Sacramento Chapter Report

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Sacramento Area Courts

The Sacramento County Superior Court overall has been very hard hit with the budget problems, with family law being hit just about the hardest. While the courtrooms are functioning fairly normally (each courtroom still has a judge, bailiff, and courtroom clerk), the problem is felt at the filing clerk, records, storage, and administrative support level.

Many clerks were laid off, reducing the number of clerks available to process family law filings and other clerk services. Some of these clerks are just now being replaced by clerks who were not laid off, but previously worked in other court divisions. So, even where the bodies are replaced, the bodies are inexperienced on family law matters.

Obtaining a file to review and copy can take hours of waiting. And, if a file is in the court's long-term storage, it can take many weeks, if at all, to obtain the file. For most cases where a file is kept in long-term storage and a motion is filed, the judge will usually not have the file and will only have the recent filings (RFO and responsive declaration).

Continuances now require a personal appearance because the court does not have the staff to accept continuances by telephone and a follow-up confirming letter.

The new case management rules also impose a new burden on the court at a time when the court does not have the resources (computer system to handle family law case management or support staff).

The court is hard at work looking for solutions that will save the court time and money and make life easier for litigants, counsel, and court runners.

What's Going on With the Sacramento Chapter

The Sacramento chapter continues to present high-quality luncheon seminars on topics as diverse as international child custody, negative equity real estate, complex issues with pension plans, domestic violence, and more. The lunches are generally well attended and the quality of speakers impressive. This year, the chapter has made a strong effort to bring in out-of-town speakers rather than the area's local experts in order to provide a greater variety of speakers and a fresh perspective from people who do not normally practice in Sacramento County. Mary-Lynne Fisher came up from Los Angeles to speak about negative equity real estate, Leslie Shear came up from Los Angeles to speak about international custody issues, and Jim Crawford came from Texas to participate in a round table discussion on complex pension issues. For 2013, I will be the chapter director and Stephanie Williams will be the associate chapter director. I and Stephanie look forward to presenting new and ever challenging programs for our members as well as non–certified family law specialists.

Our January 2013 program with Barbara DiFranza ("Notable Mistakes That Lawyers Make with Employment Benefits and How to Excel by Avoiding Them") was a smashing success. With fifty in attendance, it was, to my knowledge, a Sacramento record.

Jim Crawford, John Munsill and Thomas Woodruff are expected to present on *Gillmore* issues, and *Green* issues once the Supreme Court reaches a decision; Leslie Shear will be coming back to do part two of her 2012 presentation. ■

Holley & Lovell

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Estate tax

The estate tax applies to a person's estate upon their death if it exceeds a certain amount. Now, the estate tax only applies to the person's estate if it exceeds $5 million, adjusted for inflation, and any estate under that amount is not subject to the estate tax. Estates above the $5 million mark are subject to an estate tax that, as of January 1, 2013, tops out at 40%. However, these numbers are only valid for 2013, and are set revert to $1 million and a top-out tax rate of 55% in January 2014 unless Congress decides otherwise.

Married couples receive a privilege upon death known as the "unlimited marital deduction." When one spouse dies, they may leave an unlimited amount to the surviving spouse without having to pay the estate tax. This benefit is currently limited to opposite-sex married couples. The case currently before the Supreme Court, *Windsor v. United States*, stems from this issue. Edie Windsor and Thea Spyer, a same-sex married couple, were legally married in New York. When Thea passed away in 2009, she left her entire estate to Edie. Though Edie and Thea were legally married in the eyes of the state of New York, Edie had to pay $363,000 in federal estate tax because their marriage was not recognized on the federal level. Edie filed a refund claim, but the IRS denied her claim on the grounds that because she was not technically a spouse under DOMA, the unlimited marital deduction did not apply and thus she had to pay the applicable estate tax. Same-sex married couples that might otherwise pay a steep estate tax – like Edie Windsor – will benefit greatly from the unlimited marital deduction if DOMA is found invalid.

2. Tax Implications Upon Divorce

Taxable Gains for Buy Outs

Currently when opposite-sex married couples divorce and divide their assets, the event is nontaxable. However, when same-sex married couples split, there is a possibility that one or both may have to pay taxes. For example, if a couple owns a house together but decides to end their relationship, it is possible that one party may "buy out" the other in order to keep the house. For a same-sex married couple the party receiving the buy-out payment could potentially be taxed if the profit exceeds $250,000. However, for opposite-sex married couples, "buying- out" is not a taxable event. If DOMA is found invalid, spouses dissolving same- and opposite-sex marriages will be able to buy out their partners without triggering a taxable gain.

