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# UNANSWERED QUESTIONS: THE DISPOSITION OF FROZEN EMBRYOS IN CALIFORNIA

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California is typically at the forefront of reproductive healthcare practices and the legal issues arising from these sensitive and deeply emotional topics. However, our state has fallen behind many others in answering the question of what happens to unused frozen embryos following *in vitro* fertilization treatments if the intended parents are unable to agree on a disposition at the end of their relationship. Since Tennessee first answered this question in 1992, at least a dozen states have wrestled with this problem, setting forth various approaches to resolve this issue. Twenty-four years later, California remains largely silent on providing a framework for the courts to resolve these disputes.

The purpose of this article is to provide a practical guide to California divorce attorneys with clients who have frozen embryos stored at a fertility clinic. By analyzing related California law and the approaches taken in other jurisdictions, we can better predict the likely path future California courts will choose when confronted with this issue.

## Approaches of Other Jurisdictions

The first case to address the disposition of frozen embryos upon divorce, *Davis v. Davis*, was decided by the Tennessee Supreme Court in 1992.[1] *Davis* established a two-part analysis that has since served as the starting point for every other jurisdiction confronted with this question. The threshold inquiry under *Davis* is whether the parties previously entered into an agreement demonstrating their unambiguous intent as to the disposition of any unused frozen embryos in the event of certain occurrences, such as divorce or the death of either intended parent. If no prior agreement exists, the court would conduct a balancing test of the parties' respective interests in the use, or non-use, of the embryos.

The existence of an agreement between the intended parents is often easily ascertainable. Typically, the parties will have filled out a cryopreservation consent form at the fertility clinic by checking a box or initialing next

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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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to the desired outcome on a list of possible contingencies. For example, the parties may elect to donate the embryos to science if they both die, or they may want the embryos discarded in the event of divorce. In fact, *Davis* is the only reported case where there was no agreement whatsoever between the parties; every other case has at least some type of agreement. Still, nothing is perfect and the case law reveals instances of failed or deficient agreements. These include instances when IVF participants completed a cryopreservation consent form, but failed to make an election in the event of divorce (either by neglect or inability to reach consensus).[2] In other cases, the courts have found ambiguity in the fertility clinic's boilerplate consent form.[3] In each of these scenarios, the parties found themselves in the same position as if there were no agreement. Although some courts have stretched to disregard an agreement for technical reasons, the form of an agreement may not be so rigidly prescribed. In 2015, an Illinois court found there was an *oral* agreement between the parties, providing that the female partner would retain the embryos at the end of their relationship.[4] At least seven courts have followed a dispositional agreement without having to conduct a balancing test.[5]

In the absence of an agreement, the balancing test established in *Davis* was intended as the means to decide between conflicting individual freedoms, "composed of two rights of equal significance – the right to procreate and the right not to procreate." In *Davis*, the court found that the husband's interest in avoiding genetic parenthood was superior to the wife's competing interest in seeking to have the embryos donated. The court added, however, that the result might be different if the wife wanted the embryos for her only opportunity to have children. This added piece of dictum is important to note because it is common for one of the IVF participants (usually, but not always, the female) to have age- or medical-related fertility issues that led the parties to seek fertility treatments in the first place.

Only two post-*Davis* appellate courts have found it appropriate to apply the balancing test. In one court, the key factor was the female partner's infertility;[6] in the other, the court found that one spouse's right not to procreate outweighed the other's right to use the frozen embryos.[7] In fact, twice as many trial court decisions have been overturned for using a balancing test when an agreement should have resolved the issue in the first instance. Two of those reversals occurred because the trial court disregarded the agreements in favor of infertile women, citing the *Davis* dictum about an infertile party preserving her last opportunity for children.[8] In both cases, the reviewing courts determined that infertility did not overcome a clear agreement and the consideration of balancing test factors was entirely incorrect.

There are a bevy of generic concerns that a client might want to present to the court for consideration in the balancing test. High on this list is the fact that the relationship between the intended parents (which might be a marital or nonmarital relationship) is over. The termination of that relationship is incompatible with the notion of co-parenting, especially when the intended parents cannot even agree what to do with the embryos. Intended parents are not statutory sperm or egg donors so it is likely that an unwilling parent would be deemed a legal parent even if the parties try to agree that he or she will have no parental obligations or responsibilities.[9] This may expose both parties to unwanted challenges about parentage, custodial rights, and child support issues. It can also create estate planning problems such as potential challenges to an unwilling parent's estate, or more remote inheritance rights, such as from a genetic grandparent's estate.

The prevalence of citations to *Davis* in subsequent cases might lead one to think that its analysis has reached widespread acceptance. That is not the case. Alternative approaches are at least as frequent, if not more so,

than the *Davis* approach. The predominant theme of these other cases is that until the embryos are implanted, either party can change his or her mind about using the embryos to create a child. To date, there are two states in the U.S. that have adopted this approach through decisional law, while two others have done so by statute, under certain circumstances. There are also at least nine European countries which have adopted the same approach, as did the ABA.

Iowa's approach acknowledges that the end of a marriage evidences changed circumstances from when the intended parents first decided to undergo fertility treatments.[10] These changes are sufficient reason for the courts to disregard a dispositional agreement altogether in favor of requiring "contemporaneous mutual consent" of the parties before using or destroying the frozen embryos. If the parties cannot agree at the time of divorce, the embryos must remain frozen until they can reach an agreement.

A Massachusetts court held that even if there is a valid agreement, it would violate public policy to enforce a contract compelling a sperm or egg provider to become a parent against his or her will.[11] The court noted "[a]s a matter of public policy, forced procreation is not an area amenable to judicial enforcement."

Both Florida and Texas have passed legislation that would give an individual the opportunity to stop implantation of an embryo in certain circumstances, despite the absence of a dispositional agreement or the application of a balancing test. In Florida, if there is no written agreement, the decision-making authority resides *jointly* with the commissioning couple, so either intended parent could refuse to allow implantation.[12] In Texas, a gestational contract for a surrogate must be completed fourteen days prior to implantation of an embryo into a surrogate; refusal by either intended parent to enter into a surrogacy agreement would preclude implantation from taking place regardless of any dispositional agreement made when the embryos were created.[13] In either state, a balancing test would be incompatible with these statutes.

As of 2007, national laws in the United Kingdom, Denmark, France, Greece, the Netherlands, and Switzerland all provide the right to withdraw consent prior to implantation of the embryos, while Belgium, Finland, and Iceland appear to grant the same freedom as a matter of law or practice.[14] The national law of the United Kingdom was challenged before the Grand Chamber of the European Court of Human Rights, which upheld the male participant's absolute right to withdraw his consent to use the embryos prior to implantation notwithstanding the conclusive infertility of the female partner.[15] Despite sympathy for the woman, the court found the requirement for bilateral consent "was the culmination of an exceptionally detailed examination of the social, ethical, and legal implications of developments in the field of human fertilization and embryology, and the fruit of much reflection, consultation, and debate."

The laws of other countries are expectedly not uniform. In Iceland, embryos are to be destroyed in the event of divorce. In Germany and Italy, neither party can revoke consent after fertilization. In Hungary a woman can proceed with implantation in the event of divorce if there is no agreement to the contrary. In Estonia and Austria, a man's consent can be revoked until fertilization. In Spain, a man can revoke his consent only if married and living with the woman.[16]

In 2008, with the benefit of many of these decisions at its disposal, the ABA constructed an Act Governing Assisted Reproductive Technology (the "ABA Act") to provide clarity and a mechanism for resolving these novel disputes. Although the ABA Act would require the intended parents to enter into an agreement regarding the use of the embryos upon divorce and other contingencies, either party would be entitled to withdraw his or her consent at any time prior to implantation.[17] Although the ABA Act has not been enacted in California, it provides additional support for a party asking the court to order non-use of frozen embryos despite the existence of a dispositional agreement to the contrary.

## California Authority on Reproductive Rights Issues

Although California has not yet answered the ultimate question regarding the disposition of frozen embryos, both the legislature and the courts have been faced with related reproductive rights issues that indicate the state's policies to both recognize artificial reproductive rights agreements and to grant each individual autonomy over the use or non-use of his or her genetic material. While it is possible that California courts could fashion an altogether different analysis for resolving this issue, it is more likely that the approaches of other jurisdictions will be evaluated and harmonized, if possible, in a manner consistent with existing California authority.

The California legislature's first foray into this field came in response to a series of scandals in which fertility doctors in Irvine and San Diego used individuals' reproductive material without their consent. In 1996, Penal Code section 367g was enacted, making it a felony to use or implant sperm, eggs, or embryos except as expressly authorized in a signed writing by the provider of the genetic material.[18] Although there has been no case law interpreting Penal Code section 367g, the effect of the statute is to protect an individual's autonomy over his or her own reproductive material.

