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MILITARY PENSION DIVISION AND THE 2017 RADICAL REWRITE

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Introduction

The 2017 Department of Defense Appropriation bills from the House and the Senate have similar provisions for rewriting entirely the process of military pension division upon divorce in a majority of the states. Upon passage, the law would require *all* military retired pay to be divided according to the rank and years of service at the time of the pension division order. This new nationwide standard would overrule pension division requirements in all but half a dozen states. Here are some questions to clarify the issues and the problems.

What's Happening?

Questions:

1. **What do you mean, a "radical rewrite"? Give me an example of what the changes would do.**

   Let's say that John Doe just retired as a sergeant major (E-9) in the Army with thirty years of service under his belt. He was divorced from Mary Doe ten years ago; they married when he entered the Army. The pension division order was entered on the date of divorce, when he was a sergeant first class (E-7) with twenty years of creditable service.

   - In 90% of the states, the way it works is that John's actual retired pay would be divided, but Mary's share would be discounted to give John the benefit of the last ten years of post-divorce longevity and promotions. In virtually every state, Mary would receive 50% of 20/30 of John's *actual retired pay.*
   - The "new rule" would require the court to order for Mary 50% of *the retired pay of a sergeant first class* with twenty years of service (as if he had retired on the date of the pension order). That would be a federal government requirement, regardless of what state law says her share should be. Mary would still be receiving half of the marital share, but her share would be frozen as of the date of the MPDO (military pension division order).

WHAT'S INSIDE

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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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2. What problems would occur if this approach becomes law?

Since there have been no hearings, and there is no extensive committee analysis, we can only guess what the problems will be. Here are some that will certainly occur:

- COLAs. There is no mention of COLAs (cost-of-living adjustments) for Mary to allow her share to rise over time from John's pension division date to his actual retirement. Her dollar share will be fixed as of the date of the decree, like a fly frozen in amber. All of the COLAs would go to the military member or retiree.
- "One Size Fits All." In addition, there's no provision for settlements and agreed orders so that the parties could decide on a different method of pension division. About 90–95% of all military pension orders are done by settlement. Unless a consent order rigidly complies with the "fixed benefit" requirement, it will be rejected by the retired pay centers (Defense Finance and Accounting Service and the Coast Guard Pay and Personnel Center). The parties are no longer free to settle their cases in their own way—they have to comply with the decree of Congress.
- Immediate Payment. In California (and all of the western community property states) the law allows a spouse's share to be determined based on the rank of the military member when the retired pay begins or else—upon the spouse's choice—immediately upon the member's attaining earliest eligibility for retired pay, with pay based on ***that*** rank and years of service, with payments to begin upon the member being eligible to collect retired pay, whether or not the member actually goes into pay status. (In California, see *In re Marriage of Gillmore*, 29 Cal. 3d 418 (1981) and *In re Marriage of Castle*, 180 Cal. App. 3d 206 (1986).) Yes, that's right—immediate payments, even though the member has not yet actually retired. Well, the logical result of this new rule will be for every spouse to demand immediate payments, since the rank and years of service must be frozen at the time of the MPDO. Why should a spouse wait till the day that pension payments start? All spouses will demand immediate payment, rather than postpone the monthly pension share.
- Removal to Federal Court. Plus there is no reason why the disgruntled spouse/retiree cannot open the door to federal court if he or she is not satisfied with how the state court divided the pension. When federal law establishes the test, then federal law preempts any contrary substantive provision in state law. If there were an issue or challenge on pension division, why wouldn't a party have the right to remove the case to federal district court on *federal question jurisdiction*? When a state court judge (against the claims and wishes of a litigant) makes a determination that is at odds with the statute, or writes the order incorrectly and refuses to correct it, then the aggrieved party would be able to petition to remove the case to federal court.

No Time For Adjustment

3. Will there be any "breathing room" so that the states can adjust to this radical change?

No. The new rule will require legislative changes in most of the states, but there is no decent interval set out to allow the states to write up, propose, and enact laws consistent with the "new rule." Enough time must be allowed to let the states implement the new rule, yet none is granted.

As a result, a warped formula will occur in most of the state military pension orders, one that imposes a

double discount on the spouse. First of all, her share will be fixed and frozen at the rank and years of service at the time of the order. In addition, since state laws have not been rewritten to revise the "marital fraction," it will still be calculated in 90% of the states based on years of marital pension service divided by total pension service years (marital years/total years), rather than marital pension service years divided by the years of pension service up to the date of the order. It is essential to stop the clock for the denominator at the date of the MPDO since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. *See Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398 (holding that, in a "hypothetical clause," the denominator is months of creditable service during marriage up to the date of divorce, rather than the date of retirement, citing *Berry v. Berry*, 647 S.W.2d 945, 946-47 (Tex. 1983); accepting the husband's proposition that denominator should be total years of service would impermissibly dilute the ex-wife's share acquired during parties' marriage).

And yet no time is allowed for state legislatures to adjust to the change and rewrite the state laws. The law would become effective and binding on the states upon enactment.

4. Is anyone in Congress even aware of all these problems?

Probably not. These time bombs and landmines show clearly the error in trying to insert into the U.S. Code a new national standard for military pension division when this issue has not been studied, has received no hearings, and in reality should be left for state court decisions. State lawmakers have far more knowledge about these matters than members of Congress, who have never before enacted substantive rules on how to divide the military pension.

This bill represents a huge expansion of Congressional power over family law issues. When it was passed in 1982, the Uniformed Services Former Spouses' Protection Act wisely avoided the intrusion issue; it created a structure that is a respectful acknowledgment of state laws and courts, which have preeminent powers and expertise in this area.

"Tighten Up"—The Federal Straightjacket

5. Why would Congress want to dictate to the states how they are to divide pensions for military personnel?

That's the "24-carat question." The expertise of Congress in division of federal pensions is best described as NONE. That's because Congress makes the broad general laws allowing the division of the six federal pensions (military, Foreign Service, CIA, federal civil service [CSRS or FERS], or Railroad Retirement). Pension provisions in the U.S. Code do not "get down in the weeds" to tell the states how to do their job.

These proposals intrude in a field that has always been reserved for the states. Why should Uncle Sam step in, take over, and dictate the outcome? Each case is unique, and a single national standard would tie up military cases involving pension division into a federal straightjacket.

State Expertise Vs. "A National Standard"

6. How are the states doing in this arena?

Fewer than ten states (including Texas, Florida, Oklahoma, Tennessee, Kentucky, and Maine) require the "Frozen Accrued Benefit" method, which is another name for this method of pension division. This approach "fixes the retirement benefit" that was earned as of the date of separation or divorce.

All the rest, either by statute or by court decision, use the "Time Rule" in dividing a defined benefit plan, whether it's civil service, state government, military, local government, or a private pension.

- The *time rule* approach involves the presumptive share of 50% for the spouse or former spouse times the actual retired pay of the retiree.
- Then, discount the benefit and give the member credit for post-divorce longevity and promotions. This is multiplied by the *marital fraction,* which is years of marriage during employment divided by total years of employment. This reduction factor makes sure that the former spouse will not be overpaid.

Over the last thirty-plus years, the states have entered hundreds of thousands of orders for the division of military retired pay. They have built up a substantial body of case law and statutory rules regarding how the division is done. The pension order is required to be fair, neutral, and even-handed, regardless of whether the retiree or employee is the *husband* or the *wife*, whether it's a "safe job" like an office worker, or one fraught with danger, such as a soldier, policeman, CIA agent, or firefighter. The states have the responsibility, and they are doing their job.

The *time rule* in the vast majority of states would be cast aside in favor of ONE SIZE FITS ALL. The "federal rule" for military pension division—all without hearings in Congress—will require that the pension divided would be fixed at the rank and years of service of the military member at the time of the court order making the division.

7. How about the other five federal retirement systems? Does Congress dictate how they divide the pensions?

No. Congress has left the job to the states for how to divide these five other federal pensions.

8. Where's the current law found regarding division of military pensions?

It is contained in the Uniformed Services Former Spouses' Protection Act ("FSPA"), which is found at 10 U.S.C. § 1408. At the time FSPA was passed, there was a clear understanding in Congress that the states would be granted the power to divide military pensions (or refuse division). The federal government was accorded limited powers, such as the power to enforce orders through garnishment and the duty to ensure that federal jurisdiction tests were met.

Where's The Beef?

9. So who is claiming that FSPA needs radical surgery?

You be the judge. Here's an April newspaper piece -

4/28 article by Tom Philpott -- Northwest Florida Daily News:

> ***Ex-Spouse Law Tweaked*** *— The 1982 Uniformed Services Former Spouses Protection Act allows divorce courts to divide military retired pay as property jointly earned in marriage.*
>
> *Congress hasn't considered even modest changes to the USFSPA for more than a decade. But on Wednesday freshman congressman Steve Russell, R-Okla., a combat veteran and retired infantry officer, won bipartisan support for a USFSPA amendment to benefit members who divorce after the defense bill is enacted into law.*
>
> *Russell took aim at a "windfall" feature of the USFSPA that retirees have criticized for decades. If a member is not retired when divorced, state courts often award the ex-spouse a percentage of future retired pay.*
>
> *In effect, that allows the value of the "property" to rise based on promotions and longevity pay increases earned after the divorce. In 2001, the Armed Forces Tax Council said this was inconsistent with treatment of other martial assets by divorce courts.*
>
> *The amendment would end the windfall in future divorce cases by directing that an ex-spouse's share of retirement must be based on a member's grade or rank at time of divorce.*
>
> *Making such a change retroactive would force recalculation of tens of thousands of divorce settlements, an unpopular idea with ex-spouses. So the change is prospective only. But both Republicans and Democrats praised the amendment as fair. It cleared committee on an uncontested voice vote.*

10. What's this business about a "windfall"?

That is anyone's guess. In the "zero-sum game" of divorce, *everything* can be labeled a windfall if it benefits one side to the detriment of the other. If the husband gets the house, the wife claims that he got a windfall. If the wife receives a share of the husband's 401K plan, he is sure to shout about the windfall that she received. As a practical, factual matter, there are NO windfalls in the world of military divorce and pension division. But lots of people write to Congress about their own divorce and how unfair certain things are, and they may not like how certain state rules apply to them.

Thus, for example, California and several other community property states allow the pension to be divided based on final retired pay, or else divided at the time of divorce with payouts commencing immediately (based on the rank and years of service of the military member at that time). Is that a "windfall" for the former spouse?

On the other hand, Puerto Rico does not allow the dividing of military pensions at all. Indiana and Arkansas require the pension to be "vested" to be divided, which means the spouse gets nothing when there is less than twenty years of service. North Carolina requires the spouse to get expert testimony on valuation of the military pension, or else it cannot be divided at trial, making it a steep, uphill battle for the non-military partner. Alabama requires the pension to be vested and evaluated and obtained through ten years of military service concurrent with ten years of marriage. Maine does not allow the apportionment of COLAs (cost-of-living adjustments) to the former spouse. Are all of these state rules "windfalls" for the military member?