Spousal Support

Additionally, spousal support or "alimony" payments have different tax implications for same- and opposite-sex married couples. Currently, for opposite-sex married couples, the person who pays spousal support to the other may deduct that payment from his or her taxes. However, for same-sex married couples, spousal or partner support is not a tax deductible event on the federal level even if it is deductible in states that recognize same-sex marriages or domestic partnerships.

Retirement Accounts

One of the harshest tax implications for same-sex couples occurs if the parties want to split their retirement accounts. For an opposite-sex married couple, a judge or a settlement may require that one party give a portion of their retirement account to the other, and that person can roll over that portion tax-free. The same type of transfer between a same-sex married couple will likely trigger income taxes, and possibly even a penalty.

Conclusion

In these difficult economic times, it makes rational sense for the federal government to collect taxes on everyone equally and apply the same laws across the board. Should the Supreme Court invalidate the Defense of Marriage Act, one of the results will be equality in the tax structure. Because of this result of equalizing taxes for all married couples – opposite- and same-sex alike – the Supreme Court's upcoming decision may provide not only marriage equality, but also fiscal equality for all married couples. ■

President

Continued from page 3

for legislation as well as to promote our organization and to provide educational activities.

Our Membership/Benefits Committee, chaired by Joe Bell, helped to establish a new ACFLS chapter in Orange County, and we welcomed new board member, Wilma Presley as Chapter Director (3). Last week, at our first 2013 meeting, we voted to make Dorie Rogers the interim Associate Chapter Director (3) of the Orange County Chapter, also a board position. She and Wilma will be organizing continuing education programs under ACFLS' banner in Orange County.

Thanks to Linda Seinturier, our Outreach Director, ACFLS is delivering continuing education to parts of California where it was not available before, and to many counties that do not even have a certified family law specialist. Using our incredible DVD library, which Sterling Myers has so ably administrated for so many years, Linda has been able to organize ACFLS luncheons and dinners in remote counties.

In regard to the Outreach Committee, we established a scholarship in honor of David Borges, who died in 2011, and the Outreach Committee reviews the applications and chooses the recipient. David was President of ACFLS in 2001. He practiced in San Luis Obispo County and in the Central Valley. David worked hard to expand ACFLS outreach to provide advanced family law education to the small or remote counties in California. Our Board honors David with this scholarship intended to assist a newly certified Family Law Specialist to participate in ACFLS and our advanced seminar. This year's winner is Erin Kathleen Tomlinson from El Centro, California. She is the first to be awarded the David Borges Memorial Scholarship. The scholarship will be awarded in alternate years to a new family law specialist who was certified by passing one of the last two State Bar certification exams and then fulfilling the other requirements for becoming a certified family law specialist. Additionally, the

applicants for the scholarship must be practicing in California in a low-population county, a remote county, or a county that is underserved with quality CLE programs. The scholarship provides full registration to the Annual Spring Seminar, a hotel room for Friday and Saturday night, and a $250 stipend for travel costs.

Diane established a joint effort with the Association of Family and Conciliation Courts (AFCC) with their long-range planning committee and our ACFLS long-range planning committee to work on an ongoing basis to study ways in which the practice of family law in California can be improved. This year, Diane is taking over as chair of our long-range planning committee.

Finally, under Diane's purview, the president and vice-president now have the assignment of being the co-chairs of the Spring Seminar committee each year. Diane continues as co-chair through this year's Spring Seminar, March 22–24, 2013, ***"Call Your First Witness… Expert or Not."*** Once again being held at the beautiful Rancho Las Palmas Resort and Spa, this event is not to be missed, and we hope you will join us there this year.

In sum, Diane's two-year term as President of ACFLS was truly outstanding. My own goals will be more modest, since so much was accomplished by Diane! I will work to continue and maintain the fine work that she started.

A few other comments…

Over the Christmas holidays, we learned that our current listserv provider was going out of business, within the week! Thanks to the quick work of Seth Kramer and Bonnie Riley, we secured a temporary provider. Seth Kramer, Technology Committee Chair, and Chris Melcher, Associate Technology Director, with Bonnie consulting, are researching options for a long-term solution. Although Y-M provides a blog on our website, our members continue to prefer having a listserv, which is not available through Y-M. So, we will continue to explore this issue.