Penal Code section 367g also highlights what dispositional agreements do not cover: the specific consent of each gamete provider to *implant* the embryos into a uterus. Cryopreservation consent forms address only what will happen upon the happening of certain contingencies. For example, the parties may choose that in the event of divorce, any unused embryos will be discarded, donated for science, donated to an infertile couple, or they be given to one of the spouses. However, a compelling argument can be made that Penal Code section 367g precludes, under threat of imprisonment, *implantation* of the embryos without each progenitor's written consent, regardless of an

agreement giving the embryos to one of the spouses upon divorce. We can think of this process as having two locked doors that the progenitors must pass through together: the first door is the agreement to create the embryos; the second is an agreement to implant the embryos. Simply awarding the frozen embryos to one spouse may not be sufficient to allow for that spouse to pass through that second door.

California has also implemented minimum requirements as it relates to the information made available to IVF participants from their doctors. Health & Safety Code section 125315 requires reproductive healthcare providers to give each individual participant in fertility treatments a form with certain statutorily prescribed options for the disposition of the reproductive material upon the occurrence of stated contingencies, such as the death of one or both participants, the passage of time, or divorce.[19] As with Penal Code section 367g, Health & Safety Code section 125315 applies to individuals, again indicating that control and decision-making with regard to one's reproductive material belongs to each person individually. Because Health & Safety Code section 125315 went into effect in 2003, most clients with frozen embryos in California will have signed a cryopreservation consent form containing this required language. Although the requirements of Health & Safety Code section 125315 do not obligate IVF participants to make any elections, fertility clinics may require their patients to make dispositional instructions as a clinic-mandated prerequisite to undergoing IVF treatments.

The purpose of section 125315 is for intended parents to document their intentions before undergoing treatment, and before any future disputes arise. The goal is to add a degree of certainty to the process and reduce the possibility of litigation in the future. This process results, in most situations, in a contract between the intended parents (and possibly the fertility clinic) as to the disposition of the embryos. If one of the contingencies occurs, the parties may decide they want an outcome other than as previously selected—such as to donate instead of discarding the embryos. If the parties want to change the prior agreement, they are free to enter into a new agreement including the new dispositional instructions. If a dispute over frozen embryos arises during a divorce, it will come up in one of two situations: (1) the parties no longer agree and one of them wants a disposition other than as set forth in the dispositional agreement, or (2) the agreement does not address what will happen to the embryos upon divorce.

California cases involving agreements to participate in fertility treatments provide that the key question for the court is the intent of the parties when they entered into the agreement at the commencement of the treatment. If one party later decides to change his or her position and is unable to obtain consent from the other party, it is the initial intent that dictates the outcome of the case.

In *Johnson v. Calvert*, a married couple was in a parentage dispute with their gestational surrogate over the surrogate's claim of parenthood despite a surrogacy agreement in which she relinquished any parental claims.[20] In deciding between the competing maternity claims, the court upheld the intentions of all three parties as manifested in the surrogacy agreement, holding that the surrogate was not the mother.

The same analysis was used in *In re Marriage of Buzzanca*, where a married couple created an embryo through artificial reproductive technology, then arranged to have it implanted in a surrogate. While the surrogate was pregnant, the husband filed for divorce, claiming there were no children of the marriage; the wife responded that they were expecting a child via a gestational surrogate. In overturning the trial court's ruling that neither the couple nor the surrogate were legal parents, the court found the spouses were the parents because they intended to be the parents and had initiated the chain of events that resulted in a child.[21]

In both of these cases, the intent of the parties going into the fertility treatment, as evidenced by an agreement, was upheld. In neither case was a party to the agreement allowed to unilaterally change his or her position after the embryos were implanted.

The conclusion that California favors the gamete providers' intent is reinforced by the holdings in two cases regarding the disposition of frozen sperm. In both *Estate of Kievernagel* and *Hecht v. Superior Court*, the courts upheld the decedent sperm providers' instructions for the disposition of the reproductive material.[22]

## How Will California Decide the Disposition of Embryos?

Taking the authorities from California and other jurisdictions together, we can fairly predict that the first step of analysis by the California courts will be to look to the terms of an agreement between the parties. Health & Safety Code section 125315 indicates a legislative preference for intended parents to make dispositional directives prior to undergoing fertility treatments. Combine that preference with the rulings in *Hecht* and *Kievernagel* (the instructions of gametic donors controls disposition), as well as in *Buzzanca* and *Johnson v. Calvert* (the intent of the parties that initiated the chain of events leading to creation of the embryos is the determinative factor), and we can safely say that California will look initially to the dispositional instructions found in the cryopreservation consent form in much the same way as the Tennessee court suggested in *Davis*.

That first step is the easy part. More difficult is trying to divine what the courts will do after that. If the parties do not have an agreement, will California apply the *Davis* balancing test? A strong case can be made against the use of a balancing test in California. Penal Code section 367g requires the signed written consent of the sperm, ova, or embryo provider prior to implantation, under penalty of up to five years in prison. If there is no dispositional agreement between the parties, then it is highly unlikely there will be a writing from both gamete providers consenting to the implantation of the embryos. If a court applied a

balancing test and awarded the frozen embryos to one of the spouses, the outcome would result in the possibility of state compelled parenthood on a party who never consented to the implantation of his or her genetic material. This means that if a party does not make a decision early on, that decision-making process will be taken over by the courts—an outcome inconsistent with an individual's privacy rights under state law, that "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions."[23]

The balancing test also appears inconsistent with the no-fault divorce scheme in California. What started in *Davis* as high-minded discourse on competing rights of procreational authority and privacy rights has predictably devolved into a mudslinging contest between the one spouse that desperately wants to use the embryos to have children, and the other, who desperately wants to avoid two decades of parental and financial entanglements with a future ex-spouse. The current state of this analysis encourages attorneys to leave no stone unturned and no potentially persuasive fact held back from the court. In short, the balancing test encourages—if not requires—extensive litigation for the sole purpose of having a court decide if one party deserves to be a parent more than the other deserves not become a parent.

Only once in the three balancing test cases were the interests of the spouse seeking to use the embryos victorious over the interests of the spouse that wanted the embryos discarded. The Pennsylvania court, in *Reber v. Reiss*, appears to have sided with the wife out of sympathy directed at her, displeasure with the husband's conduct, or both. As just one example from *Reber*, the court reviewed the wife's medical history, recounting that after undergoing IVF to preserve her fertility options at the age of thirty-six, the wife underwent treatment for breast cancer which included two surgeries, eight rounds of chemotherapy, and thirty-seven rounds of radiation.[24] In the very next paragraph of the factual background, the court juxtaposes the wife's medical struggles with the husband soon starting a new relationship, filing for divorce, and having a child that was "intentionally conceived." That the wife won the likeability contest may be fine in Pennsylvania, but the court appears to have applied a fault analysis, something expressly forbidden in California.[25]

In the absence of a dispositional agreement or a balancing test, the only remaining approaches would be to either require contemporaneous mutual consent or to allow either party to veto the implantation of the embryos. Of course, these accomplish the same result: non-use of the embryos.

This leaves us with the dilemma of having an agreement that one party no longer wants to follow. A change of heart can be from any disposition to another, and can be collectively grouped as a change from use to non-use of the embryos, or from non-use to use. The latter argument, which would change the agreement from discarding the embryos at the time of divorce to awarding them to one of the spouses, has never been successful in any court of appeal. The former argument, a change from one spouse being granted the embryos to having the embryos discarded, presents different issues and has plenty of support. This outcome would be supported in the courts in Iowa (which requires contemporaneous mutual consent) and Massachusetts (which will not compel parenthood against one's wishes regardless of an agreement to the contrary). It is consistent with the ABA Act which allows either party to withdraw consent prior to implantation. It also works under the U.K. national law that was upheld by the European Court of Human Rights, as well as with at least eight other European countries.

If there is a change of heart, one option is strict adherence to the agreement. However, if the change goes from use to non-use of the embryos, authority exists to make that change. Maybe the most important reason for a California court to allow a party to back out of a prior agreement is Penal Code section 367g's requirement for written consent to implant the embryos. If one spouse changes his or her mind and refuses to agree to implantation, the spouse who was to receive the embryos under the terms of the agreement may have control of the embryos, but will not be able to use them. As a practical matter, the courts should not ignore the second door that a spouse will not be able to pass through without the consent of the other spouse.

## Conclusion

Comparing known California law and public policy with the various approaches taken by other jurisdictions supports the conclusion that California will initially look to the agreement entered into by the parties when fertility treatments began to determine their intentions. However, if one intended parent wants to stop the use of the embryos, he or she might be able to escape from the terms of the dispositional agreement. If there is no agreement, a court has valid persuasive authority going in both directions: the court could conduct a balancing test or it may allow a dissenting party to unilaterally avoid the risk of compelled parenthood. Until the courts or legislature provide concrete rules on how to approach these issues, there is enough uncertainty to allow for good lawyering on both sides of these disputes.