Congress has done nothing to eliminate any of these alternative methods found in the fifty states. It now proposes, however, to create a single nationwide standard—the "Frozen Accrued Benefit" approach—to require that the division of retired pay always and everywhere be based on the rank and years of service of the member at the time of the court order for division.

11. Is this new? Has Congress tried this before?

There have been attempts to rewrite FPSA (or to remove it entirely from the federal law landscape) going back decades. Every time someone in Congress has tried to change the law in this area, the American Bar Association and other critics have asked, "Where's the beef?" What is the problem?

A Solution in Search of a Problem

12. So what is the problem that this proposal is supposed to be solving?

There is no reported case in which a court determined that the *time rule*, the present system of pension division in most states, created a "windfall" for the former spouse. The bill is *a solution in search of a problem*. Where is the problem that would allegedly be solved by such legislation? There's a simple answer—no such problem exists. With no defined problem as the reason for these

bills, one has to wonder why we would want to change the law in most of the states, thus creating unfortunate, costly, and easily foreseeable new consequences in military pension division cases.

13. Even if there WERE a problem, where does it say that Congress gets to do this? Can Congress tweak, change, and correct anything in state procedures that it thinks might be "unfair"?

Congress has never held the power to reach out and correct what it thinks should be changed in the laws of the states. Our nation has, as it should, a vast variety of methods of reaching a fair and just division of marital or community property. FSPA was meant to protect these varied methods of dividing military retired pay, since they have been developed in state courts and legislatures over the last thirty-plus years.

Who's So Special?

14. Why are *military pensions* to be given such special treatment?

No one knows. The new rule will require statutory or case law revisions in 90% of the states because it makes the military pension *super-special.* And it does so without any recognition of terms for state court division of all the other defined benefit plans (e.g., IBM, state government, local government), or even the federal defined benefit plans which Congress has enacted (i.e., FERS, CSRS, CIA, Foreign Service, Railroad Retirement).

In addition, if enacted, this "special treatment legislation" will lead to inequitable and unfair results in every divorce in which a spouse (most of whom are women) is married to a military member. The spouse, in 90% of the states, would have her own pension divided according to her actual retired pay, but she would be denied this same treatment when it comes to dividing the military member's pension, which would be "frozen" at the date of division; thus the military member will have a greater interest in her benefits than she has in his, creating an obvious unfairness.

Perhaps some readers will be reminded of the text from George Orwell's *Animal Farm*—"All animals are equal; but some animals are more equal than others." Thus military retirees are so super-special that they have to have their pensions divided by a Congressional edict, unlike every other federal, state, or private pensioner. For example, no one who is retired from the State Department, the Federal Marshal's Service, or the CIA is treated to this type of federal division requirement upon divorce. It is reserved only for military retirees.

15. I thought that the courts could give consideration to how the efforts of "Mary Doe" and her husband during the marriage could benefit him in terms of future promotions.

That's right. The *time rule* is based on the "marital foundation theory," which recognizes that the individual's final retired pay is based on a foundation of marital effort; a servicemember would never have attained the rank of sergeant major (with thirty years of service) if it had not been for the efforts expended during the marriage up to the rank of sergeant first class over twenty years, when the parties divorced. That is one reason why a large majority of states have adopted the time rule for dividing pensions of all kinds and stripes—it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., Mary Doe's inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

16. How are pensions divided now at the retired pay centers?

The military pension award may be a:

- Fixed dollar amount;
- Percentage of retired pay;
- Formula clause (e.g., 50% of 120 months of marital pension service divided by X total months of creditable service multiplied by final retired pay); or
- Hypothetical award, fixing the benefit at a specific time for rank and years of service purposes (such as "the pay of a sergeant first class with over twenty years of service at the date of divorce/separation").

State courts may, depending on what is fair and equitable, use any of these approaches as allowed by state law. The FSPA revision would torpedo this "state law approach." It would dictate the use of the hypothetical award (above) or "fixed benefit" approach for every case, whether settled or tried, and regardless of whether it produces a fair or unjust result.

Helping (Or Hindering!) The Servicemember

17. Is the fixed benefit clause easy to do?

"Fixed benefit" division is the hardest to handle of the four pension clauses mentioned above. An attorney at one of the retired pay centers that processes military pension division orders put it this way: "I estimate that over 90% of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of … military retired pay. This legislative change will geometrically compound the problem."

But everyone will have to know how to do it. Since almost no one now can write one competently without a lot of research and a handful of Excedrin, this means the cost of military divorce will go up once again, with rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval.

Then it is back to the drawing board for another crack at it, or else farm it out to some expert who can do it

properly (IF there's enough information available to figure it out, including the member's "High-3" annual compensation) (and an expert can be located) (and enough money is left to pay the expert draftsman for the next stab at this!).

18. Where can I find an explanation of the "time rule" and the "fixed benefit" approaches to pension division?

For an explanation of the difference between these approaches, see:

- BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 6.26 (3d ed. 2005 & Supp. 2015).
- *Prescott v. Prescott*, 736 So. 2d 409 (Miss. Ct. App. 1999)
- *In re Marriage of Hunt and Raimer*, 909 P.2d 525 (Colo. 1996).

The *Hunt and Raimer* case contains a limited summary of "Time Rule" states (now up to about forty jurisdictions):

> The "time rule" formula has been approved by a number of jurisdictions. *See, e.g., Cooper v. Cooper,* 167 Ariz. 482, 808 P.2d 1234, 1242 (Ct.App.1990), *review denied,* (Ariz. May 7, 1991); *In re Marriage of Freiberg,* 57 Cal.App.3d 304, 127 Cal.Rptr. 792, 796 (1976); *Stouffer v. Stouffer,* 10 Haw.App. 267, 867 P.2d 226, 231 (1994); *Warner v. Warner,* 651 So.2d 1339, 1340 (La.1995); *Lynch v. Lynch,* 665 S.W.2d 20, 23-24 (Mo.Ct.App.1983); *Rolfe v. Rolfe,* 234 Mont. 294, 766 P.2d 223, 226 (1988); *Gemma v. Gemma,* 105 Nev. 458, 778 P.2d 429, 431 (1989); *Berry v. Meadows,* 103 N.M. 761, 713 P.2d 1017, 1023 (Ct. App.1986); *Welder v. Welder,* 520 N.W.2d 813, 817 (N.D.1994); *Woodward v. Woodward,* 656 P.2d 431, 433-34 (Utah 1982).

19. Where are these House and Senate provisions located?

The terms in the Senate bill, S. 2943, are found at Section 642; the House equivalent is H.R. 4909, Section 625. Sen. John McCain of Arizona is the sponsor for the Senate Bill and Rep. Mac Thornberry of Texas is the sponsor for the House Bill.

Bar Association Opposition

20. Where do the American Bar Association and the American Academy of Matrimonial Lawyers stand on rewriting FSPA?

The American Bar Association has been on record for over three decades on the role of Congress and the states in the division of military retired pay. As stated in the 1998 Congressional testimony of Las Vegas attorney Marshal Willick, representing the ABA:

> *There are two formal statements of policy by the ABA. One was in 1979, urging that all forms of deferred compensation be allowed to be subject to State dissolution laws, and the other one in 1982, in the wake of McCarty [McCarty v. McCarty, 453 U.S. 210 (1981)], and that was a formal policy, again, strongly urging specifically that military retirement be made divisible as would any other asset so that military members are treated like civilian employees of the Federal Government, employees of State governments, and private citizens all throughout the United States.*

The ABA is on record opposing any attempt to "federalize" the means of dividing military retired pay.

And the American Bar Association has made it clear that complex family matters are best reserved to the states, which over the course of time have developed appropriate expertise and mechanisms to make fact-driven determinations regarding military pension division. Federal efforts to legislate the division of military retired pay depart from the long-standing history of deference to state laws in matters involving property division.

The American Academy of Matrimonial Lawyers has specifically addressed military retirement benefits and military related divorce matters, including detailed position papers submitted to Congress in 2001 and 2010 regarding the Uniformed Services Former Spouses Protection Act and related issues. In a resolution dated June 24, 2016 and a letter by President Joslin Davis dated July 6, 2016, the Academy has made it clear that we are opposed to any attempt to "federalize" the division of military retired pay:

- The states would no longer be able to use their own time-tested and finely tuned rules regarding military pension division.
- The new rule would take the entire military pension division process away from state courts and judges, forcing an awkward "national solution" which would transform everyone's divorce case into "one size fits all."
- And a proposal that seeks to "federalize" military retirement—out of all defined benefit plans—carved out for special treatment and calculated differently—is counterproductive and inequitable. It would provide military spouses with lesser property rights than all other spouses.

The AAML likewise strongly advocates the rejection of these legislative proposals.

21. What can I do to stop this?

If you are opposed to such a radical rewrite of FSPA and the removal of the powers, duties, and abilities of the states to handle military pension division, then write your senators and your representative to urge them to stop this ill-advised scheme… or at least to conduct hearings on the issue (as happened when Congress passed FSPA in 1982) so that the voices of those affected—attorneys and their clients—may be heard.

Conclusion

These FSPA rewrite proposals contain serious flaws. Passage in the Department of Defense Authorization Act for Fiscal Year 2017 would lead to a major intrusion into federal court for courts, lawyers, servicemembers, former spouses, and retirees. It will certainly cost them dearly in time and money spent in court and with attorneys. Family law attorneys should contact their representatives in the House and the Senate. State bars and bar associations should let their voices be known regarding this radical revision of federal law, by means of clear and strong resolutions and statements on the record. If enough voices are heard in Washington, these unnecessary and harmful changes may *never* become federal law.

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law in North Carolina since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders.

PRESIDENT'S MESSAGE

JILL L. BARR, CFLS | ACFLS PRESIDENT | SACRAMENTO COUNTY | JILL@HEMMERBARRLAW.COM

I have enjoyed my tenure as President of ACFLS. I am extremely proud of my fellow board members, who spend hundreds of hours per year volunteering for the benefit of ACFLS. The board is a diverse group of family law attorneys from all over the State of California with a common goal of ensuring that ACFLS is the best family law organization in the state.

Executive Director Dee Rolewicz and her assistant, Rachelle Santiago, are very important to the continued success of our organization. They oversee the day-to-day operations of our organization while providing consistency and excellent service to our members. They also provide additional support to our board members and committees and are invaluable assets to our organization as a whole.

Most of the current board members have agreed to continue to serve on the board next year. This will provide the new president, Seth Kramer, with an experienced and dedicated board of directors. I have enjoyed working with Seth, who will undoubtedly be an exceptional president next year.

I would like to thank my coordinating directors, Joe Bell, Sterling Myers, and Diane Wasznicky for their continued service these past two years to ACFLS. Each of them has served many years on the board of directors and provide, amongst many other contributions, essential historical context for our current board members and have been particularly helpful to me as advisors. Lynette Berg Robe, past president, has also been a valued advisor during my term.