I lastly want to express our appreciation to four board members who have departed the board. Debra S. Frank, who has served on the board twice, served as Newsletter editor several times, before it became *ACFLS Family Law Specialist*, was secretary in 2012, and frequently has served as a member of the Spring Seminar Committee. Dawn Gray, who served on the board for many years, often as editor and associate editor of the Newsletter, was the one who lobbied for the change of name to the more professional *ACFLS Family Law Specialist*. Dawn has also been a panelist numerous times at the Spring Seminar and has served on various committees. Marjorie Huntington served as Associate Legislative Director, and Kelly Chang Rickert served as Associate Technology Director. We acknowledge and thank them for their valuable service to ACFLS.

If you are interested in becoming an ACFLS Board Member, please contact our Vice-President and Chair of the Nominating Committee, Jill Barr, at jbarr@kringandchung.com. The Nominating Committee will start meeting to nominate next year's board shortly after the Spring Seminar.

Please do not forget to sign up for the Spring Seminar! I look forward to seeing you at the beautiful Rancho Las Palmas Resort in Rancho Mirage, March 22–24, 2013 – ***"Call Your First Witness…"!*** ■

PRESLEY

Continued from page 21

December 2012: We had no programs due to the holidays.

Looking forward to 2013: As to future programs, ACFLS Coordinating Director, Leslie Shear, has graciously agreed to be a speaker on "Dude: I'm 14 and want to talk to the Judge…." Steve Temko has offered to give a seminar to our group on one of two topics, i.e., "Justice for Bad Actors" and "32 Ways to Change a Judge's Mind Without an Appeal." They cannot be combined, so we hope to have Steve up to Orange County from San Diego twice in the coming months. In addition, we hope to have Dawn Gray come to Orange County in March 2013, topic to be determined.

As I write this report I do not know when Steve will be available to speak. It may not be until January 2013.

We will probably not have a dinner program in November or December, but will have another Lunch and Learn, and of course our core group meetings. Now that we have a larger core group to assist in planning and development for our new Chapter, I expect next year will be very exciting in terms of our growth and educational endeavors. ■

Threads of Interest: Topics and Quotes from Your Listserv

Laura Dewey, CFLS
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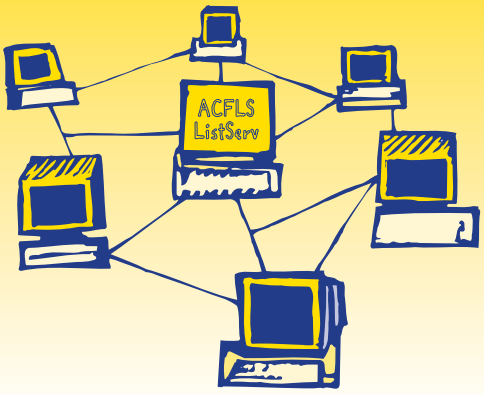
lgdcfls@west.net



Ms. Dewey began practicing law in 1983 in the Coachella Valley. She was certified as a specialist in family law in 1994 by the California State Bar Board of Legal Specialization.
In 1995, she relocated her practice to Santa Barbara and continues to practice there. Ms. Dewey has served on the Family Law Advisory Commission to the Board of Legal Specialization, as well as the Board of Legal Specialization. A former President of Santa Barbara Women Lawyers and former Trustee of the Santa Barbara County Bar Association, Ms. Dewey continues to serve the legal community by serving on the Board of CP CAL (Collaborative Practice California).

The ACFLS Listserv has a new address. That's right. Our former webserver rather suddenly ended our relationship. The story is told in Bonnie Riley's email of December 29th at about 2:00 p.m. The new address is: acfls-members@lists.acfls.org.

PLEASE do not run to your computer to do a "Test." Dozens have already done that, and we have continued to function. Trust us, IT WORKS! Please do NOT clog our already huge incoming email "basket" with "test" emails. If you really are unconvinced, find an active "thread" and make an intelligent contribution.

THANK YOU to Bonnie, Joe Makowiec, the Tech Committee, and all other Board members who helped to make this transition seamless, and over the holidays, to boot.