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1 *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).
2 *Reber v. Reiss*, 42 A.3d 1131 (Pa. 2012).
3 *J.B. v. M.B.*, 170 N.J. 9 (2001); *A.Z. v. B.Z.,* 431 Mass. 150 (2000).
4 *Szafranski v. Dunston*, 2015 IL App. (1st) 122975.
5 *Kass v. Kass*, 91 N.Y.2d 554 (1998); *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006); *Szafranski v. Dunston*, 993 N.E.2d 502 (Ill. 2013); *Dahl v. Angle*, 222 Or. App. 572 (2008); *Litowitz v. Litowitz* 48 P.3d 261 (Wash. 2002); *Cahill v. Cahill*, 757 So. 2d 465 (Ala. 2000); *York v. Jones*, 717 F. Supp. 421 (Va. 1989).
6 *Reber*, 42 A.3d 1131.
7 *J.B.*, 170 N.J. 9.

8 *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006), *Kass v. Kass*, 91 N.Y.2d 554 (N.Y. 1998).
9 See Cal. Fam. Code § 7613(b)(1), *Robert B. v. Susan B.*, 109 Cal.App.4th 1109 (2003), *K.M. v. E.G.*, 37 Cal.4th 130 (2005).
10 *Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003)
11 *A.Z. v. B.Z*,. 431 Mass. 150 (Mass. 2000).
12 Fla. Stat. § 742.17(2).
13 Tex. Fam. Code § 160.754 (*cf. Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006)).
14 See *Evans v. United Kingdom*, 43 E.H.R.R. 21, Para. 37 and 41 (U.K. 2007).
15 *Evans v. United* Kingdom, 43 E.H.R.R. 21 (U.K. 2007).
16 See *Evans v. United Kingdom*, 43 E.H.R.R. at Para. 41.
17 ABA Act Gov. Asst. Repr. Tech., § 50101(a)-(b) (2008).
18 Cal. Pen. Code § 367g.
19 Cal. Health & Saf. Code § 125315.
20 *Johnson v. Calvert*, 5 Cal.4th 84 (1993).
21 *In re Marriage of Buzzanca*, 61 Cal.App.4th 1410 (1998).
22 *Estate of Kievernagel*, 166 Cal.App.4th 1024 (2008), *Hecht v. Superior Court*, 16 Cal.App.4th 836 (1993).
23 Cal. Health & Saf. Code § 123462.
24 *Reber v. Reiss*, 42 A.3d at 1133.
25 Cal. Fam. Code § 2335.

*Thomas M. Kenney is a partner at Hanson Crawford Crum Family Law Group LLP in San Mateo. He is a member of the ACFLS Membership Benefits Committee. His practice focuses solely on family law litigation. In the summer of 2015, Mr. Kenney successfully enforced an embryo disposition agreement in a highly publicized trial in San Francisco.*

# PRESIDENT'S MESSAGE

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

Over the past few years, I have noticed an influx of newer younger attorneys practicing family law in my community. I remember back when I was a newer attorney, I was grateful for the ability to be able to seek advice and learn from veteran attorneys. Part of the reason that I gravitated toward family law as a specialty was because of the positive feelings that I had toward my local family law community. There are probably scores of tips that our experienced members could pass on to our newer colleagues. However, ala David Letterman style, I polled some of our board members and we collaborated on a "Top Ten" Tips for newer Family Law Attorneys:

10. When a potential client says money is "no object," don't believe it.
9. Ask a well-respected Family Law attorney to be your mentor.
8. Attend as many Family Law CLE courses as possible- they provide networking opportunities as well as education.
7. Don't believe everything you hear. Rely on what the evidence shows, and let your client know that is what you have to do.
6. Invest in software- you will need a calculator program and a research product.
5. Do not represent friends or family members- No exceptions.
4. Website- a must in today's world.
3. Volunteer for family law clinics, panels, etc. - you learn and get your name out into the community for possible referrals.
2. Join a study group with experienced attorneys who are members of ACFLS so that the communal knowledge and experience can be shared AND finally, the #1 tip:
1. Start working on becoming a CFLS as soon as possible so that you can join ACFLS and gain access directly to The Specialist and our listserv—the best benefits offered by any family law organization!

*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.*

## SUBMIT AN ARTICLE

*Have an article you want published? Or, an idea you want to develop?*

**ACFLS encourages your submissions!**

For more information, please contact Debra S. Frank at dfrank@debrafranklaw.com

# EDITOR'S COLUMN

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

During the last few months, the debate on Davis has continued. As mentioned in my last column, Sen. John M. W. Moorlach, 37th Senate District, introduced legislation on 2/18/16, SB 1255, to amend the California Family Code to allow a couple to be considered living separate and apart, while still living under the same roof, for purposes of establishing a date of separation as a precursor of divorce. The bill was to have taken effect January 1, 2017.

The California Senate amended SB 1255, taking out the section that said it would be prospective only starting January 1, 2017. The bill was passed in the Assembly on June 30, 2016 and is on the Governor's desk for signing. SB 1255 will be applied to cases that were filed but have not reached judgment by January 1, 2017. Section 4 of the Family Code provides general transitional rules applicable to the family code. The general rule is that a new law applies immediately on its operative date to all matters, including pending proceedings. The general rule is qualified by certain exceptions, including subdivision (h) which provides a safety valve that permits a court to vary the application where there would otherwise be a substantial impairment of procedure or justice

Our articles in this issue of the Specialist are representative of the breadth of knowledge required by the practice of family law, from the cutting edge issues of reproductive healthcare practices and the legal issues that arise, to employee benefits, the mediation process, and the use of appellate counsel in trial proceedings. We are always looking for more articles of interest to the certified family law specialist. Please contact me if you have an article you would like to discuss.

Our regular features include Dawn Gray's (Nevada) article, "Hot off the Press," summarizing the holdings of the most significant recent cases, upcoming chapter programs, and the ACFLS's CLE programs on DVD. To remind everyone of the 150 plus programs available and in will celebration of STREAMING, we have included a condensed version of the current catalog of CLE on DVD/CD/MP3.

As Jill Barr states in her column, among other suggestions, younger lawyers should volunteer in various family law organizations and of course read the ACFLS Listserve on a regular basis. Following that advice, I've recently become more involved with the ACFLS Amicus Committee and have been preparing both publication and de-publication requests on significant legal issues of public interest. It's exciting and challenging and of course, increases your knowledge base.

To follow from Jill's tips for the newer attorney, I asked our ACFLS Board for tips for the more experienced family law CFLS attorney. Here are essential tips from David Lederman, our Technology Director and guru and incoming State Bar Family Law Executive Committee Chair, to the more experienced attorney:

*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 2009-2015, and received the Spirit of CEB Award, October 2012, for generous contributions to the Continuing Education of the Bar California and service to the profession.*

"To quote Bob Dylan, attorneys must remember that the "times, they are a changing." An attorney that can't keep pace with the efficiency that technology provides, nor understand the electronic evidence available in the family law practice, risks being the victim of "creative destruction." That is the evisceration of their practice by those that can leverage the efficiencies of technology. Think quicker, cheaper, more effective. Thus my top 10 for the "experienced attorney" are:

1. Understand the technologies available to make you more effective.
2. Understand collaborative tools like Dropbox and Evernote.
3. Understand the data available on Facebook.
4. Understand the data available on LinkedIn.
5. Understand the data available on each person's mobile device.
6. Know how to find the law quickly.
7. Understand what data is left behind on your computer (metadata from documents and cookies from websites)
8. Acknowledge that privacy no longer exists - get over it.
9. Embrace technology with an open mind.
10. It may be scary, but you can do it!!!

I hope all of you are having a great summer. Keep in touch as to new developments and resources for the Certified Family Law Specialist.

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# 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*

# UPCOMING CHAPTER PROGRAMS

## Bay Area

### August 9, 2016

**Christopher C. Melcher CFLS**

*Bias - The Enemy of Persuasion*

### September 6, 2016

**Mark Lutrell, CPA**

*Tax Discounts on Valuations of Pass-through Entities*

### October 11, 2016

**Ann Fallon, CFLS, and John Madden, actuarial expert**

*Untangling Survivor Benefits: The Basics*

### November 8, 2016

*TBD*

## Orange County

**2016 Speakers Series "Complex Family Law Trial Issues"**

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

### September 19, 2016

**Drew Hunt, CPA and William Scott Mowrey, Jr., CPA**

Part Three - "Advanced Support Calculations and Property Division"

### November 14, 2016

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

Part Four – "Approaching and Presenting Complex Property Issues"

## Sacramento Chapter:

### August 23, 2016

**Christopher C. Melcher CFLS**

*Bias - The Enemy of Persuasion*

### September 27, 2016

**Mike Jonsson, Esq.**

*Screening for Power Imbalances and Danger in Our Cases*

### October 25, 2016

**Jerry White, Esq.**

*Bankruptcy and Family Law Crossover Issues*

# FINBY* – EMPLOYEE GOODWILL AND OTHER ISSUES

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## FACTS OF THE FINBY CASE

In 2009, Rhonda Finby worked as a financial advisor for UBS. The parties separated in February 2010.

Wachovia Securities (later acquired by Wells Fargo) induced Rhonda to join their firm by paying her what is known in the brokerage industry as a "transitional bonus." The transitional bonus was based on her trailing twelve months production of $1,868,631 and her pre-hire assets of $192,671,911. In other words, they loaned her $2.8 million that was to be repaid from her salary, a salary that was artificially increased by $27,688 each month. Rhonda reported that additional salary on her tax return but actually never received it because the additional salary was used to make the loan payments. The loan would be paid off in 112 months via the additional salary. If she left the firm she would have to pay off the balance of the promissory note without the benefit of additional salary from Wells Fargo.