The *Specialist* has experienced great improvement during the past two years under the leadership of Journal Editor Debra Frank. Debra and Associate Journal Editor Christine Gille have worked to modernize the look and stream-line the content of our journal. I am hopeful that by the end of my tenure we will also be able to offer the journal in digital format.

The Membership Benefits Committee, led by Jason Schwartz, is always looking for new ideas to increase our membership and enhance the benefits that we provide.

The Legislation Advisory Committee has been extremely active these past two years under the leadership of Legislative Director Dianne Fetzer and Associate Legislative Director Michele Brown. ACFLS was instrumental in ensuring that the Anti-Davis legislation, SB 1255, was enacted this last session, effective January 1, 2017. In addition, this committee has been active in reviewing and commenting on proposed legislation that impacts family law.

Jill L. Barr has practiced family law for nearly thirty years. She has served on the ACFLS Board since 2011. Ms. Barr has served on many family law related committees in her career, including the California State Bar Family Law Section for nine years, including Chair of the committee in 2008-2009. She practices in Sacramento County as a partner in the firm Hemmer & Barr LLP.

Leslie Shear and Steve Temko are the co-chairs of the Amicus Committee. This committee reviews pending appellate and Supreme Court cases that affect family law in the State of California. ACFLS has sought publication and de-publication of many cases in the past two years pursuant to the recommendations of this committee. Most recently, ACFLS joined others in seeking the de-publication of *In re Marriage of Cooper*, a recent Third District Court of Appeal case, which request was granted by the Supreme Court.

The Technology Committee continues to explore improving our website, our social media presence, and all things technology related. Technology Director David Lederman and Associate Technology Director Avi Levy are perfect to lead this committee. I look forward to further improving our technology for the benefit of our members and our organization as a whole.

Rick Cohen took over the leadership of the Outreach Committee this year and with the assistance of immediate past Outreach Director Linda Seinturier, he has recruited new members to his committee. In addition, the committee has continued in its important mission to provide education to family law attorneys in the under-represented and outlying counties of our state.

The Spring Seminar this past year was co-chaired by Diane Wasznicky and Seth Kramer. The annual seminar requires much of the board's attention during the year as we start planning the seminar about eleven months before the event. The entire board pitches in to ensure that this event surpasses the seminar from the prior year. In addition to the staff and board members that dedicate much of their time to this event, we could not present the cutting

edge content each year without the contributions of many of our gifted members and family law judicial officers who volunteer to be a part of the faculty each year. Co-chairs Karen Freitas and Patricia Rigdon and the entire Spring Seminar Committee are planning another outstanding seminar for 2017.

The Chapters, Bay Area (Anne Davies, director and Kimberly Campbell, associate director), Sacramento (Stephanie Williams, director and Mary Molinaro, associate director), and Orange County (Dorie Rogers, director and Catherine Goodrow, associate director) have excelled in providing continuing education to their local family law communities. Many of those local presentations are videotaped and available for all members to purchase from our store via our website.

Education Director Sherry Peterson has skillfully handled the annual Holiday Party in December, our Awards program, and continuing education at the annual state bar meeting. I am also thankful to Secretary John Hodson who has contributed significantly to the board for the past few years.

This past year, with the support and consent of the board of directors, Past President Joe Bell spearheaded the effort to create what is now the ACFLS Charitable Foundation, Inc., an entirely separate entity from ACFLS, but with the full support and cooperation of ACFLS. The foundation's mission is to solicit donations and to raise funds for the purpose of making monetary grants to persons and/or entities who are working to enhance access to justice, to provide family law-related education, and/or to improve the California family law process for affected persons, families, or groups in need.

It has been a privilege to serve on the board these past several years and work with colleagues who are so dedicated to our organization and the improvement of our profession. I look forward to serving on the board for the next two years as past president to assist in the continued success of ACFLS.

SAVE THE DATE!

ACFLS Annual Holiday Party

The ACFLS Annual Holiday Party will be held at the Sir Francis Drake Hotel San Francisco on **Saturday, December 3, 2016**

6:00pm Cocktails, Music, Raffle and Hor d'oeuvres and **7:00pm** dinner

This year we will be honoring the following recipients:

Hall of Fame: Diane E. Wasznicky

Outstanding Service to Family Law: Kenneth Allen Black (Posthumous)

Board Award (aka Sterling Award): Stephen Temko

EDITOR'S COLUMN

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It is election time again! This issue includes the Slate of Nominees and Ballot for the 2017 ACFLS Board. You should be receiving the ballot via email, if you have not already received it. The results will be announced at the ACFLS Annual Holiday Party which will be held at the Sir Francis Drake Hotel in San Francisco on Saturday, December 3, 2016.

Our articles in this issue of the Specialist include in-depth discussions of several significant topics for the certified family law specialist. In our lead article, Mark Sullivan opposes proposed changes to the process of dividing military pensions as a result of the 2017 "radical" rewrite—federal legislation that would change entirely the process of military pension division upon divorce in a majority of the states, changing from the time rule to the frozen accrued benefit method. We have uploaded to the Specialist page of the ACFLS website Sullivan's sample letter to legislators (federal, not state) opposing the pending action.

The article by Jeff Makoff and Ted Israel, *Achieving the Best Results in Business Valuation Cases Through Proactive Lawyering*, describes how family lawyers and valuation experts can work together at each step of the valuation to enhance the valuation's accuracy and achieve the best result for our clients.

Jeri Hamlin, the President of the California Court Commissioners Association, and the AB1058 Commissioner for the counties of Tehama, Glenn, Colusa and Plumas and Rebecca Wightman, the AB1058 Commissioner for San Francisco County, provide Part I of their two-part article on the statewide child support program and its recent budget woes.

Our regular features include Dawn Gray's (Nevada County) article, *Hot off the Press*, summarizing the holdings of the most significant recent cases. Congratulations to Dawn Gray for her appointment to Flexcom. She will also be the editor of the Family Law News and *Hot off the Press* will now be published in the Family Law News. We thank Dawn for providing us with *Hot Off the Press* and encourage you to continue to read her insightful case updates in the Family Law News.

Starting in our Winter 2016 edition, ACFLS will be providing you with our new regular column, our analysis of new cases from the "Litigator's Log- Quarterly Case Exam." We will analyze recent cases from the litigator's perspective. In addition to providing a brief summary of the case, we will discuss the strengths and weaknesses of the presentation of the case focusing on trial fundamentals.

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

Our ACFLS Amicus Committee continues to contribute to the evolution of family law in California. Committee members continue writing amicus briefs on impact cases and seeking publication of significant cases and de-publication of cases. I recently prepared two publication requests and one depublication request on behalf of ACFLS. Subsequently, the Court of Appeal, First Appellate District, ordered *Anne H. v. Michael B.* published in part July 12, 2016 (204 Cal. Rptr. 3d 495 (Ct. App. 2016), *modified* (July 12, 2016), *review filed* (July 25, 2016)). In *Anne H. v. Michael B.*, the appellate court held that:

> trial court's comments regarding potential changed circumstances are not binding in any manner on the next judicial officer who hears the case if the trial court's comments were unnecessary to the trial court's position and were not actually litigated and decided. They are not the law of the case and have no preclusive effect under the doctrines of res judicata or collateral estoppel.

I submitted a depublication request in the case *In re Marriage of Cooper*, No. C073014 (May 16, 2016) asserting that:

> [t]he opinion disregards the law regarding transmutations; transmutations must satisfy Family Code section 852 before the presumption of Family Code section 2581 applies. Under *Cooper*, separate

property funds were transmuted by virtue of a presumption without any of the formalities required by Family Code section 852(a). *Cooper* failed to recognize transmutation concepts and leading transmutation opinions.

ACFLS members Rick Cohen, Dawn Gray, and Nancy Perkovich, together with Attorney Hugh Thomson, submitted a joint depublication letter request and ACFLS member Robert Marmor also filed a depublication letter request. The Supreme Court ordered the case depublished on August 10, 2016.

My thanks to the members of the Amicus Committee for their assistance. The work of the committee, including letters and amicus briefs, is now published on the ACFLS website, accessed via the sidebar tab "Amicus"— https://www.acfls.org/page/Amicus.

I hope to see many of you at the Annual Award and Holiday Party in San Francisco. Contact me if you would like to write an article for the Specialist or if you have any suggestions for topics you would like to see addressed in future editions of the Specialist.

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

ACHIEVING THE BEST RESULTS IN BUSINESS VALUATION CASES THROUGH PROACTIVE LAWYERING

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Introduction

Business valuation issues arise at a variety of points during marital dissolution cases, including property division, decisions whether and/or at what price to buy or sell community business interests, and strategic or investment decisions concerning businesses in which the community has an interest. For most legal purposes, the value of a business (or a fractional interest in a business) is treated as an issue of fact. Because business valuation is a complex discipline, beyond the presumed ability of a judge, business valuation issues are driven by expert opinions unless the value is readily ascertainable, such as through a public market in its securities.

Because the value of a business is an issue of fact, valuation may be resolved through negotiation between the parties, joint delegation of the issue to an expert (or panel of experts), valuation by a court-appointed Evidence Code section 730 expert, or litigation with a "battle of experts." When the value of a business is not agreed upon by the parties, and becomes a matter of expert opinion, the law does not specify the precise method that an expert must follow to arrive at a valuation. Business valuation or "appraisal" has its own professional standards. The 2015 decision of the California Court of Appeal (First Appellate District), *In re Marriage of Honer*, 236 Cal. App. 4th 687 (2015), held that a trial court's valuation of a business for purposes of property division is reviewed under the substantial evidence standard. So long as the trial court's fact-findings are supported by substantial evidence, a reviewing court will not substitute its judgment for the trial court's factual determination of value.

Due to the complexity of business valuation, family law practitioners often delegate the entire task to an expert. Many valuation experts are highly skilled at litigation support and are pleased to complete the valuation, draft witness examinations, and prepare relevant graphics. This article shows how a more proactive and collaborative approach between family lawyers and valuation experts can enhance the valuation's accuracy and improve client results.

At the front end of the business valuation process, several "macro" issues arise—many of which involve legal determinations such as what is being valued, the valuation date, what valuation standard will apply (which, in turn, affects the expert's methodology in the valuation), who will perform the valuation, what and when attorney/party client input is permitted, and how a valuation may be challenged. These ground rules typically are not determined by the expert; they are determined by the parties and the court through negotiation or litigation. This article shows how family law attorneys can help shape these structural rules, then work within the valuation process to provide proper and influential input to the expert.

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Ted Israel has been practicing in public accounting since 1976. He co-founded Israel Frey Group, LLP (San Rafael, California) in 2015. Ted provides business valuation consulting and expert witness services in a variety of contexts including estate and gift matters, mergers and acquisitions, family law and corporate dissolutions. He has published numerous papers on business valuation and spoken on the topic at state and local conferences. Ted is a member of American Institute of CPAs Business Valuation Committee.

What is Being Valued?

"What" is being valued can have a significant impact on the valuation methodology and the ultimate determination of value. The types of business interests that are valued

in family law cases include the entire business, a partial interest in the business (such as a 25% ownership interest), particular assets or divisions of the business, an income stream from certain operations, derivatives (such as stock options), "carried interests," and particular business liabilities.