Another big "Thank You" to those who offer their thoughtful (and often humorous) contributions. I think we all agree that the Listserv is a valuable resource.

So, here are the threads of interest that floated to the top for this issue:

"Sweat equity," issue presented by Robert Marmor on December 30th at about 1:40 p.m.

Suppose your client asks if his/her spouse has any right to be compensated for the value of work performed by that spouse during the marriage to improve the family residence which is your client's separate property. Your auto-response is to say, "No. There's no such thing as sweat equity." You're really saying that there's no basis for a claim to a community interest or right to reimbursement for the value of a spouse's efforts (labor) during the marriage to improve the non-business separate property asset of the other spouse. (The same question exists with respect to efforts (labor) of a spouse during the marriage to improve his/her own non-business separate property asset.)

Okay – so now your client says, "Great! I'm relieved. Please provide me with an opinion letter with the applicable law." You go to your usual sources which, of course, include the Gray and Wagner's *Complex Issues in California Family Law*. You find voluminous law relating to the rights of the community that arise from community efforts during the marriage that increase the value of separate property business assets. You find law relating to the right of the community to be reimbursed for the community's financial contributions to a spouse's separate property and law relating to Moore/Marsden rights.

I, for one, could not find anything expressly stating that there's no such thing as a community property claim based on one spouse's labor to improve either his/her own or the other spouse's non-business separate property asset.

I found a case saying that the court need not decide that issue in that particular case, but no case expressly holding that there's no such thing as "sweat equity."

Are you aware of any case that expressly addresses the issue?

Not being deterred by the holiday weekend, Paul Marks responded:

I disagree with the premise that we would advise a client that there is no such thing as sweat equity. I would tell the client that proving the increase in value is the difficult part, not the concept of reimbursement itself. There are a ton of cases in Gray and Wagner's books about unjust enrichment [as I recently learned by reading huge portions]. But there is a big distinction between effort and value. Most people want to be reimbursed for the hours spent, and I don't think that is the law. I don't see anything unfair about a party receiving no reimbursement when the owner [the community or separatizer] receives no value for that effort.

I don't have ABC with me on vacation, but there was a case perhaps half a dozen years ago where the in-spouse wanted to be compensated for the hours spent for his post-separation work improving the community residence. The holding, as I recall, is that he is limited to the increased value attributable to his efforts, not the value of the efforts themselves. I think the logic is analogous to your situation. The reverse is that the separatizer can work on his house all he wants, without compensating his spouse, so long as he doesn't do work that increases the value of his house – if it does increase the value, the spouse is entitled to be compensated to prevent unjust enrichment.

Here's a hypothetical: I spend the next two years of weekends digging a hole for a swimming pool in the back yard of my separate property house. As a result, my wife divorces me. Have I been unjustly enriched by a huge hole in the ground I spent thousands of hours digging, when I could have hired a backhoe operator for $500 to do the work? Maybe the house is worth more with the hole, but why should it be any more than the $500 it would have cost me to have the work done by someone else – that's the unjust part of the work.

Here's a second: I have carpentry skills, and build a house on my property that greatly increases the value. Should my obligation to my spouse be the cost of the materials I used, and get to keep all my labor that went into increasing the value? Of course not, that's unjust enrichment.

The burden of proof is the issue. Other than the case I referred to above, I don't think there is any case law on point.

Dawn Gray provided further helpful information:

Bob: To answer your actual question, I am not aware of any case that expressly addresses this issue. I also agree with you that no case has ever expressly held that there is no such thing as "sweat equity" that would justify an opinion that the court would never hold that the community is entitled to be compensated in some way for the value of a spouse's efforts applied to the other spouse's separate property. In fact, as you can see from Complex Issues, there are arguments to be made in favor of compensation to the community for those efforts. Therefore, I think an opinion letter would reasonably state that there is legal support for the claim for reimbursement to the community, although there is no precedent specifically authorizing it.

The fundamental rule is that the community owns either spouse's efforts during marriage, and the law will require either party's separate estate to pay reasonable compensation for those efforts if they are used. If the efforts increase the value of the separate asset beyond market increases, then the community is also entitled to share in that increase. The separate estate is not treated the same way because the community is favored; separate efforts are presumed a gift, whereas community efforts require compensation. The issue is the value of those efforts. On that issue, a lot depends on the facts. Was the spouse a professional in the particular type of efforts made? Was he/she a carpenter, an electrician, or a mechanic such that he/she would have been paid reasonable compensation for those efforts by anyone else? Or were the efforts the type of thing that people ordinarily do to that type of property to maintain it?