It is clear from the facts of the case that the transitional bonus was based solely on Rhonda's book of business.

Wells Fargo also provided two other incentives, a "production bonus" and a "4front bonus" to their financial advisors in 2009. Rhonda achieved the production requirements of the "production bonus" and received another $373,726 in April 2010, two months after the couple separated. She also qualified for and received the "4front bonus" of $890,000 in mid-2010. Like the transitional bonus, Wells Fargo paid her the bonus amounts in return for a promissory note. As was the case for the transitional bonus, the purpose of paying the production bonus and the 4front bonus with a promissory note was to defer taxes on the bonuses to future years and provide a "golden handcuff" incentive for Rhonda to stay with the firm.

## ISSUES

The case raises a number of issues relating to property division and support including:

1. Should Rhonda's book of business be considered a property right?
2. If it is a property right, how should it be characterized, as community or separate?
3. How should the phantom income recognized during the community be treated for tax purposes?
4. How should the liability on the promissory notes be characterized?
5. How is support affected by the determination of the character of the bonuses?

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## Should Rhonda's book of business be considered a property right?

The appellate court reversed the trial court's determination and held that Rhonda's book of business is a property right. The court's determination was based on the following reasoning:

1. The court agreed with husband's argument that wife's status as a licensed financial advisor with the ability to induce clients to follow her when transferring to a new firm is similar to the goodwill found in other licensed personal service professions such as lawyers and physicians.
2. The court relied on cases in other jurisdictions that support the position that a licensed professional is an asset subject to division in a marital dissolution.[1]
3. The court distinguished Rhonda's situation from that of Mr. McTiernan in *McTiernan & Dubrow* (133 Cal. App. 4th 1090) by reasoning that Rhonda's book of business was "transferrable" while Mr. McTiernan had no book of business to transfer. The court in *McTiernan* stated: *"He cannot sell this standing to another . . . . That standing is his, and his alone, and he cannot bestow it on someone else. Thus, an essential aspect of a property interest is absent."*
4. Finally, the court dismissed the fact that Rhonda's right to the bonus was contingent on her remaining with Wells Fargo citing *Marriage of Brown* and *Marriage of Fonstein*.[2]

Does the result in *Finby* usher in a new era in family law appraisals in which employees who have a book of business have goodwill? That is a radical departure from the traditional demarcation between employees and self-employed individuals. Yet *Finby* appears to be the first case that provides precedent for making the argument that an opposing client who is an employee of a third party may have goodwill.

What if a non-owner associate employee in a law firm, accounting firm, or any other professional practice creates a book of business during marriage? Should that book of business be valued as goodwill even if the associate is an employee at the date of separation? *Finby* suggests that goodwill may exist. What about an insurance broker who works as an employed agent? *Finby* suggests that goodwill may exist as long as a third party is willing to pay a higher salary or bonus to the agent with the book of business than to a similarly situation agent without the book of business.

## How should the property right and accompanying liability created during marriage but subject to contingency be characterized, community or separate?

The court found that the rights to the "transitional bonus," the "production bonus," and the "4front bonus" were community property because they were created during marriage. The court held that the bonuses were similar to other property rights that are created during marriage but may not vest until after separation (stock options, retirement benefits, etc.). The determination of the community and separate components was remanded to the trial court. As a result, there is no guidance in the appellate decision regarding exactly how to apportion the separate and community components, although the court does cite *Marriage of Skaden* as follows:

> *In re Marriage of Skaden*, *supra*, 19 Cal.3d 679 noted "Brown . . . indicated [there were] two basic solutions" to the division of a community's interest in a contingent benefit. (Id. at p. 688.) "[F]irst, a determination by the trial court of the present value of the rights or [obligations] adjudged to be marital property [or liability] and an equal division or adjustment of the same [citations][,] and second, 'if the court concludes that because of uncertainties affecting the vesting or maturation of [such] rights . . . it should not attempt to divide the present value . . . it can instead award [or confirm to] each spouse an appropriate portion of each . . . payment [or obligation] as it is paid [or incurred].'"

Andrew (Drew) Hunt of White, Zuckerman, Warsavsky, Luna & Hunt, was Rhonda's expert. Mr. Hunt employed the time rule to determine the character of the transitional bonus and the accompanying loan. "He described the transitional bonus as a 'mixed-type asset,' with 'approximately . . . 13 and a half percent of' it 'on an after-tax basis was community' and the balance being wife's separate property."

The methodology appears appropriate not only for the transitional bonus but also for the other two bonuses Rhonda received. Under the time rule, the community portion of a bonus will be based on a numerator representing the period from the date the bonus was contracted to date of separation. The denominator of the fraction would be the period from the date the bonus was contracted to date the last payment of the promissory note is paid.

Often in cases like *Finby* where a stockbroker receives a bonus for joining another firm, the parties may not be financially prudent and may go on a spending spree. Under those facts, much, if not all, of the up-front transitional bonus may be spent by date of separation but the liability under the promissory note will remain largely unpaid. The result of the above fact situation may be that the community will have benefitted substantially from a loan that may be characterized as the separate liability of the employee spouse at the date of separation. The employee spouse's financial picture may be enhanced if the bonus proceeds are traced to the acquisition of assets still in existence at date of separation. However, if all of the bonus spending was on lifestyle the employee spouse may still be responsible for paying off the loan by staying employed through the end of the contract term.

In Rhonda's case any separate bonus funds calculated using a time-rule that can be traced to any bank account or brokerage account at the date of separation would be her separate property. Additionally, Rhonda would have a right to reimbursement under Family Code Section 2640 if any of the separate allocation of the bonus can be traced to the acquisition of a community asset that had equity at the date of separation.

There was another bonus Rhonda could receive that the court held to be Rhonda's separate property. This was a recruitment bonus that she would receive if she remained actively with the firm through January 2016. The court, citing *Brown*, concluded that the recruitment bonus only constituted an expectancy because prior to the vesting date in 2016 Rhonda had no enforceable right to receive it.

## How should the phantom income recognized during the community be treated for tax purposes?

Phantom income results when taxpayers must report income on their tax returns that they do not actually receive. Rhonda's additional salary that she did not actually receive that was used to repay the Wells Fargo loan is an excellent example of "phantom income." The phantom income portion of Rhonda's W-2 during the marital period would be chargeable to the community when allocating taxable income. After separation, the income tax payable on the phantom income would be allocable to Rhonda.

## How should the liability on the promissory note be characterized?

If part of the Wells Fargo transitional loan is community property then the community portion of the debt should be a community liability. The problem the parties face is that both the separate and community portions of the Wells Fargo transitional loan will be paid out of Rhonda's separate salary post-separation.

Rhonda should be entitled to reimbursement from the community for the income tax she will be paying based on the repayment of the community portion of the debt with her separate property "phantom income" salary. One way of providing Rhonda with her reimbursement is for the court to retain jurisdiction over her right to reimbursement until the Wells Fargo loans are paid off. However, collectability of the reimbursement is a risk that only Rhonda faces if there is a retention of jurisdiction. The collectability risks to Rhonda include, but are not limited to, Mark Finby declaring bankruptcy before the full amount of reimbursement is repaid, or Mark dying and leaving insufficient assets in his estate to continue to be able to fund the reimbursement.

Forensic accountants can compute the present value of the future tax on the phantom income as a means of removing the collectability risk. Under the present value approach, the forensic accountant will calculate a credit to Rhonda in the property division for her future tax liability associated with the inclusion of the phantom income salary in her future income tax returns. This approach is not as mathematically certain as reserving jurisdiction but does eliminate the collectability risks noted above. There is some risk to Rhonda in the present value approach if she does not remain employed at Wells Fargo for the term of her notes. Were she to leave Wells Fargo and the payment of the notes accelerate then the amount of tax she would ultimately pay would probably be materially higher than the present value of the contemplated taxes over the contemplated repayment period.

## How is support affected by the determination of the character of the bonuses created during marriage but received post-separation?

The court addressed the "double dip" issue created by the possibility that husband could receive a portion of the bonus post-separation and that Rhonda could be charged with those same funds as income but held it speculative and remanded the issue to the trial court.

A double dip is not relevant with respect to the "transitional bonus" because Rhonda did not receive any community funds after separation. All community funds were deposited in the parties' accounts when received in 2009. Accordingly, there would be no further community funds available to Rhonda post-separation. However, she did receive the other two bonuses after separation.

Under what circumstances would the community portion of the other two bonuses that Rhonda may receive post-separation be construed as a double dip? We know that Wells Fargo will pay the bonus up front as a loan and we presume that the community will be entitled to its share of the loan under the time rule or some other appropriate allocation method. But Rhonda will be required to repay the community's share of the loan proceeds with her future separate phantom income salary.