The importance of defining up-front what is being valued is illustrated by the following example:

> Case 1: Value 100% of the business and divide it in half;
>
> Case 2: Value a 50% interest in the business; and
>
> Case 3: Value 50% of the business's assets less 50% of its liabilities.

In Case 1, a valuation of 100% of the business will consider the fact that a 100% owner has total *control* of the business—how to run it, when to sell it, how to raise money, and so on. Control of a business is almost always worth something, and a control block (whether 100% or 51% or some other appropriate measure) generally will receive a higher valuation. In a case in which the marital community owns 100% of a business, or other controlling stake, the party who seeks a higher valuation often will argue that 100% of the value should be cut in half.

In Case 2, the owner of 50% (or less) often is in a precarious position—that owner may lack control, may have no discretion how to operate or finance the business, may be faced with deadlocks on key issues (often the case with 50%-50% owners), may be subject to capital calls (mandatory investments), and may be trapped in an illiquid investment with no power. If the community owns a *non-controlling* interest in a private company, a party who prefers a lower valuation generally seeks to ensure that what is being valued is not simply 100% of the business (which will be multiplied by the percentage owned by the community, then divided in half). That party generally will want to advocate for the "minority interest" to be valued as such, and for the valuation expert to apply discounts and other negative factors to reflect the vulnerability.

Case 3 arises when the business is worth little more than the value of its assets minus its liabilities. This situation typically arises in businesses that hold other assets (such as an LLC created exclusively to hold a piece of real estate with no significant business operations) and in smaller professional firms whose values derive from the ongoing labor of the owners and employees. In the former situation, the "business" may be so closely identified with its assets that it is reasonable and cost-effective simply to value the assets rather than the business. In the latter situation, it is often appropriate to focus on the ability of relevant owners or employees to generate a stream of personal income—it may be "the business" has little or no independent value.

"What" is being valued may have complexity far beyond the three examples described above. Let's say the marital community owns 51% of a business—but a dozen employees in the company have handwritten, "unlawyered" documents titled "Option Promises," under which 25% of the company "will vest and be exercisable at 5 cents/share if the president dies or becomes disabled." Further, assume there are no plans to sell the company, and the owner-president is only thirty-nine years old—but, due to genetics, the owner-president has a 50% chance of contracting Huntington's disease by age forty-five. His death or disability could trigger vesting and potential exercise of the "options" and a possible loss of community control of the business (depending on who owns the other 49%). What is being valued now is not just "the business" or the "community interest in the business"; the valuation must consider the possible contingent rights of the employees and their impact on the community block's value.

From the earliest stages in a dispute, a family lawyer should identify issues concerning what is being valued to ensure that the scope of the valuation expert's work is accurately defined.

The Valuation Date

The valuation date is the date "as of which" a business is valued. Under Family Code section 2552, the trial court generally is required to "value the assets and liabilities as near as practicable to the time of trial." Upon notice and for good cause, the trial court may set an alternate valuation date "at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner." FC § 2552(b). In the recent *Honer* case, the Court of Appeal confirmed that in the selection of a valuation date, the trial court's judgment is reviewed under the highly deferential "abuse of discretion" standard. Under the abuse of discretion standard, the trial court's selection of a valuation date will be reversed only if the court's decision "exceeded the bounds of reason" or "no judge would reasonably make the same order in the same circumstances." *In re Marriage of Honer*, 236 Cal. App. 4th 687, 693-94 (2015).

The selection of an appropriate valuation date is predominantly a legal issue—with sufficient information, a business valuation expert can value a business as of just about any date. The trial court may take information from an expert into consideration in setting the precise valuation date (e.g., the expert may recommend that the valuation be done as of the end of the most recent calendar year), but the major decision whether to require a trial date valuation, a separation date valuation, or something in between, is driven largely by legal and equitable factors. In determining what valuation date to seek, unless it is obvious, family law counsel should work with a valuation expert to determine what date is most helpful to a particular client.

In advocating for a particular business valuation date, family law attorneys should consider the following:

- The default or presumptive valuation date (i.e., close to trial, or with respect to certain businesses such as small professional practices, the separation date under case law);
- The practicalities of a particular date, in terms of making

information available to the expert. Business valuation experts often prefer to work with "final" year-end numbers that have been adjusted by the business's accountants to be comparable to past year data. Valuation experts always prefer to value a business at the end of a quarter, perhaps the last quarter before trial, rather than on the exact trial date;

- Whether there are remedial factors that can be argued to support a more favorable valuation date than the legally presumed date. For example, whether a party improperly delayed the sale of an asset that declined in value during the delay period; and
- If a valuation date is likely to be significantly in advance of the trial date, whether it is possible to obtain an "update" report from the valuation expert so that the court may have access at trial to information that may affect its perception of valuation opinions.

The Valuation Purpose, Standard, and Methodology

The purpose or intended use of a valuation is linked to the valuation standard and methodology that an expert will use. Common purposes of valuations in family law cases include valuation for asset division (who gets what asset, and at what value, in an equal division of community property), the price paid by the acquirer-spouse in a negotiated or court-ordered interspousal buyout transaction, tax-related issues (e.g., whether gift, estate, or capital gains tax ultimately will be due on an asset), and determination of the impact of a business "buy-sell" provision.

The purpose of a valuation affects the valuation standard and methodology, which in turn affects the ultimate value determination. For example, a corporate buy-sell agreement may prescribe a specific business valuation method to be used (sometimes based on "book value" or a specified standard); the Internal Revenue Service in some cases requires specific factors to be considered; and family law has an overriding goal to achieve an equal division of the community property. Valuation opinions virtually always disclaim the reliability of a valuation for purposes beyond what was commissioned in the engagement. Family law attorneys should ensure that, if a valuation, or any part of it, is required for multiple purposes, the expert understands all needs before the valuation work has progressed so far that the expert cannot effectively adjust the methodology to allow the valuation to be used as required by the case. An example of such "multiple purposes" is when the compensation analysis in a business valuation will be used to determine both the value of a business and the compensation that would be available to one or both spouses for purposes of establishing long-term spousal support.

The valuation "standard" defines what "value" means in a specific valuation. The *Honer* case illustrates that the selection of a valuation standard for a particular case may involve both legal and expert considerations and input. In *Honer*, husband's expert performed a valuation that he labeled a "marital value" analysis in which he valued the business based on "the economic value of the business to the spouse retaining it." *Honer*, 236 Cal. App. 4th at 697-99. Wife argued that the trial court was bound by a "fair market value" standard in which valuation would be determined based solely upon the value that would be received by the community in a hypothetical sale of the business to a third-party. The Court of Appeal held that the trial court was not so narrowly restricted and that the expert's use of a marital value standard, in a case in which the court had ordered a spousal buyout and not a sale, was permitted. We note the courts in *Honer* observed that the business's "fair market value" and the "marital value" were not significantly different, and the marital value standard applied by husband's expert incorporated methodologies that would be used in a fair market value analysis.

The following list familiarizes family lawyers with several of the most common valuation standards:

- **Fair Market Value**: The price at which a business or asset would likely sell in a transaction between parties who are not related and not under unusual pressure to make a deal.
- **Fair Value**: Fair value has different definitions depending on the purpose and jurisdiction, but generally contemplates a concept of overall fairness considering the parties' relationship and circumstances of the transaction. A common situation is in the valuation of dissenter's rights in a corporate merger transaction. The "fair market value" of the dissenter's interest might be low because the dissenter lacks control. It may be unfair, however, to discount the dissenter's shares for a lack of control or marketability when all non-dissenters will obtain the merger price and become liquid. Therefore, the fair value of the dissenter's shares for this purpose may be based upon the value of the entity without applying discounts.
- **Investment Value**: The amount that would be paid by an investor to acquire a particular interest in a business, considering all important attributes of the interest such as illiquidity, lack of control, and lack of a market to dispose of the interest. This measure is especially appropriate for businesses that are extremely unlikely to be bought and sold, but which may deliver a valuable stream of benefits to an investor.
- **Book Value**: The value of the business or its assets and liabilities as reflected on the balance sheet (or similar list of business assets and liabilities). Since many assets are carried on business books at their adjusted basis (original purchase price less depreciation), the book value often does not reflect the current value of appreciated assets and may be much lower than the market value of the business. Likewise, a business with large liabilities that are not reflected on the books may be overvalued based on book value. Book value will generally not include any estimate of the current value of the business's intangible assets (e.g., intellectual property).
- **Liquidation, Salvage, Fire Sale**: The value that assets will yield if sold-off separately and not as part of an ongoing business. The notion of a "fire sale" adds an element of urgency—the seller has little bargaining power and may

have to take the best offer in a small time period possibly from a buyer who is aware of its advantage.

- **"Marital Value"**: The value of a business or asset to the spouse that acquires another spouse's interest, with all of its long and short-term benefits and risks (described in *Honer*).
- **Custom Valuation Standards**: A contractual or statutory provision that adopts a valuation standard for a particular purpose or transaction, often by adjusting one of the usual standards (e.g., a contractual requirement that a business be valued "at 115% of book value, as determined by the company's CPA," or requiring that "no discounts be applied for illiquidity, minority, lack of marketability, taxation, or otherwise").

Counsel should take steps to ensure that the engagement letter or court order that appoints an expert sufficiently specifies both the purpose and to some extent the applicable standard for valuation. By defining these items up-front, counsel can reduce ambiguity in the final product and distinguish valuations done for other purposes that may be urged on the court.

Who Will Do The Valuation?

The process of deciding who will perform a business valuation is heavily dependent on lawyering and often a judicial decision. Part of the process is macro-structural—will each side retain and use its own experts, will the court appoint an expert, or both? Once that is resolved, the identity of the expert(s) will depend on the nature of the business, and will require exploration of a variety of factors such as the expert's qualifications and experience with a particular type of business, location, availability to testify at trial, cost, and availability to perform the work on the anticipated case timetable. For some businesses, the valuation process will require multiple experts who may need to coordinate. For example, if a major asset of the business is a piece of intellectual property that has not yet produced any income (such as newly granted patent rights), one expert may value the operating business and another may value the patents.

In selecting an expert who might be required to testify at trial, family law attorneys often need to balance specialization in the type of business involved in the case against experience with family law cases. It is helpful to have a valuation expert who is respected by family law judges, and who can comfortably address issues that are unique to family law. That expert may have less experience with a particular type of business than, for example, an expert who specializes in valuing businesses for mergers and acquisitions in a narrowly defined industry segment. These considerations must be weighed on a case-by-case basis. No matter what, if an expert who is unfamiliar with family law is brought into a family law case, that expert must be assimilated into family law. If a compelling valuation expert has little or no family law experience, the family law lawyer should educate the expert on relevant family law principles and seek to avoid that expert drifting into areas with which he or she is unfamiliar (risking an analytical error).