There are defenses. Was the community getting the benefit of the use of the separate property asset? If so, there could be an offset. However, I would never opine that the opposing party will not be entitled to claim reimbursement on behalf of the community under any circumstances.

(One more Thread from the New Year, then we will return to some from late 2012.)

On Saturday, January 5th, Stephanie Williams started a thread entitled: "Age of majority was 21?" with the following problem:

"Was it ever the case in CA that a parent's obligation to support a child lasted until the child turned 21? I've got a potential client wanting to pursue an action for arrears. Her child turned 18 in 1986. Was the age of majority 18 at that time? And, yes, I know I've got to research the applicability of the latches defense."

Now, some of us are old enough to remember when you had to wait until you were 21 to vote (although you could be drafted to fight in Vietnam at age 18). Some of us even revealed our age in answering this question for Stephanie. Some of us remember anxiously awaiting the change in the law so that we could vote for the first time in 1972. Yes, the correct answer (March 4,1972) was provided by Stephen Gershman, Linda Moon, and Letty van der Vegt, in that order.

On October 30th, Jim Lazar brought up an issue that sometimes arises when the opposing party refuses to sign that deed, even though ordered by the court to do so. (Under title "County Clerk's signature"):

I have a case in which the sale of the residence is about to close and the opposing party is refusing to sign the closing papers. On one or two occasions I have successfully had a judge order the clerk to sign the documents in lieu of a party, but it has been many years and I cannot recall or find the authority for such an order. I'm going

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DEWEY

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to be in front of a new judge on this issue tomorrow and expect I will need to provide him with the authority. I would greatly appreciate it If anyone can direct me to the applicable case or statute. Thank you in advance.

Three minutes later (!), Dawn Gray provided the answer:

Jim: Code of Civil Procedure §262.8 defines an "elisor" as someone designated by the court to execute process or orders. In *Rayan v. Dykeman* (1990) 224 Cal.App.3d 1629, 274 Cal.Rptr. 672, the Fourth District upheld a trial court that appointed an elisor to sign the deed and other documents necessary to transfer one joint tenant's interest in a residence to the other. It's routine in family law cases where one party refuses to sign documents.

Joe Winn provided a venue question on Christmas Eve that involved any attorney working in a more lucrative field of practice than family law:

Change of Venue. I don't believe that my client can win this one… BUT….. her dad is a hotshot PI attorney and has his clerks researching and INSISTS there is a good shot at a change of venue… I don't buy it… but…..

Disso was 4 years ago.

On separation H agreed that W (my client) could move from Placer County to San Mateo County with the kids (two boys 7 and 5 at the time).

Parenting has been challenging in that H tends to bully W at every possible opportunity… H has two weekends per month. 4 weeks in the summer, holidays, etc. He's generally a good dad other than that.

H works in Bay area probably 4 -6 days a month (irrelevant?).

H now files motion to have parenting for the entire summer.

W WILL object.

W says… why can't we change venue to San Mateo? Witnesses, school, friends, extracurricular, doctors, etc., etc.

EVERYTHING REGARDING PARENTING THAT'S ASSOCIATED WITH THE CHILDREN (OTHER THAN DAD) IS IN SAN MATEO COUNTY.

In the reading I've done on change of venue, it does not appear that there is any reasonable probability of a change of venue being granted since H still lives up here.

However, never having filed a motion for change of venue in a custody matter, perhaps I'm missing something.

Hogoboom seems to cite to CCP 397 (c) as an alternate ground "end's of justice."

My belief is that H continuing to reside in decree county trumps "ends of justice."

Any useful comments? (and useful would also be "no chance"…..)

Frederick "Rick" Cohen provided the following thoughtful response:

Two different issues.

1. Father's continued residence in Placer County blocks a mandatory venue change (no one lives there anymore).

2. Mother can seek a discretionary (convenience) change of venue.

a. Totally within the court's discretion.

b. Most judges will deny the motion if (a) Father is still in the county and (b) more importantly, if Father is reasonably involved with the children.

c. Some judges will truly weigh the facts and consider the extent to which there really are evidentiary issues that make the case more appropriate for a change of venue. And, if the judge cannot stand the case, it gives the judge an easy way out (especially if the parties are "frequent fliers)").