The following questions arise from the foregoing facts:

1. Is the receipt of the community portion of the bonus in the form of loan proceeds income available for support or should the community portion of the loan proceeds be considered a receipt of property?
2. How should the phantom income portion of Rhonda's salary relating to the receipt of the Wells Fargo bonus loans post-separation be treated?
3. What about the separate portion of the loan proceeds that Rhonda received post-separation? Should that portion of the loan proceeds be considered income available for support?

1. Arguably, the Wells Fargo bonus funds are a property right and not income. Each of the parties received their share of the community loan proceeds and should be responsible for their share of the community loan payments. If the proceeds are considered a property right then no double dip problem exists because neither party is charged with receiving income. The fact that neither of the parties will have to report the community loan proceeds on their income tax returns supports the position that the community loan proceeds are not income.

2. Rhonda will be entitled to reimbursement from the community for payment of the income tax on the community share of the Wells Fargo loan paid by her phantom income salary in the same manner as discussed above with respect to the transitional loan.

But it is inequitable to include the phantom income created by the loan payments in Rhonda's income available for support because:

a. She is not actually receiving cash salary; and

b. She did nothing post-separation to manipulate her finances to reduce her spousal support.

Furthermore, not only should the phantom income be excluded from Rhonda's income available for support but the tax generated by the phantom income on her repayment of the separate property portion of the Wells Fargo loans should also be excluded.

3. If, as noted above, Rhonda's phantom income is not included in her income available for support an argument may be made that the portion of the Wells Fargo loan proceeds representing her separate property should be available for support when her bonus vests. Under the circumstances, an *Ostler-Smith* approach appears to be the appropriate method to deal with the receipt of her bonus funds.

## CONCLUSION

The comments on the *Finby* case presented herein reflect a number of new financial issues that will be affecting many of our clients. Employed stockbrokers are not the only clients who receive W-2 income that will be affected by the *Finby* case. Other situations in which employees who are not self-employed or who do not own any interest in a business or professional practice but have a client following that are affected by *Finby* include:

1. Insurance agents;[1]
2. Attorneys, accounting, and medical professionals; and
3. Any business started during marriage or post-separation in which the spouse has a pre-existing transferable book of business.

Consider the employee who created a separate book of business prior to marriage and starts a new business during marriage. Is the character of the business community or separate? *Finby* supports the argument that such a book of business is separate property.

We hope that our discussion has provided our readers with information that will broaden their understanding of the novel and complex areas of family law that now exists as a result of the *Finby* decision.

One further note—after remand, the *Finby* case settled.

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* *In re Marriage of Finby,* 166 Cal. Rptr. 3d 305 (2013).

1 *Moll v. Moll*, 187 Misc. 2d 770, 775 (N.Y. Sup. Ct. 2001) (clients serviced by stockbroker constitute marital asset; "the 'thing of value' is the personal or professional goodwill of a stockbroker or financial advisor"); *Reiss v. Reiss*, 654 So. 2d 268, 268-69 (Fla. Dist. Ct. App. 1995) (stockbroker's "signing bonus" for clients he brought with him to new securities firm is a divisible marital asset); *Niroo v. Niroo*, 313 Md. 226, 234-35 (1988) (insurance agent's anticipated renewal commissions on policies sold during marriage "are a type of property interest encompassed within the definition of marital property"); *Pangburn v. Pangburn,* 152 Ariz. 227, 230 (1986) (citing *Brown*, insurance agent's "contractual right to commissions for future renewals . . . earned during coverture" includable within community estate).

2 *In re Marriage of Fonstein*, 17 Cal. 3d 738 (1976); *In re Marriage of Brown,* 15 Cal. 3d 838 (1976).

# REPRESENTING CLIENTS EFFECTIVELY IN FAMILY LAW MEDIATION

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## Introduction

What does a "mediation consulting attorney" do? As more and more clients seek the services of family lawyers to support and assist them in mediation, lawyers in turn have an opportunity to think critically about the kinds of services that support mediating parties most effectively. Mediation consulting attorneys certainly perform traditional attorney tasks such as drafting and reviewing settlement agreements, although they may perform these tasks differently in the mediation context. There are many other less traditional roles consulting attorneys can play which materially benefit clients and create lucrative practice expansion opportunities. This article explores the difference between traditional advocacy and effective mediation representation through three alternative lawyering roles—scholar, teacher, and negotiation coach.

## 1. Be a Scholar: Know and Use Mediation Research[1]

Mediation, especially in the family law context, has been widely studied. There is a tremendous amount of empirical information available about mediation, including without limitation who chooses to mediate; the mediation process; outcome and satisfaction; impact of timing of mediation; number of sessions; use of directive strategies; and the list goes on. Familiarity with mediation research, and strategic use of that research in advising clients, can help clients maximize chances of success in mediation.[2]

For example, research indicates that the factors most predictive of settlement are (1) the parties' perception of the mediator's ability to provide insights into their own feelings; and (2) the mediator's ability to aid the parties in understanding the feelings of children and ex-spouses.[3] If we as consulting attorneys are aware that insight into clients' own feelings as well as those of their children and former spouse promotes settlement, why not put effort into helping our clients gain that insight?

Other research indicates that the "active ingredients" of mediation include (1) the call for parental cooperation over the long run; (2) the opportunity to address underlying emotional issues; (3) helping parents to establish a businesslike relationship; and (4) avoidance of divisive negotiations at a critical time for family relationships.[4] Think of the many ways consulting attorneys could support mediation by working with clients on these issues.

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A final example relates to the timing of mediation. Several empirical studies have found that mediating early is more likely to result in settlement than waiting to mediate later in the litigation process. This is inconsistent with the conventional wisdom that mediation should only take place once all discovery has been completed and the case is essentially ready for trial. Consulting attorneys can add value by encouraging early use of mediation while simultaneously identifying and helping fill information

gaps early to ensure that clients have a sufficient basis for informed consent without missing the window of opportunity for settlement.

## 2. Be a Teacher: Educate Clients about Divorce Dynamics

Clients are not born, they are taught. Clienthood is not a genetic condition. Most people need attorneys to explain, clearly and patiently, the keys to success as a client in order to have their goals met and enjoy a positive lawyer-client relationship.

Clients who are educated about general divorce dynamics are likely to be more self-aware and have greater insight into the post-separation behavior of their spouses. Since (as research shows) mediation success depends on the ability to articulate one's own needs and interests as well as the ability to acknowledge the other participants' needs and interests, the more insight and empathy your client has, the more likely your client will contribute productively to the mediation as well as get his or her own needs met.

There are many ways to approach the subject of divorce dynamics. Conceptual frameworks can be extremely helpful. For example, you can point out the distinct divorce relationships involved (e.g. Maccoby and Mnookin's four types of divorce—spousal divorce, parental divorce, economic divorce, and legal divorce).[5] In the spousal divorce, sexual, psychological, and social intimacy is brought to an end. In the parental divorce, the parties' respective parental roles are redefined to accommodate new arrangements for the children. The economic divorce involves transition away from an economic relationship based on a single household. The legal divorce is aimed at producing a written document governing what will happen economically and in terms of parenting post-dissolution. These different relationships are obviously intertwined, but can unfold at different speeds and with different levels of acrimony and chaos. Using these relationships as a framework for discussion, check in with your client as to the status of each as a way of assessing where the parties are in the process and what implications there may be for mediation timing, agendas, and likelihood of success.

Another useful framework for discussing divorce dynamics is the model of cycles of grief developed by the Swiss psychologist Elisabeth Kübler-Ross.[6] This model, which identifies a cycle of emotions including shock, denial, anger, bargaining, guilt, depression, and acceptance, can be used as a tool for mitigating feelings of loss. Because divorce represents many losses—the loss of a relationship and companionship, lost connections to extended family and community, loss of an identity, and loss of each spouse's hopes and dreams for the relationship and for their long-term future, the cycles of grief model applies to the divorce experience.

Parties in the **shock/denial** stage may feel stunned or numb; they may try to avoid the very notion of the pending divorce by deflecting efforts to talk about what is happening, refusing to respond, procrastinating, or acting as though nothing has changed. Parties in the **anger** stage may vent, express frustration and fury at the separation, and focus on punishment or vengeance ("I want to hire the nastiest divorce attorney I can find and take my ex to the cleaners!"). **Bargaining** parties try to change the outcome of the relationship by fantasizing about "what ifs" that may be irrelevant to the other party or otherwise unrealistic ("If I show my ex I can change the way s/he always wanted, maybe s/he will come back."). During the **depression** stage, the person takes on as his or her responsibility the failures in the relationship and surrenders to the sorrow of the divorce ("I am worthless. This is all my fault—no wonder my ex left. I will be alone forever. Who would possibly want to be with me?"). Finally, in the **acceptance** phase, the person develops an ability to focus on the future and move forward towards it ("This has been really hard, but I am ready to be done and move on. I want to do what needs to be done to get this whole thing finished.").

Though the model identifies an overall pattern, a party's transition through these phases does not occur in a perfectly linear way.[7] To the contrary, parties can move back and forth between and among the stages for months or years before arriving at acceptance. To further complicate matters, chances are the two parties will be at different stages in the process during any given interaction or negotiation.