If the valuation is contested in a "battle of experts," presentation skills and testifying experience may be important qualifications. If a valuation expert will be neutral, such as an Evidence Code section 730 expert, the expert's relationship with the court and parties takes on greater importance—i.e., is there concern that the expert will favor one party over the other or that the court will accept the expert's valuation even if one side can identify tangible defects in the analysis? In most localities, a small number of experts handle most family business valuations. With these experts, it is important to ascertain what the expert opined in similar cases.

On an issue of any magnitude, a business valuation expert generally should meet these criteria:

1. **Experience.** The expert should have experience in the general type of business or asset involved in the case. It is not essential that a business valuation expert have valued an extremely similar business (e.g., "an investment advisory firm that specializes in foreign stocks and bonds"). The expert should have experience in valuing the type of business (e.g., a financial services business). If the expert will value a particular asset, such as stock options or intellectual property rights, the expert should have experience with that asset class.
2. **Qualifications.** The expert should have relevant professional designations, certifications, and involvement in organizations with rigorous professional standards and continuing education requirements, especially if the opposing expert is likely to have such qualifications.
3. **Testifying Skill.** A testifying expert should be capable of presenting valuation results under examination by a court and lawyers. If the expert has extensive non-judicial presentation experience, that experience may be sufficient if the expert will not be cross-examined. In a highly contentious situation, an expert's cross-examination skills (both as a witness and as a consultant for cross-examination of the other side's expert) are extremely important and some qualification-superiority is often sacrificed for these skills.
4. **Acceptable Cost**. An expert should be selected whose rates and out-of-pocket costs are appropriate for the case. Business valuations can be extremely expensive—often exceeding $25,000 or even $100,000. There is wide variation in the cost of business valuations, both in the professional's hourly rate and billing practices. An expert who must travel far to complete the work may be significantly more costly due to the travel time and costs. The retaining attorney should have a clear understanding with the expert how travel time and costs will be billed, and what other resources will be used by the expert and charged to the party who retains the expert (e.g., junior analysts and others at the expert's firm). While some experts are uncomfortable with a budget, due to the uncertain effort to be expended on a project (especially when the parties have many disputes), most valuation

experts are able to quote a price range, subject to updating if parameters change.

If it is necessary to find a hyper-specialized expert, a good source for a referral is another expert. Professionals generally have ways to identify the leaders in allied fields of study, often by calling a professional contact in the field, consulting proprietary databases for articles, and contacts with professional organizations in which specialist groups may exist. In general, non-experts are in a poor position to evaluate the qualifications of an expert. It is helpful to use an existing working relationship with an expert to identify other experts (the same way an attorney is often asked to refer-out clients who have matters in another field of law).

The Main Valuation Methodologies

Valuation experts use a variety of approaches and methods to value a business. While a family lawyer need not be an expert in these approaches and methods, it is critical to understand basically what the expert is doing and the points at which a lawyer can add value to the process.

- **"Asset" Approach:** This approach treats the business as an assemblage of tangible assets, individually valued, rather than as a cohesive, income-producing whole. This approach is appropriate when the value of the business derives primarily from the market value of discrete tangible assets such as real property, marketable securities, or collectibles, etc. The Asset Approach generally is not effective in capturing the business's intangible asset value (e.g., goodwill) if any exists. Methods used by valuation experts under the Asset Approach include:
- **Net Book Value Method –** Relies on the unadjusted accounting values for assets and liabilities reflected on the business's balance sheet.
- **Adjusted Book Value Method –** All of the business's assets and liabilities (both recorded and unrecorded) are adjusted to their fair market value.
- **Cost Method –** The value is determined by estimating the costs to replace/create all the business's assets.
- **Orderly Liquidation –** Values the business based upon the estimated net proceeds of liquidating its assets over a reasonable period of time with the objective of maximizing the proceeds. This method is appropriate if the business is not considered a going concern.
- **"Income" Approach:** In contrast to the Asset Approach, the Income Approach considers both tangible and intangible assets (e.g., goodwill) of the business as a cohesive, income-producing whole. The two methods within the Income Approach are:
  - **Capitalized Earnings Method –** A single period of earnings considered representative of the business's sustainable future income is converted to value through division by a "capitalization rate" (a numerical factor that is intended to aggregate the investment risks and benefits of a business going-forward, considering a variety of macro-economic, industry, and company-specific factors).
  - **Discounted Future Earnings (or Discounted Future Cash Flow) –** The value of the business is arrived at by discounting the business's estimated future earnings to present value using a "discount rate" (a numerical factor that adjusts the value of a stream of future payments/cash flows by a factor which reflects that payments received in the future have less value than cash received today and also the investment risks and benefits of a business going-forward, considering a variety of macro-economic, industry, and company-specific factors).
- **"Market" Approach:** Values a business based on actual ("market") transactions for the purchase/sale of interests in "comparable" businesses. The two methods within the Market Approach are:
  - **Guideline Public Company Method –** The value of a private company is derived from one or more trading multiples (e.g., price at which the company stock is traded by investors in relation to its revenues, earnings, or other financial metrics) of a representative group of comparable publicly traded companies.
  - **Guideline Private Company Method –** The value of a private company is derived from the terms on which a representative group of private companies was (usually) sold.
- **"Hybrid" Approaches/Methods:** There also exist hybrid approaches and methods that do not strictly adhere to the approaches and methods described above and which combine elements of several. The "Excess Earnings Method," for example, is a hybrid that combines elements of both the asset and income approaches.

Valuations often include more than one of these methodologies, with the output of each method being assigned a "weight" in the final valuation. Because the methods may yield significantly different outputs—in some cases a 75% difference or more—it is important to understand not only why a valuation expert selected a particular methodology, but also its weight. An expert should be able to explain the weighting analysis clearly to the lawyers and the court.

Where the Family Law Lawyer Comes In: Improving the Process

The family law lawyer's role is driven by what analysis the valuation expert will pursue and what litigant input is permitted by the process. While the lawyer's input into the expert's analysis is limited by the expert's need to apply professional standards and protect credibility, party and counsel input is often negotiable and helpful, and can make a significant difference in the final outcome of the analysis. Several of the most common valuation analyses are "multiple-driven," meaning that the business value will be a *multiple* of some metric (such as revenues, profits, a certain kind of sales, or other metric). Therefore, when a litigant can correct an input, the change in the output value may be a multiple of the correction. In some cases a party's input can affect the multiple itself, because the multiple often derives from the valuation expert's assessment of

where the business fits in its markets, its competition and other information.

By way of example, if a party shows the valuation expert that expenses of the business are overstated (perhaps because personal expenses are being "run through the company"), a proper valuation analysis will likely disregard those expenses—increasing profits and increasing the value. Likewise, if a party shows that revenues are being understated, the valuation expert may use higher revenue/profit numbers—which also would increase the value. Similarly, if a party can show the valuation expert that the business tends to grow more slowly than others in its industry (perhaps due to a unique clientele), the valuation expert may project smaller future cash flow and profits, which will result in a lower business valuation. The "garbage-in, garbage-out" nature of the valuation process creates a role for vigilant counsel to play in the valuation process by helping shape the major inputs into the analysis.

Of course, counsel and the parties can only play a useful role in a valuation if the process allows such input. A spouse who is intimately involved in the business will likely play a role in the process (not as a litigant, but as a manager on whom the valuation expert will depend for information). The business out-spouse may need to fight to give input—and that effort is often worthwhile. An especially valuable role may be played by an out-spouse who knows about the business, especially an out-spouse who actively participated in the business for many years.

The time to protect the client's ability to participate in the valuation process is when the process is established. The following list describes the main valuation processes that are used:

- **The Evidence Code Section 730 Approach:** California Evidence Code section 730 permits a court to designate a neutral expert who will report back to the court with a recommendation that the court will adopt, reject, or modify. It is a common belief that the recommendations of section 730 experts are highly influential on a court. Many courts have standard appointment forms for Evidence Code section 730 experts. In other cases, the parties draft a stipulation or the court establishes the ground rules concerning compensation of the expert, scope of the analysis (often including the valuation date, the standard and other guidelines), and how the expert's report will be delivered. The order should be reviewed and the parties' ability to have input should be negotiated. Note that under Evidence Code sections 732 and 733, the appointment of a court expert does not preclude the parties from challenging the expert report or presenting party-appointed expert testimony. Even if there is no plan to oppose the conclusions of a section 730 expert, it may be helpful in an important valuation issue to have one's own expert assist in developing input for the section 730 expert, examination of the expert, or objections to the report and recommendations of the expert.
- **"Free-For-All" Approach:** Sometimes a court will grant the parties virtually unlimited rights to contact the experts. This approach can make all parties feel that the expert has considered their information, which is especially helpful when there is an in-spouse (business manager spouse) and an out-spouse (spouse who is outside the business at the time of valuation). The main issues in a free-for-all approach are cost (Who will pay for extra work that the expert does at the parties' request?) and transparency (What level of disclosure to the other side is required when one party communicates information to the expert?). All of these elements can be negotiated, or, if an agreement is not reached, ordered by the judge in the case.
- **Comments/Adjustments to a Draft:** Most parties, experts and judges prefer that an expert issue a draft report for comment before a final report is issued. The draft allows parties to comment informally on the report before a final report is issued and to correct all types of errors. When a free-for-all approach is not used, at a minimum the parties in business valuations should request comment rights on a draft.
- **Counter-Opinions and Litigated Valuations:** The most effective way to oppose an expert's opinion, whether it is from a section 730 expert or another party's designated expert, is to propose one's own expert. It is critical to ensure that the expert has sufficient access to underlying information to generate and defend a report. When there is an in-spouse and out-spouse, an order from the court may be helpful to ensure that all parties' experts have equal access to business records and employees.

Using Litigation Tools to Build a Record on Specific Valuation Inputs

We now will describe the more common valuation inputs, and how a family law lawyer can use common litigation tools, especially discovery procedures, to develop a factual record on the inputs.

Sales and Revenue Recognition

Much of the analysis of business valuation ties in some way to the revenues of the business, whether standing alone as a metric of business performance or as a component of a profit calculation. Business revenue recognition is subject to manipulation, even when accounting supposedly is done under "Generally Accepted Accounting Principles" (GAAP)—such as manipulation through accelerated or delayed billing, deferred transactions, "channel stuffing" (transfers of inventory to false buyers), and manipulation of work-in-process calculations to accelerate or delay revenue recognition. In almost all business valuations, a reduction of revenue will have a negative impact on valuation—often an exaggerated impact due to the role of multiples in business valuation. For example if a business is valued at 2.5X sales, a $200,000 understatement of sales will understate the value of the business by $200,000 x 2.5=$500,000.

When one party has an incentive to devalue the business, the family law lawyer (often working with an out-spouse who once worked in the business) can play a

critical role in determining whether the business's financial statements are being manipulated. An inquiry that should be done in most cases when reduced revenue manipulation is suspected will look into whether the business's revenue recognition activities deviated from historical practice, industry practice, and/or a consistent application of the requirements of GAAP during a relevant valuation period.