3. Without knowing more, your chance of success is going to be low. But, it would not be a frivolous argument and sometimes if you do not ask, you do not get.

a. Given that you will be second guessed by hotshot PI lawyer, you might be better off taking a shot at it and seeing what happens. Just do a good CYA letter (within the court's discretion; chance of success is low; not really worth the attorney fees; if you want to spend the money and take a shot at it feel free).

Paul Marks also provided some helpful advice:

I agree with Rick, BUT add that your client needs to develop the testimony available in San Mateo that is relevant to the issue, including the children's needs and loss of their support services for 2 1/2 months each summer – extracurricular activities, etc. *Forum non conveniens* requires a strong showing that you can't get all the information in front of the judge in the present county, and that is difficult if Dad is a good father and there aren't particular and special issues that necessitate the trial in the children's home county. For example, if the children are having significant issues in school, are in therapy, or undergoing dialysis, and you can demonstrate that the therapist, teachers and doctors need to be heard by the court [and that the information is really in dispute and can't adequately be presented in some other way], you have a chance.

I do agree that the chances of a change are low. I have met few judges who believe that they aren't more competent than anyone else to make the decision.

(Following this response, Paul told a very interesting "war story," which I have eliminated due to space limits, but which is very much worth reading. Look for the Thread which begins with the phrase "Change of venue.") Rick Eldridge, Peter Trombetta, and Leslie Shear also contributed to this thread, and their comments are worth looking up, as well.

On November 14th, Leslie Shear directed us to a Los Angeles Times article concerning the closure of ten courthouses in that County due to fiscal issues.

Bonnie Riley reminded us all of the change in law restricting depositions to seven hours in most circumstances. This came to us on the auspicious date of 12/12/12.

Well, we are out of space for this column in this issue. Thank you again for all who contributed.
Keep up the good work! ■

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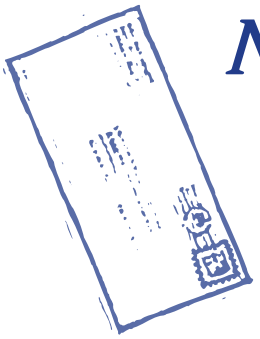

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20th Annual Spring Seminar 3/23/2012 – 3/25/2012

"Show Me the Money": Exploring Its Nuances and Complexities

Expert Wizardry in Presenting and Defending Income Adjustments for Support: Hogwarts and All (Unabridged Version) (in 2 Parts) – *Ronald S. Granberg, CFLS and Robert E. Blevans, CFLS*

Finding Your Way Through the Executive Compensation Maze – *Compensation Experts: Mark Lipis; Terry L. Pasteris, CCP, GRP; Lynne Yates-Carter, CFLS*

Double-Dipping: Bad Manners or Irresistible Temptation? – *Michelene Insalaco, CFLS; Christopher C. Melcher, CFLS*

When Money Disappears Offshore – Discovery and Recovery – *Robert C. Wood, CFLS; Edward J. Thomas, CFLS; Daniel J. Jaffe, CFLS*

Imputed Income – The Netherworld of Gross Cash Flow for Support – *Bruce Cooperman, CFLS; David Swan, CPA/ABV*

What Law Applies? – *Hon. Kenneth Black, Ret.; Hon. Thomas Trent Lewis*

Ask the Judges: the Last Word on "Show Me the Money" – *Garrett C. Dailey, CFLS (moderator); Hon. Lorna Alksne; Hon. Thomas Trent Lewis; Hon. Michael J. Naughton, Ret.; Hon. Cynda R. Unger*

19th Annual Spring Seminar 4/15/2011 – 4/17/2011

"Just the Facts"… An Advanced Course in Family Law Evidence: Discover, Obtain, Admit and Exclude It

After Elkins: Advanced Courtroom Practice Under A.B. 939 – *Hon. Mark A. Juhas; Hon. Thomas Trent Lewis; Hon. Cynda R. Unger; Garrett C. Dailey, CFLS*

Getting the Facts: Comparing Discovery and Disclosure – When to Use Each – *Dawn Gray, CFLS; Christopher C. Melcher, CFLS*

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Reflections on the Human Side of Family Law Practice:

WHAT FAMILY LAWYERS ARE GOOD AT

Heidi S. Tuffias, CFLS
Los Angeles County
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Since it is the beginning of a brand new year, at least as I write this, I think it is time to celebrate what is good about us family lawyers. It is a long and illustrious list, of course, so I will have plenty to talk about.