Educating clients about divorce dynamics is productive for a number of reasons. People going through divorce often feel isolated; normalizing their experience can be comforting. Clients are also often comforted and helped by the reminder that their feelings will change over time. Adopting the posture of a teacher and helping clients contextualize their own experiences builds trust and reassures clients that you have insight into their struggle. Gaining insight into their own emotional processing gives clients self-awareness which may help them differentiate and articulate their short-term needs from their long-term needs. It may also help clients recognize and empathize with the other spouse's parallel struggles in a manner that facilitates bridging the gap between them.

## 3. Be a Coach: Prepare Clients for Negotiation

In traditional representation, family lawyers are the key players in the game. Not only do we strategize, but we are the leading players in negotiation and the sole players in court advocacy and drafting. In mediation, the key players are the clients. Lawyers can still carry proverbial clipboards and whistles around their necks, but the clients are on the field as well. Sometimes, lawyers assume the role of "player-coach" in partnership with the client.

The lawyer coach can teach the client essentials of negotiation theory and give supervised individual training to the client in preparation for the mediation session. Helping the client develop creative options and a plan for

the negotiation may be one of the consulting lawyer's most important roles. In her groundbreaking article "Toward Another View of Legal Negotiation," Professor Carrie Menkel-Meadow makes a persuasive case that thorough and creative negotiation planning, not style of presentation, is most effective in achieving negotiation success. [8] The consulting attorney can help the client assess the strengths and weaknesses of various proposals and help the client develop not only an initial proposal but also backup proposals based on anticipated responses. The lawyer can coach the client on how to present a proposal in a way that maximizes the likelihood that it will be heard and received positively by the other party.

Before a negotiation, offer the client an opportunity to consult with you to develop a strategic plan and to role-play making and responding to offers. Spend enough time working with your client to unpack and explore the client's own underlying needs and goals in order to help develop priorities and clear objectives for the negotiation. Brainstorm these needs and goals with the client and list them. Have the client rank and prioritize them and help the client think critically about the subjective value that the client places on each one. This process may require more than one session to give the client sufficient time for reflection. What additional information might the client need, if any, to prioritize his or her needs and goals in a thoughtful and informed way? Identifying information gaps and options for filling them in can save clients time and money and facilitate mediation. Clients will fare better in mediation when they have a clear sense of their own strategic endgame, as opposed to mediating in a purely reactive, ad hoc fashion.

As with divorce dynamics, conceptual frameworks are useful here. There are many conceptual models for negotiation that you can use to provide structure for your client preparation. Professor Russell Korobkin of UCLA School of Law sets forth one such model in his casebook *Negotiation Theory and Strategy;*[9] and many other scholars have articulated such models.[10]

Consulting attorneys should explain to clients fundamental negotiation concepts such as BATNA (Best Alternative to a Negotiated Agreement)[11] and work with clients to articulate their BATNA's in advance of working mediation sessions. In the context of family law mediation, the most common BATNA is to litigate; assessment of the BATNA, therefore, will involve a discussion of the law as it applies to the disputed issues and an assessment of the relative strengths and weaknesses of the parties' legal positions. Comparing a negotiated agreement to the BATNA and quantifying the differences between the two will help the client determine his or her initial reservation point (i.e. the tipping point at which the BATNA is better for the client than a negotiated agreement.) Reservation points can always be adjusted during negotiation to accommodate new information. Strategic planning of this kind can help clients avoid what Professor Korobkin calls the "cardinal sins" of negotiation, namely (a) agreeing to a deal which renders the client worse off than the BATNA; and (b) missing out on a deal which would have rendered the client better off than the BATNA.

There are other ways to add value as a negotiation coach. For example, talk to clients about ways in which they might try to promote their interests in the mediation. Many clients initially gravitate towards power-based techniques (e.g. coercion, intimidation, using status and resources to overpower opponents) which can sometimes be effective but can also engender emotional responses that lead to impasse, damage reputations and relationships, and make future dispute resolution even harder.

Help the client to analyze the personalities involved (including those of the mediator and the opposing party's consulting attorney), communication dynamics, and psychological factors that may influence how the negotiations unfold. For example, one common psychological factor in family law mediation is reactive devaluation, a cognitive bias that acts to devalue proposals that originate from an antagonist. The other side might be more amenable to considering a proposal that appears to originate from the mediator, or is raised as a hypothetical, than one that comes directly from the spouse. Anticipating and strategizing about how to defuse reactive devaluation is a highly effective aspect of consulting attorney negotiation coaching.

Progressive law schools emphasize role-playing for teaching essential skills such as client counseling, negotiation, and trial practice. In effect, you can become the client's clinical instructor by rehearsing a negotiation and then giving constructive feedback. You can do this type of rehearsal in the presence of an associate or paralegal to get a useful outside perspective. Have the client record the rehearsal on his or her Smartphone and review the recording together.

## Conclusion

Lawyers are more than just scriveners or legal encyclopedias. Our access to relevant research on mediation and on emotional dynamics of divorce, our experience working with families in transition, and our expertise in negotiation theory and practice are commodities with tremendous value for mediation clients. By thinking outside the traditional attorney box and leveraging our specialized experience and expertise in creative ways, consulting attorneys can serve mediation clients more effectively while also expanding our practices.

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1 *See* MOSTEN & SCULLY, COMPLETE GUIDE TO MEDIATION, app. B (Highlights in Divorce Mediation Research) at 209-16 (ABA Family Law Sec. 2d ed. 2015).

2 For the best compilation of research on mediation between two covers, *see* CONSTANCE BECK & BRUCE SALES, FAMILY MEDIATION: FACTS AND MYTHS (Am. Psychological Ass'n

2001). While this book needs updating, it is a solid foundation for our work.

3 JESSICA PEARSON & NANCY THOENNES, DIVORCE MEDIATION: REFLECTIONS ON A DECADE OF RESEARCH, IN MEDIATION RESEARCH 9-30 (Kenneth Kressel & Dean G. Pruitt eds., 1989).

4 R.E. Emery, D. Sbarra & T. Griver, *Divorce Mediation: Research and Reflections*, FAM. CT. REV., vol. 43, Issue 1, 22-37 (2005).

5 ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 19-57 (1992).

6 ELISABETH KÜBLER-ROSS, ON DEATH AND DYING, 1969.

7 ELISABETH KÜBLER-ROSS & DAVID KESSLER, ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS (2007)

8 Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754, 818-21 (1984).

9 NEGOTIATION THEORY AND STRATEGY (3d. ed. Wolters Kluwer Law & Bus. 2014).

10 *See, e.g.,* ROBERT H. MNOOKIN, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000); R.J. LEWICKI, B. BARRY & D.M. SAUNDERS, ESSENTIALS OF NEGOTIATION (4th ed. McGraw–Hill/Irwin (2007).

11 ROGER FISHER & WILLIAM, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1983).

# BRINGING IN APPELLATE COUNSEL BEFORE THE APPEAL

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Although the primary role of an appellate lawyer is to litigate a case on appeal, appellate counsel can also provide substantial assistance to trial attorneys while superior court proceedings are still ongoing. My experience has been that although family law attorneys generally know the benefits of involving appellate counsel before a notice of appeal is filed, they may not be aware of the full range of such potential services.

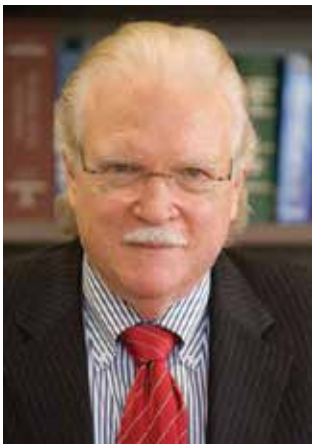
These can include consulting with counsel on issues even before a petition or response is filed, through trial on all sorts of matters, including temporary spousal and child support, custody, property issues, and attorney's fees; drafting or editing opening and closing trial briefs; advising on statement of decision proceedings; and assisting with or drafting motions for new trial and/or to vacate the judgment. In addition, many times I have been retained to sit with trial counsel during a trial or substantive hearing to consult in the moment on evidentiary issues. I have also helped counsel prepare for depositions of evaluators and other adverse expert witnesses. Last, at times I have appeared in superior court to argue some portion or all of a disputed issue.[1]

Are these services that trial counsel could perform? Yes. But sometimes an "outside" perspective from someone who does not have to focus on the day-to-day nuts and bolts of the litigation and who spends a majority of his or her time researching, writing, analyzing, and reading trial court records can prove helpful.

This article identifies and briefly discusses some general areas in which I, as an appellate attorney, have been asked to participate during the litigation process. Perhaps the mention of these topics will trigger some ideas in the reader's mind. I also know, however, that as a practical matter, the financial constraints of a particular case will often bar an appellate lawyer's involvement at the trial stage, and can even ultimately preclude an appeal. I therefore hope this article may also serve as a loose checklist for trial attorneys to use during the course of a dissolution proceeding to ensure certain inquiries and courses of action.