Business Expenses

In a business valuation, expenses are the flip side of revenue: excessive expenses or an acceleration or other upward manipulation of expenses can have a negative impact on business value. The reason for this impact is that profits decrease as expenses increase—and a less profitable business is less valuable. A valuation expert will routinely seek to identify "Owner Discretionary Expenses" (ODEs) that are not a normal part of operating the business, such as the payment of personal or household expenses by the business or keeping non-employee family members on the payroll. Another area for inquiry is business "reserves" (e.g., reserve for inventory obsolescence) that are accounted for as expenses. Excessive reserves may reduce apparent profitability of the business. A sudden change in reserve practices may be a red flag for expense manipulation by the managers of the business.

An out-spouse who worked in the business at some point, or who does family bookkeeping, may have intimate knowledge of what ODEs the business pays for and what reserve levels are customary. In such cases, the family lawyer should work with an out-spouse client to ensure that personal ODEs and excessive reserves are properly added-back into revenue and profits. In many cases, the issue is not just whether an expense is "business or personal"—an expense may have both business and personal components, which need to be parsed to avoid valuation inaccuracies.

Perhaps the most commonly disputed expense item in a privately owned business is owner-officer compensation. While a valuation expert may feel competent to make some determination of reasonable compensation, a family law lawyer often is able to bring more resources to the compensation discussion and find significant overcompensation or undercompensation—either of which warrants an adjustment of the compensation expense (which affects profits/value). A family law lawyer whose client prefers a lower valuation can work to show that the current compensation paid to an owner is unreasonably low and argue that the fair market value of the business is lower because the replacement cost of the owner's services is higher than the present owner's compensation. A family law lawyer whose client prefers a higher valuation can show that the compensation paid to a current owner is unreasonably high and argue that the fair market value of the business is higher because the replacement cost of the present owner's services is lower than the present owner's compensation. The use of discovery to determine how an owner's job function is the same or different from the jobs of executives in similar businesses can have a major impact on reasonable compensation.

Profit Computation

Many business valuations are based upon a multiple of "earnings"—i.e., the profits of a business. Profits are often expressed as "EBITDA" (Earnings Before Interest, Taxes, Depreciation, and Amortization) or "EBIT" (the same except it includes depreciation and amortization). EBITDA and EBIT are often viewed as a better basis on which to determine the value of a business—because interest and taxes, and typically depreciation and amortization, often relate more to how the company is capitalized and managed by its current owners than a new owner's predicted costs. Using EBIT and EBITDA to calculate profits, a prospective new owner can make its own calculation of the "IT" or "ITDA" factors. A valuation using EBITDA multiples generates an estimate of a company's "invested capital" (which includes equity and debt). To arrive at the value of the subject company's equity, the value estimated using EBITDA multiples is then reduced by the balance of the business's existing debt.

The profits of a business relate directly to revenues and expenses, so any defects in the revenue and expense accounting will affect profits. When a business is being valued on profits rather than revenues or sales, the multiple that is used to achieve the valuation (i.e., the factor that is multiplied against the profits to determine the value of the business) is often larger than a revenues multiple. For example, a business may be valued at 2X revenue and 6X EBITDA. Therefore, any factor that affects the profit computation (including revenues, expenses and the inclusion or exclusion of any item in the profit calculation) should be understood by the family law lawyer and potentially be the subject of further disclosure and investigation.

Industry Classification and Comps

Much of the valuation process depends on the valuation expert applying accepted metrics for the same type of business as the business being valued. Extensive books and databases provide valuation experts with industry-specific valuation factors, including appropriate multiples, capitalization rate inputs, and metrics. As such, the valuation depends heavily on how the business is classified. In cases where a business has multiple segments, or does not fall clearly within a single classification, judgment calls must be made as to how to classify a business. Businesses that have both traditional segments (e.g., product manufacturing) and new or nontraditional segments (e.g., cloud computing services) can present complex classification challenges. When the classification issue is identified, the family law lawyer working with a valuation expert can use investigation and discovery to generate data for the expert.

For example, an in-spouse who desires a low valuation may explore the traditional aspects of a business model to argue for a low multiple on grounds that the business is "not very exciting" in terms of future growth. From typical financial statements, that may appear to be the case

because all of the business's current revenues come from the traditional business. The opposing family law lawyer may be able to show that the business is on the verge of entering into a new segment that should generate a significant amount of growth. The in-spouse's initial claim may be that such a new line of business should be discounted as a speculative pipe dream. Is that what the internal projections say? Is that what an employee or contractor was told when he or she was hired by the company specifically to develop that new segment? Probing these areas is greatly assisted by discovery tools (especially e-discovery) and in general can go far beyond the amount of investigation and "case-building" that a valuation expert will do alone. Unless given a specific investigative task, the valuation expert is largely dependent on the good faith of the business's current management for business information.

Beyond industry classification, there is the issue of "comparable" businesses, competitors, and transactions in the market. All of these issues arise in most business valuations. If a lawyer represents the out-spouse, that lawyer should assume the in-spouse is in a better position to influence the expert on the issue of business classification, comparable transactions, and the competitive landscape. The out-spouse's lawyer must fight for a seat at the "comps" table. People who have been involved in a business are often better than experts at distinguishing comps—with unique insight into who is an *actual* competitor of a particular business. If necessary, the lawyer for the out-spouse should consider hiring a person with operating experience in the same segment to help gain equal footing with the in-spouse in terms of classifying the business.

Market and Growth Expectations

A similar dynamic is at play with other input—especially expectations for how much the business will grow. The difference between whether a business will grow 1% or 3% is a 200% difference. Accordingly, when an in-spouse claims that the business is "stagnant" or "declining," that difference will translate into reduced future revenue and profit projections, and a dramatically reduced valuation. Especially if the business is in a robust segment, the out-spouse should explore any factors that would tend to affect the market and the growth rate.

Business Risks

Business risks include both general types of economic risks that affect all businesses or an industry, and company-specific risks such as too much debt on the balance sheet, too few different customers, input and supply chain risk (e.g., a component is supplied from an unstable country), and key person risk. Business owners may try to enhance general and company-specific risks. If a lawyer represents a spouse who wants a lower valuation, that lawyer can develop a record to overcome skepticism about company-specific risks. For representation of a party who seeks a higher valuation, develop a record to overcome claims that company-specific risks are severe. This may require discovery to explore each of the alleged risks, and to undermine exaggerated claims (or at least put them in context so that the risks are not unfairly driving the valuation).

Here is a simple example on customer concentration risk. The in-spouse claims 45% of the business revenues are from a single customer that is "rumored to be a takeover target." If the customer is taken over, that revenue supposedly will evaporate because all potential acquirers "do the work in-house." On one hand, this risk may be very true and real. On the other hand, the risk may be speculative and hard to verify. The in-spouse's attorney can seek to substantiate the rumors as much as possible, as well as the fact that all potential acquirers of the customer perform the work in-house. The out-spouse can seek to show that the rumors are unlikely to be true, that the acquisition is not imminent and that with sufficient advance planning the business can absorb the loss of this customer and obtain future growth in other ways.

The investigation of company-specific risks is not only useful for purposes of completing the valuation—this work also may affect how a buyout or other transaction is structured. A fuller understanding of company-specific risks can help make a buyout deal. For example, even if it is shown that a business may lose 45% of its value if a rumored customer acquisition occurs, that does not mean the in-spouse should be allowed to buy the business at a price that *presumes* the business will be lost. It is possible to negotiate a transaction in which buyout payments are reduced if the rumored customer acquisition occurs with dire consequences.

Concluding Thoughts

It is critical to address business valuation issues early in a marital case and to understand the basic process. Family law practitioners should use their "litigation superpowers," especially broad civil discovery tools and the ability to obtain key procedural orders, to assist the development of information that will be material to an expert business valuation. A valuation expert cannot require people to testify under oath, nor compel the production of information by parties and non-parties. Therefore, identify and investigate areas rife for manipulation in the key valuation inputs. Recognize that the normal valuation process does not contemplate that the valuation expert will do a significant amount of investigation or verification. Use specific information about the business to help get an accurate valuation and to structure a fair deal.

THE IMPORTANCE OF AB1058 FUNDING TO FAMILIES AND PROGRAM SUCCESS*

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REBECCA WIGHTMAN | AB1058 COMMISSIONER FOR SAN FRANCISCO COUNTY

[Part 1 of a 2-part series]

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

The Judicial Council is presently considering a revision to the amount of AB1058 monies sent to each county's trial courts, commencing fiscal year 2017-2018. The financial impact on each court, especially for counties that may lose monies, may not only cause a negative and profound immediate effect upon the ability of California's families to have reasonable access to the courts to establish and receive much needed child support, but may very well be detrimental to the program overall. Why is that? It's complicated, but is in large part tied to the structure of the grant program—and how it has evolved over the past almost two decades. But first, a primer:

What's "AB1058" about anyway?

Historical Background

In 1997, the Federal government created through Title IV-D of the Social Security Act, a child support program to be co-administered in each state. In California, statutory implementation of this program was set forth in Assembly Bill AB1058. Hence, the program is interchangeably referred to as the Title IV-D program or the AB1058 program. It was designed to improve the process of establishment and enforcement of child support quickly and efficiently for families in California. Administrative implementation of the program occurs through the state Department of Child Support Services (DCSS), with each county or region having a Local Child Support Agency (LCSA) that reports to DCSS. LCSAs can initiate court cases to establish paternity, support, modify support and conduct a wide range of enforcement activity. They can also—unlike any other government entity—literally "step into" existing family law court cases and litigate the same issues, including enforcement activity.

Jeri Hamlin is currently the President of the California Court Commissioners Association and the AB1058 Commissioner for the counties of Tehama, Glenn, Colusa and Plumas.

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

The program is primarily federally funded (two-thirds federal grant, one-third state general fund, aka "base funding"). Trial courts can also request to participate in "Federal Drawdown Funds," which if granted, brings two federal dollars to the court for every dollar the trial court itself puts in from its own trial court budget. Each state must meet federally imposed performance-based standards. Failure to maintain these minimum performance standards jeopardizes the continued receipt of federal funding for the program.

Funding for each county was originally allocated based upon a 1997 Family and Juvenile Law Advisory Committee report presented to the Judicial Council that looked at active caseload, minimum staffing levels, county-provided information and estimates on hearing workload, county requested needs, and other factors.

The program was set up such that each year thereafter, trial courts submitted annual funding requests. A mid-year reallocation process was set up for counties that did not spend all of their funding, with any monies not spent by the end of each fiscal year being swept back to the state's general fund.

In addition, from the very beginning it was deemed important for smaller counties to have a minimum flooring of funding notwithstanding active case numbers given the need to attract and retain experienced Commissioners,[1] and the importance of maintaining a basic infrastructure to implement and run a child support court. Some smaller counties have turned to sharing Commissioners, but the disproportionate salary expenses and the hard costs of infrastructure in running an AB1058 program in each county, remain problematic to smaller courts.