Clearly, we are good at the following:

1. Figuring out what is relevant and what is not

It is blazingly clear to me what 10 minute part of the 45 minute story my client tells is relevant but not so much to them. Somehow they think that all their hurt and justified anger is part of the story!

2. Saying things people do not want to hear

We have to say things to so many people that they do not want to hear – the Judge when we want a continuance, opposing counsel when we take a position they disagree with, our clients of course, when we tell them that California is a no fault state.

3. Explaining things in a way that makes it seem obvious we are right

How many times does it happen to you when you see things so clearly but you have to take everyone step by step by step before they see it?

4. Persisting

Simply trying again and again until what we want gets done; really, an invaluable quality in all walks of life.

5. Doing things quickly: decision making, thinking on our feet, jumping to conclusions

6. Finding ways around obstacles

We do this every day but it seems more noticeable in "the regular world" when there is a rule or an obstacle that really should not apply to me or my situation.

Please tell me why this rule exists and then I will tell you how it cannot possibly apply to me. Ok, then may I speak to your supervisor?

7. Identifying problems

Really, we are super at identifying, describing and analyzing problems.

8. Blaming

It is very easy for us, once we have identified the problem, to ascertain who outside of us and our client is to blame for the problems we have so clearly identified.

Of course there are things we are terrific at but we wish other lawyers would be better at:

A. Identifying solutions

Nothing bugs me more than someone who tells me in detail what the problems are but has no solutions to offer. See above #7, I too can thoroughly identify the problem. Now help me be useful and work with me to get to solutions.

B. Being rational and logical (i.e., agree with me)

We, who are reading and writing this article of course, are supremely rational and logical. Those who disagree with us are very hard to take.

C. Seeing two sides of the story

What I would like very much is if everyone spent just a minute in my, or my client's shoes. I promise I will do the same. I work very hard at seeing both sides, not only to figure out how to argue my own side better but also how to come up with solutions that will work for everyone.

Heidi Tuffias has been a Certified Family Law Specialist since 1995. She practices in Brentwood. Heidi and the members of her firm provide the full range of family law legal services. Heidi focuses her practice on alternative dispute resolution and settlement-oriented representation of clients in litigation.

And there are things we want to be good at, we may even think we are good at, but we need work on:

1. Collaborating in a group

The truth is that it is an effort for a bunch of controlling, type A personalities to collaborate (i.e. work together,

TUFFIAS

Continued from page 30

listen to others' ideas, incorporate others' thoughts into a plan) who truly believe that their own ideas are so close to perfect as if God him/herself had come up with them.

2. Listening to the whole story

It is so hard not to believe that we have heard every story and can figure out what to do in the first five minutes, when we have so, so many other things to do.

3. Multi-tasking well or not multi-tasking

I know science proves me wrong, but I really do believe that I can do more than one thing at a time and I fervently believe that multi-tasking is efficient.

And of course, things we are just plain not good at like being patient, not interrupting, giving the benefit of the doubt, being told we are incorrect or wrong, listening to other points of view. But who ever said we were perfect? ■

EDITOR

Continued from page 2

By popular assent, our picture "centerfold" will now appear only after the Spring Seminars and State Bar annual meetings. Smile when you see us with cameras. With the departure of our former editor Dawn Gray as Associate Editor, we're also weighing the relative virtues of hot new case summaries by electronic update, rather than in the *Specialist*.

Finally, I am still seeking input from members, and judicial officers, state-wide, as to innovative approaches to addressing the ongoing challenges. There's a newly minted crop of specialists, and new members out there, (Congratulations! Welcome!) and it's time to get them on board, to assist the more "experienced" contributors, some of whom have been doing this since ACFLS' Day One, now some thirty-plus years ago. ■

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Join online at www.acfls.org or send your application and payment by mail to: Dee Rolewicz, ACFLS Executive Director, 1500 W. El Camino Avenue, Suite 158, Sacramento, CA 95833-1945 or fax: (916) 930-6122 or scan and email to acfls@comcast.net

ACFLS JOURNAL

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