## Start with the End

I have sometimes been asked at the beginning of a case—at times even before the petition or response has been filed——to help formulate a game plan for the litigation. One such process is to think through to the end of the case and imagine what the best-case scenario would be for the client. I have found it helps to conceive an actual statement of decision that makes all necessary findings in the client's favor, on all requisite elements. With that end result in mind, counsel can then plan how to get there from here, knowing the legal and factual terrain. It is also a good idea for counsel to refresh his or her familiarity with the relevant areas of law and update that knowledge with recent authority. I have occasionally been asked early in a case to provide that limited research and analysis.



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It is good to write down—not just keep in our heads—all the legal and factual elements that must be satisfied along the way. This process will not only help define discovery strategy, but could also help refine counsel's assessment of the case at the outset and lead to further questions for the client. This analysis is not binding, for as always, the case will be a work in progress. But having a preliminary reference point and long-range objectives which you can return to, revise, and augment can often help things stay focused.

## Discovery

I have been asked on occasion to research an area of law relating to the potential testimony of an adverse expert witness, to then formulate areas of questioning and specific questions that trial counsel should explore in deposing that witness, and to ultimately observe the deposition and discuss with counsel on breaks proposed follow-up questions for the deponent.

## Trial and Motion Proceedings

Counsel will usually file an opening trial brief to educate the court on the law and facts that will govern motion ("Request for Order" or "RFO") and trial proceedings. (If the proceeding is a motion and not a "trial," then a memorandum of points and authorities may be submitted as part of the underlying paperwork.) (See CAL. R. CT. 5.92(c).) I am often asked to prepare—or review and edit—these opening briefs or legal memoranda.

Moreover, sometimes counsel will need to file or respond to motions in limine that address foreseeable evidentiary issues or ask the court to clarify how a particular area of law will apply to an aspect of the current case. In addition, ancillary matters may arise that require separate briefing—for example, motions to disqualify a judge, or opposing counsel, or a motion to enforce a settlement agreement under Code of Civil Procedure section 664.6. I have been retained to draft or review all such pleadings.

I have sat at counsel table during a trial or hearing to listen to critical testimony in real time and to potentially advise concerning cross-examination and—more commonly—evidentiary objections and offers of proof. Trial counsel will already know what evidence he or she wants in or out, and on what legal grounds, but appellate counsel's presence can help ensure the record is sufficiently made as to those matters. Recall that the failure to object on *specific grounds* to the admission of the opponent's evidence may waive the right to challenge that evidence on appeal. (*See* CAL. EVID. CODE, § 353(a).) Further, a claim on appeal that certain evidence was erroneously excluded generally requires an offer of proof as to what the evidence would have shown, thereby establishing not only error but also prejudice warranting reversal. (*See id.* § 354.) In addition, it is important to make sure all of trial counsel's exhibits have been expressly moved into evidence, and a clear ruling is made by the court. Lastly, some courts now return all exhibits to trial counsel. If that happens, counsel should get any such stipulation on the record. If that does not happen, counsel should confirm with the trial judge and court clerk where the exhibits will be held post-judgment. I have handled more than one appeal where some or all of the exhibits were somehow lost. There are ways around that problem if it occurs, but it is better to avoid it altogether.

At the end of trial, closing trial briefs will be filed. (These can be in addition to, or in lieu of, oral closing arguments) This service—preparing or editing a closing trial brief—is one of the three for which I am most frequently retained before judgment. (The other two concern the statement of decision process and the appealability of particular rulings. Both are discussed below.) Indeed, when the trial has involved a large amount of testimony, or documentary evidence, or both, preparation of the closing brief can simulate writing an opening brief on appeal, although on a smaller scale. In such cases the trial judge will often set the briefing schedule far enough out to enable the court reporter to prepare transcripts to be used in drafting those documents. Because in most cases I will not have sat through the trial itself, I will be reviewing the transcript and other pertinent documents with an "outside" eye. If I am the primary writer, I will work closely with trial counsel, who will be savvy about the evidence, the witnesses, opposing counsel, and the judge, and whose views are critical in writing a persuasive trial brief.[2]

## The Statement of Decision Process

I am frequently consulted—although sometimes too late—concerning the statement of decision after trial. This process is governed generally by California Code of Civil Procedure sections 632 and 634, and more specifically by California Rules of Court, rule 3.1590. As those statutes and rule state, the court is obligated to prepare a statement of decision upon the trial of a question of fact only if a party requests one, and only upon controverted issues specified by that party.

After issuance of a tentative decision by the court, any party may submit proposals as to the content of a statement of decision.[3] The judge will then serve a proposed statement of decision—or direct a party to do so—after which any party may file objections to any omissions or ambiguities in the decision. Usually the judge then files a final statement of decision and the final judgment.

This is thus a two-step process: a party requests a statement of decision as to specific issues, and then a party claiming deficiencies in the proposed statement must bring those defects to the trial court's attention to avoid implied findings. (*See generally*, CAL. R. CT. 3.1590; CAL. CIV. PROC. CODE § 632; *In re Marriage of Arceneaux*, 51 Cal. 3d 1130, 1138 (1990).)

In an article I wrote for this publication two years ago, I explained that if neither party requests a statement of decision in the first place, or if a party fails to object to the proposed statement of decision, the appellate court will presume the trial court made every finding necessary to uphold its decision, whether such findings are stated in the statement of decision or not. (*See, e.g., Fladeboe v. Am. Isuzu Motors Inc.,* 150 Cal. App. 4th 42, 48, 58 (2007).) On the other hand, that presumption will not apply to a defect in a statement of decision that was called to the attention of the trial judge but not corrected. (*See* CAL. CIV. PROC. CODE § 634; *see also* Gregory R. Ellis, Requesting and Objecting to Statements of Decision: What Happens If I Don't?, ACFLS SPECIALIST 2014-2 Spring, at 20.)

Note that the court must issue a statement of decision after the trial of a bifurcated issue, assuming all requisite procedures have been followed, but cannot prepare a proposed judgment until all issues have been tried (unless an interlocutory or separate judgment could be otherwise entered.) (CAL. R. CT. 3.1591(a).) But nothing precludes the court from going forward with the trial of subsequent issues before the statement of decision on the prior bifurcated issue has been rendered. (CAL. R. CT. 3.1591(c).)

## Rulings

The question of what to do after a particular ruling is probably the question I am most often asked by trial counsel before appeal, and with good cause. The failure to recognize what sort of ruling has been made, and hence what sort of remedies are available, can lead to unfortunate consequences.

In general terms, the analysis I undertake jointly with trial counsel in this area is sequential, strategic and tactical in addition to legal. First of all, we examine whether the ruling is a judgment after trial that fully and finally resolves all issues between the parties. If so, then it's probably a final judgment and is appealable. Other pre-appeal remedies may still be available, however, and depending on the circumstances of the particular case, could warrant relief. These include a motion for new trial (*see* CAL. CIV. PROC. CODE §§ 657-662) and a motion to vacate (*see id.* §§ 663-663a).

If the ruling is interlocutory—that is, not a final judgment resolving everything at issue between the parties—it may nonetheless still be appealable. This could be by statute—for example, it could be an order "granting or dissolving an injunction, or refusing to grant or dissolve an injunction" (see *id.* § 904.1a(6)), or an order or interlocutory judgment awarding sanctions against a party or attorney for more than $5,000 (*see id.* § 904.1 (10)(11))—or it could be that the order is a final ruling on a collateral matter although not a final judgment in the underlying matter itself (see, e.g., *Steen v. Fremont Cemetery Corp.,* 9 Cal. App. 4th 1221, 1226-27 (1992); *Lester v. Lennane,* 84 Cal. App. 4th 536, 561 (2000)). Examples in family law of such rulings on collateral matters include orders on temporary support (spousal and child) and on requests for pendente lite attorney's fees. Importantly, if an interlocutory ruling is appealable but is not timely appealed, the right to appeal it is lost and may not be invoked on an appeal from the final judgment in the case.

In family law cases a party may also seek discretionary appellate-court review of interlocutory rulings by way of certification and a motion to appeal, a multi-stepped procedure. (*See generally* Cal. R. Ct. 5.392.)

If a ruling is not appealable, the available appellate remedy is a petition for extraordinary writ review, which is purely discretionary and rarely even heard on the merits, let alone granted. But sometimes that is the only possible appellate remedy available—for example, where a temporary custody order (not appealable) is challenged, or where a discovery order (not appealable) threatens to reveal privileged information. And even if a ruling is appealable, sometimes the only effective remedy on a practical level will be a petition for writ relief. (For example, although the denial of a motion for pendente lite attorney's fees is appealable as a final ruling on a collateral matter, if the fees are necessary in order for the requesting party to participate in the upcoming trial, an appeal would arguably not be an effective legal remedy unless the trial or appellate court stayed the subsequent trial until after the appeal. Such a stay might in itself, however, lead to other problems or inequities.)