Budget woes

So why is this an issue now? Unfortunately, federal funding has been flat-lined at $55 million since 2008 due to federal budget woes. Labor costs, supplies, etc. have obviously continued to rise. The mid-year allocation process helps, but even though it was recently changed to occur sooner, it remains a cumbersome process and some funding always goes unused.[2] This has been a barrier to DCSS successfully getting additional overall funding that all agree is so greatly needed. "Federal drawdown" options also help somewhat, but the lack of any federal grant funding increase, along with the state judicial branch's budget woes, have left trial courts struggling in all counties to continue to provide adequate child support court services.

As a result, this program and its funding methodologies have come under scrutiny, and counties find themselves pitted against each other to grapple for funds at the expense of their sister counties. Grant funding changes for many, especially smaller counties, can easily jeopardize their ability to successfully implement the AB1058 program itself, as well as continue providing access to justice for child support litigants. Changing the current grant funding—which has evolved over the years – also creates a real risk that a *greater* number of counties and courts (and therefore California as a whole) will be unable to comply with the minimum federal performance standards required for continued federal funding.

In 2015, the Judicial Council created an AB1058 Funding Allocation Joint Subcommittee ("2015 Joint Subcommittee") to study the program's funding allocation methodology. It was comprised of members from three different Advisory Committees: Family & Juvenile Law, Trial Court Budget and Workload Assessment.[3] Due to the unique complexities of administering the AB1058 program, it became evident that simply determining the total number of California child support case filings in a fiscal year, and dividing the $55 million in funds pro rata among the counties based upon their percentage of these case filings, was too simplistic a methodology for reallocation of funds. The 2015 Joint Subcommittee, realizing the need to better understand the program's complexities, as well as the need to work with DCSS as it was conducting its own LCSA program funding methodology assessment, reported back to Judicial Council early this year seeking additional time to receive further information.

In February, 2016, the Judicial Council voted to appoint a 2016 Joint Subcommittee to develop a workload-based funding methodology to begin implementation no later than FY 2018-2019. The 2016 Joint Subcommittee was also tasked to coordinate with DCSS on their current review of funding allocations for local child support agencies, and to continue its work to determine accurate and complete workload numbers to include in a funding methodology for both child support commissioners and family law facilitators. Toward this goal, the Judicial Council directed that a subject-matter expert group be established, comprised of both commissioners and facilitators to provide input and expertise to the joint subcommittee. A report back to Judicial Council for their findings and recommendations has been set for this December.

What is REALLY at stake here? Stay tuned for Part 2 in the next issue of [*The Specialist*].

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* This article was first published in the June 2016 edition of The Bench, the official journal of the California Judges Association.

1 Judges by law are not allowed to hear cases where DCSS is involved except under exceptional circumstances. Fam. C §§4251(a), 4252(b)(7); CRC, Rule 5.305.

2 Approximately one million dollars each year is left on the table and swept.

3 Individual judges and CEOs comprised the majority of over 15 initial members, with only one AB1058 Commissioner and one family law facilitator, along with the state DCSS Director.

HOT OFF THE PRESS! JOURNAL EDITION

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Editor's Note:
The holdings from various cases are below. Dawn Gray's extensive summaries of these cases, as well as summaries of other cases of interest, too lengthy to publish in the Journal, are on the ACFLS website on the ACFLS Family Law Specialist Current Newsletters page.

Cite: *De La Luz Perez v. Torres-Hernandez*, No. A139710, 2016 WL 3769513 (Cal. App. June 8, 2016).

Holding: In this case, ordered published on July 11, 2016, the First District reversed a trial court's order denying a request to renew a DVRO. It held that the trial court applied the incorrect legal standard to deny the request by erroneously concluding that there must be new evidence of abuse or threatened abuse to renew the order; that the restrained party's past abuse or violations of the existing order did not support renewal; that the evidence of "new" abuse must be physical in nature; and that evidence of the restrained party's abuse of the couple's children was not relevant to the DVRO renewal.

* * * * *

Cite: *Anne H. v. Michael B.*, No. A146610 (Cal. App. June 15, 2016).

Holding: In this case, ordered partially published on July 12, 2016 at the request of ACFLS, the First District affirmed a trial court's order denying mother's request to modify a permanent custody order giving custody of the parties' daughter to father during the school year and to mother during the summers. The trial court found no change in circumstances. In affirming, the panel held that "the statement in the custody order specifying changed circumstances requiring a reconsideration of custody arrangements was not binding on subsequent judges."

* * * * *

Cite: *Hayward v. Superior Court (Osuch)*, No. A144823 (Cal. App. Aug. 3, 2016)

Holding: In this case, a First District majority issued a writ voiding and vacating all orders made by a private judge, including the parties' Memorandum of Intent regarding a settlement, holding that her failure to disclose in writing "information that is reasonably relevant to the question of disqualification under Canon 6D(3), including her professional relationship with the parties' attorneys violated Canon of Judicial Ethics 5D(5)(a)." It also held that she "failed to comply with a provision of the Rules of Court requiring a temporary judge to certify (in his or her oath of office or otherwise) 'that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the Rules of Court.' (Rule 2.831(b).)"

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

Other cases of interest:

In re Abbigail A., 2016 WL 3755924 (Cal. July 14, 2016): In this case, the California Supreme Court held that one ICWA Rule of Court - Rule 5.482(c), which requires the juvenile court to "proceed as if the child is an Indian child" and to take steps "to secure tribal membership for the child," is invalid, but that Rule 5.484(c)(2), which "merely directs the juvenile court to pursue tribal membership for a child who is already an Indian child as defined in ICWA, in order to prevent the breakup of the Indian family and to qualify the child for tribal services," is "consistent with state law and valid."

In re Alexandria P., 2016 WL 3676682 (Cal. App. July 8, 2016): In this case, the Second District affirmed a trial court that held that child's foster parents had not proven by clear and convincing evidence that "there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.)." It is a long and interesting opinion, discussing standards of proof and many factors impacting on the ICWA, foster parents, and the factors that the court uses to determine whether to place an Indian child with extended family members for adoption.

In re Isaiah W., 203 Cal. Rptr. 3d 633 (2016), 373 P.3d 444: In this case, the California Supreme Court majority held that:

> a parent who does not bring a timely appeal from a juvenile court order that subsumes a finding of ICWA's inapplicability may challenge such a finding in the course of appealing from a subsequent order terminating parental rights. Because ICWA imposes on the juvenile court a continuing duty to inquire whether the child is an Indian child, we hold that

> the parent may a challenge a finding of ICWA's inapplicability in an appeal from the subsequent order, even if she did not raise such a challenge in an appeal from the initial order.

ViaView, Inc. v. Retzlaff, 2016 WL 3626708 (Cal. App. July 6, 2016): In this case, the Sixth District granted a writ compelling the trial court to vacate its order denying husband's motion to quash service of a TRO on the basis that it lacked personal jurisdiction over him. The trial court held that he had made a general appearance by filing an answer at the same time as his motion to quash. In issuing the writ, the panel said that he had not made a general appearance and that plaintiff failed to establish that defendant had minimum contacts with California sufficient to subject him to personal jurisdiction here.

Erler v. Erler, No. 14-15362 (9th Cir. 2016): In this case, a Ninth Circuit panel held the duty of support under a sponsorship contract extended beyond entry of dissolution judgment incorporating the waiver of spousal support provision of the parties' premarital agreement, even when coupled with showing that wife was adequately supported by a third party (in this case, her adult son). This case discusses the factors and the public policy grounds upon which the sponsorship law is based and the relationship between state and federal courts. Specifically, the Ninth Circuit held that: "[w]e agree with the district court to the extent it found that, despite the divorce, Yashar has a continuing obligation to support Ayla. However, we hold that court erred in treating Ayla and Dogukan as a combined household for purposes of determining whether Yashar breached that obligation." The parties' California divorce previously resulted in an unpublished opinion upholding the validity of the parties' premarital agreement.

DP Pham, LLC v. Cheadle, 200 Cal. Rptr. 3d 937 (Ct. App. 2016): In this case, the Fourth District reversed a trial court's refusal to seal and exclude allegedly privileged documents and disqualify plaintiff's counsel where he improperly obtained copies of privileged communications between defendant and his attorney and used them to oppose another party's summary judgment motions. The trial court reviewed the communications and held that based on their content, they were not privileged. In reversing, the panel held that:

> (a) court, however, may not review the contents of a communication to determine whether the attorney-client privilege protects that communication. The attorney-client privilege is an absolute privilege that prevents disclosure, no matter how necessary or relevant to the lawsuit. The privilege attaches to all confidential communications between an attorney and a client regardless of whether the information communicated is in fact privileged. Accordingly, it is neither necessary nor appropriate to review a communication to determine whether the attorney-client privilege protects it.
>
> Once the proponent makes a *prima facie* showing of a confidential attorney-client communication, it is presumed the communication is privileged and the burden shifts to the opponent to establish waiver, an exception, or that the privilege does not for some other reason apply. The opponent may not rely on the communication's content to make that showing.
>
> Here, the trial court relied exclusively on the content of the communications to conclude they were not privileged and Pham points to no other evidence to support the trial court's determination. The court also concluded the communications fell with certain statutory exceptions the Evidence Code establishes for the privilege. As explained below, we conclude the trial court erred in applying these statutory exceptions because to do so here would expand them well beyond their intended scope.
>
> Although we reverse the trial court's order denying the disqualification motion, we remand for the trial court to determine whether the receipt and use of the privileged communications by Pham's counsel warrants disqualification. As explained below, the decision whether to disqualify counsel is vested in the trial court's sound discretion based on its careful balancing of a variety of factors concerning the disclosure and use of the privileged information. The court never considered those factors based on its determination the communications were not privileged.

JAMS, Inc. v. Superior Court, No. D069862, 2016 WL 4014068 (Cal. Ct. App. July 27, 2016): In this case, the Fourth District denied a petition for writ of mandate to compel the trial court to vacate its order finding plaintiff's action against JAMS and Honorable Sheila Prell Sonenshine (Retired) exempt from the anti-SLAPP procedures under the commercial speech exemption of section 425.17(c). It held that the "commercial speech exemption applies and precludes the use of the anti-SLAPP procedure in this case," which arose out of plaintiff's use of JAMS for alternative dispute resolution in his dissolution case. The complaint alleges that JAMS and Sonenshine omitted material information in their biography of her on their website. The panel said that:

> Kinsella's causes of action against JAMS and Sonenshine arise from statements posted on the JAMS Web site regarding Sonenshine's background and qualifications to provide ADR services as well as general statements about how JAMS conducts its business in providing ADR services. These statements fit comfortably within the commercial speech exemption of section 425.17, subdivision (c).

Heidi S. v. David H., No. B263933, 2016 WL 4045404 (Cal. Ct. App. July 28, 2016): In this case, the Second District affirmed an LA County trial court that denied wife's motion to modify a juvenile court exit order awarding father legal and physical custody of child and limited supervised visitation to wife. Wife brought the family court motion on the basis of changed circumstances just three months after entry of the exit order; the trial court found changed

circumstances and expanded wife's visitation but refused to award joint legal and physical custody. In what it calls a case of first impression, the Second District held that all of the trial court's drug and alcohol testing orders were proper under Family Code section 3041.5 and that "(n)othing in the statute limits the family court to ordering drug testing for a fixed period of time." It also held that the family court has the authority to order that a positive drug test result would immediately trigger a reduced visitation schedule.

In re Alexander P. (Heidi S. v. Michael P.), No. A146040, 2016 WL 4098682 (Cal. Ct. App. July 29, 2016): In this case, in a partially published opinion, the First District held that the family court orders determining that two men were child's presumed fathers did not bind the juvenile court in a dependency action. Here is the court's summary:

Alexander P. (minor), then three years old, became the subject of a dependency petition after his stepfather, Donald Q. (Donald) assaulted his mother, appellant Heidi S. (Mother), in the minor's presence. At the time of the filing of the dependency petition, the minor's paternity was the subject of competing motions filed in a family court action by two other men, appellants Michael P. (Michael) and Joel D. (Joel). Joel is the minor's biological father, while Michael is the man with whom Mother was living at the time of the minor's birth. Two weeks after the filing of the dependency petition, the family court ruled that both Michael and Joel qualify as presumed parents and designated both under Family Code 1 section 7612, subdivision (c), which authorizes multiple presumed parents.

When the juvenile court inquired into the minor's paternity during the initial stages of this dependency proceeding, all three men sought to be declared the minor's presumed parent. Michael and Joel based their claims on the family court's order, while Donald provided evidence that he had, as a practical matter, served in the role of the minor's father for the 20 months prior to his assault on Mother. Considering itself bound by the family court's order, the juvenile court found both Michael and Joel to be presumed parents. The court also found that Donald satisfied the requirements for presumed parent status and designated him as well, pursuant to 7612, subdivision (c).

Michael and the minor have appealed the designation of Donald as a presumed parent, while several of the parties have challenged Michael's designation. In addition, Michael has challenged the juvenile court's subsequent denial to him of visitation with the minor.

We conclude that the juvenile court erred in finding Michael to be a presumed parent. Because Welfare and Institutions Code section 316.2 grants exclusive jurisdiction over paternity issues to the juvenile court upon the filing of a dependency petition, the family court order on which the juvenile court relied, issued subsequent to the filing, was void. The same reasoning applies to the designation of Joel as a presumed parent. We vacate the juvenile court's designation of Michael and Joel as presumed parents and remand to the juvenile court for an independent determination of their requests for presumed parent status. We find no error in the designation of Donald as a presumed parent, which was supported by substantial evidence. Finally, we vacate the juvenile court's order denying visitation to Michael and remand for reconsideration of his request in the event the court designates Michael as a presumed parent.

UPCOMING CHAPTER PROGRAMS

Bay Area

October 11, 2016

Ann Fallon, CFLS, and John Madden, actuarial expert

Untangling Survivor Benefits: The Basics

November 8, 2016

TBD

Sacramento Chapter:

October 25, 2016

Jerry White, Esq.

Bankruptcy and Family Law Crossover Issues

November and December - Holiday break

Orange County

2016 Speakers Series "Complex Family Law Trial Issues"

The experts will demonstrate "how to put into practice" legal principles.

November 14, 2016

Judge Michael Naughton (Ret.), Philip Seastrom, Robert Watts, CPA

Part Four – "Approaching and Presenting Complex Property Issues"

SLATE OF NOMINEES AND BALLOT FOR THE 2017 ACFLS BOARD

Position	Name of Nominee or Office Holder	Explanatory Notes	Vote for Nominee	Write-in
President	Seth Kramer (Los Angeles)	Current Vice-President, Nominated for a 2-year term starting 2017		
Vice-President	Dianne Fetzer (Sacramento)	Current Legislative Director, Nominated for a 2-year term starting 2017		
Immediate Past-President	Jill Barr (Sacramento)	Current President, 2 year term starting 2017	✗	
Treasurer	Karen C. Freitas (Los Angeles)	Current Treasurer, Entering 2nd year of 2-year term	✗	
Secretary	Patricia A. Rigdon (Los Angeles)	Current Regional Director, Nominated for a 1-year term		
Journal Editor	Christine Gille (Los Angeles)	Current Associate Journal Editor, Nominated for a 1-year term		
Associate Journal Editor	Debra S. Frank (Los Angeles)	Current Journal Editor, Nominated for a 1-year term		
Legislative Director	Michele Brown (San Diego)	Current Associate Legislative Director, Nominated for a 1-year term		
Associate Legislative Director	Dorie A. Rogers (Orange)	Current Chapter Director (3), Nominated for a 1-year term		
Technology Director	David Lederman (Contra Costa)	Current Technology Director, Nominated for a 1-year term		
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Position	Name of Nominee or Office Holder	Explanatory Notes	Vote for Nominee	Write-in
Outreach Director	Fredrick S. (Rick) Cohen (Sacramento)	Current Outreach Director, Nominated for 1-year term		
Chapter Director (1)	Anne Davies (Alameda)	Current Chapter Director (1), Nominated for a 1-year term		
Associate Chapter Director (1)	Kim Campbell (Contra Costa)	Current Associate Director (1), Nominated for 1-year term		
Chapter Director (2)	Stephanie L. Williams (Sacramento)	Current Director (2), Nominated for 1-year term		
Associate Chapter Director (2)	Mary Molinaro (Sacramento)	Current Associate Director (2), Nominated for 1-year term		
Chapter Director (3)	Cathy Goodrow (Orange)	Current Associate Chapter Director (3), Nominated for a 1-year term		
Associate Chapter Director (3)	Courtney Shepard (Orange)	New to the board, Nominated for a 1-year term		
Regional Director	Cari Pines (Los Angeles)	New to the board, Nominated for a 1-year term		
Coordinating Director (1)		To be appointed by the President		
Coordinating Director (2)		To be appointed by the President		
Coordinating Director (3)		To be appointed by the President		

Write-in Nominee	Position

Pursuant to section 7.06 of the "Bylaws of the Association of Certified Family Law Specialists," the Nominating Committee has met and selected a slate of officers as set forth in the ballot above.

Pursuant to section 7.06, the ballot shall contain a provision for write-in member candidates.

Pursuant to section 7.05, the ballot shall contain the names of any members nominated for office by an application signed by at least ten other Corporation members, provided said application is received by the Secretary of the Corporation at least ten days prior to the mailing of the ballots. As of the date of going to publication for the ACFLS *Specialist*, no such application has been received. If received by the Secretary by October 5th, any such application will be reflected on the ballot being mailed out.

Please return your ballot to ACFLS Executive Director Dee Rolewicz, at 1500 W. El Camino Ave., #158, Sacramento, CA 95833. Ballots must be received by Saturday, November 13, 2016, to be counted. Only current members in good standing may vote. Place your ballot in an inner envelope, if you desire, but be sure your name is on the outside of the mailing envelope so that your voting status may be confirmed.

(NOTE: Checked boxes indicate previously-elected officers who have two-year terms and are shown for information only.)

ACFLS
LIBRARY GOES STREAMING!

The entire ACFLS Educational Library of more than 150 programs of Advanced Family Law Continuing Education is now available for streaming or to download directly to your computer, tablet, or cell phone. The programs remain available on DVD. All of the programs recorded in the past five years are approved for specialization and recertification credit in family law and for MCLE credit. ACFLS provides cutting edge presentations by experts as a starting place for your research. The ACFLS Educational Library is available without cost to any judge sitting in a family law assignment. The programs are searchable by title and category in our online store at www.ACFLS.org where they may be purchased. In this edition of the Family Law Specialist, we have included the entire index of available programs. You can also view the catalogue and index at the online store.

- If you are an ACFLS member, don't forget to **sign in** before ordering for member pricing.
- If you are a California Family Law Certified Specialist, and not yet an ACFLS member, you should be!
- ACFLS is a State Bar of California-approved MCLE provider and an approved family law provider by the State Bar of California Board of Legal Specialization: Provider #118.

Recently Added Programs

Mindfulness in the Minefields
Emily Doskow (3/22/16) 1 Hour

24th Spring Seminar 2016
SPOUSAL SUPPORT: An In-Depth Analysis for the 21st Centry
April 1 - April 3, 2016

Don't Worry, It's Only Temporary
Christopher C. Melcher, CFLS and Andrew L. Hunt, CPA, ASA (4/1/16) 2.1 Hours

Marital Standard of Living: The Highs and Lows of It
Hon. Lon F. Hurwitz, Hon. Michael J. Naughton (Ret.) and Edward J. Thomas, CFLS (4/1/16) 2 Hours

THE AWARD for BEST SUPPORTING
Family Code 4320 Factor Goes To?
Hon. Bruce Iwasaki, Michael A. Guerrero, CFLS, and William Ryden, CFLS (4/2/16) 2.1 Hours

BEYOND 4320
Hon. Patti C. Ratekin, and Michele Brown, CFLS (4/2/16) 2 Hours

FROM CHAOS TO CLARITY
Establishing a Spousal Support Award
Hon. Mark A. Juhas, Hon. Sue Alexander and John D. Hodson, CFLS (4/2/16) 2 Hours

POST-JUDGMENT MODIFICATION of SPOUSAL SUPPORT: "It Ain't Over Till It's Over"
Hon. Justice Dennis A. Cornell (Ret.), Robert E. Blevans, CFLS and Vanessa Kirker Wright, CFLS (4/3/16) 3 Hours

Ask the Judges - the Last Word on "Spousal Support: An In-Depth Analysis for the 21st Century"
Hon. Dianna Gould-Saltman, Hon. Thomas Trent Lewis, Hon. Mark S. Millard, and Hon. Alice Vilardi (4/3/16) 2.1 Hours

2016 Speaker Series: "Complex Family Law Trial Issues" Part One - "ESI Made Simple For Every Case"
Judge Nancy Stock (Ret.), Cari M. Pines, Esq., and Kevin Mooney, Esq. (4/18/16) 2 Hours

Separation Anxiety: Understanding the *Davis* case and the Proposed Anti-*Davis* legislation"
John Munsill, CFLS and Tom Woodruff, CFLS, Esq. (4/26/16) 2 Hours

"The Effect of Marital Status and the Characterization of Property on Post-Death Transfers"
Cecilia Tsang, Esq. (5/24/16) 1 Hour

"Complex Family Law Trial Issues" Part Two - "Simple Answers to Complex Tax Issues in Practice and at Trial"
Judge Lon Hurwitz and Christopher Melcher, Esq. (6/13/16) 1.5 Hours

"Phantom Income from Pass Through Entities - How to Identify It and How to Treat It in Determining Support"
Brigeda Bank, Esq. and Brian Boone, CPA, ABV, CFF, CCVA (6/14/16) 1 Hour

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ACFLS JOURNAL

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ACFLS MEMBERSHIP APPLICATION

Eligibility for ACFLS membership is limited to attorneys certified as family law specialists by the State Bar of California, Board of Legal Specialization.*

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Firm name _____

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Dues for first member in firm: $250 Dues for ____ additional members from same firm: $175 each. Total amount of payment $_____

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