Moreover, by statute some rulings are reviewable only by writ petition. (*See*, *e.g.*, CAL. CIV. PROC. CODE §§ 170.3 [motion to disqualify a judge], 405.39 [motion to expunge lis pendens].)[4]

## Notice of Appeal

Finally, if a ruling is appealable, and the client wants to appeal, it is critical that the notice of appeal be timely filed in the superior court. (*See* CAL. R. CT. 8.105, 8.108.) This is a jurisdictional requirement; an untimely notice of appeal will lead to dismissal of the appeal. There is no room for error and no circumstance in a family law case that will excuse the untimeliness. Not surprisingly, I receive many calls from trial attorneys about the filing of this notice, which now can be done using a simple Judicial Council form. Moreover, it can be prepared by counsel to be filed in the client's name, in propria persona.

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1 On more than one occasion it has been the trial attorney who has asked me to provide a particular service I had not previously performed during a trial. The education thus runs in both directions.

2 One significant difference between a trial judge reading a closing brief and a reviewing justice reading an appellate brief is that the trial judge will have experienced the witnesses and other evidence firsthand, whereas the appellate justice will experience such things from an appellate brief and a cold record.

3 If the trial "is concluded within one calendar day or in less than eight hours over more than one day . . . the request must be made prior to the submission of the matter for decision." (CAL. CIV. PROC. CODE § 632.)

4 Note that these so-called "statutory writs" have their own specific deadlines, much shorter than the presumptive 60-day filing deadline applicable to most writ petitions.

# HOT OFF THE PRESS! JOURNAL EDITION

DAWN GRAY, CFLS | NEVADA COUNTY | DAWN _ GRAY@EARTHLINK.NET

***Editor's Note:***
*Dawn Gray's extensive summary and comments on* In re Marriage of Cooper*, No. C073014, 2016 WL 3138012 (Cal. Ct. App. May 6, 2016), too lengthy to publish in the Journal, are available in the full version of Hot Off the Press published on the ACFLS website on the ACFLS Family Law Specialist Current Newsletters page.*

**Cite: *In re Marriage of Hall and Frencher*, 201 Cal. Rptr. 3d 769 (Ct. App. 2016).**

**Holding:** In this case, the Second District reversed a trial court's order setting arrearages in husband's child support payments. It held that the trial court incorrectly held that "excess" Social Security derivative benefits that child received due to husband's disability could not be applied toward his support arrearages.

**Summary of the facts:** Winifred and Bruce have a daughter, Kayla. He was ordered to pay child support for her in various amounts over the years, but support was modified to $8.50 per month in August of 2011. At that time, it determined he owed $16,421.84 in arrears, and ordered him to pay $150 per month toward them, plus interest.

At some point, he began receiving Social Security disability benefits, and Kayla began receiving $960 per month in derivative benefits, payable to Winifred. Social Security also paid Kayla a lump sum payment in derivative benefits, which Winifred shared with Bruce. By June of 2014, Bruce had reduced his arrearages to $11,270.84; the court also calculated that by making the derivative benefit payments, Social Security had paid Bruce's support of $8.50 per month, further reducing his arrears to $11,083.84. However, the trial court found no authority to order that the "excess" derivative benefits—the balance of $961 per month paid to Winifred for Kayla after deducting Bruce's child support of $8.50—reduced Bruce's support arrearages, so it ordered him to continue making monthly payments of $150 toward the remaining arrearages.

**Result on appeal:** Bruce appealed, and the Second District reversed. It held that Family Code section 4054(b), which states the order of crediting child support payments and which requires them to be credited as stated in Code of Civil Procedure section 695.221, requires that the derivative payments be applied first to the current support amount, and "then the excess amount should have been applied to the principle on the arrears, and then to the interest on the arrears. Accordingly, we will reverse the portion of the family court's order reflecting Frencher owes $11,083.34 in arrears. The amount of arrears owed will need to be recalculated by the family court."

*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.*

The panel distinguished *Marriage of Robinson*, 65 Cal. App. 4th 93 (1998), which came to the opposite conclusion, by stating that "(t)he version of Family Code section 4504 in effect at the time of the *Robinson* opinion was different than the current version of the statute. … (W)e disagree with the *Robinson* opinion because the statutory wording has changed so as to contradict the Robinson court's holding—Code of Civil Procedure section 695.221 is now expressly incorporated into Family Code section 4504."

**Cite: *In re Marriage of Cooper*, No. C073014, 2016 WL 3138012 (Cal. Ct. App. May 6, 2016).**

**Holding:** In this case, the Third District reversed a trial court's order holding that four investment accounts held in joint title by the parties during marriage were wife's separate property and its order granting wife reimbursement for her separate property contribution to the acquisition of the family residence. It held that the court had the discretion to deny *Watts* charges to the community, but that it erred in not imposing such charges on wife while she had the exclusive use of the residence. It held that husband owed no *Epstein* credits for certain periods when the community was not entitled to *Watts* charges and also held that wife was entitled to certain Epstein credits when she owed *Watts* charges.

**Cite: *Elena s. v. Kroutik*, No. D068831, 2016 WL 2943411 (Cal. Ct. App. May 18, 2016).**

**Holding**: In this case, the Fourth District affirmed a trial court's five-year DVRO, holding that the lack of a record on appeal precluded defendant from demonstrating that the parties did not orally stipulate to a commissioner hearing the matter. It also held that by participating in the hearing, defendant impliedly consented to the commissioner.

**Summary of the facts**: Vlad and Elena met online and got engaged four months later. However, before marriage, Vlad sexually assaulted Elena and threatened to report her to the immigration authorities. Elena filed a petition for a DVRO; after a three-hour hearing,

> which included testimony and cross-examination of Vlad and Elena, introduction of over 20 exhibits, and closing arguments by both sides, Commissioner William Y. Wood granted a five-year domestic violence restraining order. Vlad timely appeals. In the notice designating the record on appeal, Vlad checked a box stating that he elected to proceed without a record of the oral proceedings in the trial court making it impossible for this court to consider what was said during those proceedings.

**Result on appeal**: Vlad contended that the order was void because the record did not "reflect a stipulation that a commissioner may hearing the matter," but the Fourth District affirmed. It held that Vlad, who was self-represented, failed to provide a reporter's transcript of the proceedings.

> A proper record includes a reporter's transcript or a settled statement of any hearing leading to the order being challenged on appeal. Although Vlad is representing himself in propria persona, he is not exempt from the rules governing appeals. A self-represented party is to be treated like any other party and is entitled to the same, but no greater, consideration than other litigants having attorneys.
>
> These proceedings were reported by a certified court reporter. In the "Appellant's Notice Designating Record on Appeal," Vlad signed the form after checking a box which stated that he elected to proceed "WITHOUT a record of the oral proceedings in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during these proceedings in determining whether an error was made in the superior court proceedings." Nevertheless, he chose to forego the submission of the court reporter's transcript of proceedings (which might reveal an oral stipulation of the parties to the commissioner) and elected to proceed on the clerk's transcript.
>
> . . .
>
> In this case, without a transcript of the oral proceedings and given the presumption that the court acted properly, Vlad cannot meet his burden to establish that he did not orally stipulate on the record to the commissioner. Further, he fully participated in a three-hour hearing involving testimony and cross examination of the parties, introduction of 20 exhibits, and closing argument by both sides. Vlad cannot participate in the hearing, gamble on a successful outcome, and then, only after receiving an unfavorable ruling, decide to object to a commissioner handling the case.
>
> . . .
>
> In the absence of a proper record, which would include either a reporter's transcript or settled statement (neither of which we have in this case), we must presume the trial court acted properly.
>
> Therefore, the judgment is correct and must be affirmed. On this record, we cannot eliminate the possibility that Vlad orally stipulated to the commissioner handling the domestic violence restraining order. Even without this assumption, because Vlad fully participated in the hearing, he impliedly consented to allowing Commissioner Wood to determine whether the restraining order should be granted. Under these circumstances, by knowingly forgoing the preparation of a reporter's transcript or a settled statement, Vlad made success on appeal unattainable.

## Other cases of interest:

*Erler v. Erler*, 2016 U.S. App. LEXIS 10361 (9th Cir. June 8, 2016): In this case, the Ninth Circuit held that an affidavit of support filed by a sponsor under 8 U.S.C. § 1183a is enforceable regardless of any dissolution judgment between the sponsor and the immigrant that provides for no spousal support. It also held that, for purposes of determining whether the sponsor was meeting his obligation to support the immigrant with "any support necessary to maintain [her] at an income that is at least 125 percent of the Federal Poverty Guidelines for [her] household size," the court must assume that the immigrant is living in a one-person household and cannot consider the income of another person in the household.

*Adoption of K.C.*, 2016 WL _____ (Cal. Ct. App. June 10, 2016): In this case, the Second District affirmed a trial court's holding that the UCCJEA does not apply to adoptions. The trial court granted a stepparent adoption petition over the natural father's objections, holding that it did not lack jurisdiction because it failed to comply with the UCCJEA, and the Second District affirmed, holding that Family Code section 3403 "presents an insuperable barrier to Father's contention. It provides, 'This part *does not govern* an adoption proceeding . . . .' (Italics added.) 'This part' refers to the UCCJEA. Jurisdiction over adoption proceedings is governed by section 9210. Father does not contest that the trial court has jurisdiction over the child's adoption. Father argues that the instant petition is not part of an adoption proceeding. But the petition and the trial court's findings show that it is."

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