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IRRECONCILABLE DIFFERENCES? FAMILY LAW DISCOVERY AND TRUSTS

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Compelling public policies embedded in the California Family Code ("FC") impact rights and responsibilities of married and unmarried couples and the lives of children. For the family law practitioner, there are competing public policies outside of the Family Code statutory framework which require analysis of issues that at first blush may seem straightforward. One such question arises when a party in a family law proceeding involving child or spousal support is the beneficiary of one or more trusts that might be a source of income on which a support order could be based.[1] Discoverability of information concerning the assets and/or income of such trusts is where competing public policies intersect and potentially collide. In these cases, it is not just the Family Code dictates but also the public policies of the Probate Code ("PC") and the Code of Civil Procedure ("CCP"), as articulated in statutes and case law interpreting those statutes, which play significant roles in determining the extent to which trust information is discoverable.

Turning first to the Family Code and questions of child support, strong public policy allows the diligent, if not aggressive, investigation into sources of income for child support. FC section 4053 makes a parent's first and principal obligation the support of his/her minor children. Parties cannot waive child support.[2] Parents' respective support obligations are determined according to their financial circumstances, each to pay according to his/her ability, with a statutory mandate that children should share in the standard of living of both parents.[3] Child support may, therefore, appropriately improve the standard of living of the custodial household to improve the lives of children.[4]

What, then, of a payor with a beneficial trust interest? FC section 4058 specifically defines "income" for child support as including "trust income." Notwithstanding,

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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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this definition itself does not open an unlimited discovery door and cannot be so broadly construed as to do away with all other considerations. Among these is the general rule that child support is paid from present earnings and a parent need not invade assets or liquidate pre-existing assets to pay child support.[5] We see this rule in the 2006 *Pearlstein*[6] decision, where the unrealized value of stock was held to be capital, not FC section 4058 gross income. Were shares of stock sold for the purpose of reinvestment in income-producing assets, any resulting gain would not be income, but the mere replacement of one capital investment with another,[7] and thus not available for support purposes.

Further, for purposes of calculating child support, case law including *Marriage of Alter*, *Marriage of Scheppers*, and *County of Kern v. Castle*,[8] teaches that the principal amount of a one-time, lump sum gift or inheritance is not income available for support, although the rents, interest, or dividends generated thereby are, and recurring gifts may likewise be so designated in the discretion of the trial court.

The existence of a beneficial interest in a trust therefore reasonably opens a line of inquiry when child support is at stake, but what first appears as a clear public policy to maximize child support payments from any possible source is ultimately subject to limitations, as discussed further below.

On the spousal support side, where the statutory prerequisites of "need" and "ability to pay" are met, spouses are required to continue financially supporting each other after their marriage has ended, in order to ensure that former spouses do not become burdens on the state. This public policy, however, is tempered by the FC section 4320 factors governing the support analysis, which give courts much greater discretion in awarding spousal support than child support and permits limits on duration of the obligation itself,[9] including limits imposed by passage of time sufficient to substantiate downward modification or even termination.[10] While there is no statutory or common law definition of income akin to FC section 4058 for spousal support purposes, there is also nothing in the law that would exclude trust income from an analysis of available income where the issue is solely spousal support.

In other words, there is no separate rule setting forth when assets held in trust, and income generated by those assets, are deemed available as the source of support payments, whether child support or spousal support. Instead, these assets and income are considered within the statutory and case law framework that presently exists for all sources of support payments, subject to trust law where relevant.

Significantly, trusts—like corporations—are creatures of state statutes, the Internal Revenue Code, and IRS Regulations, and consequently are highly technical in their requirements, which are strictly construed. There are many kinds of trusts, including revocable and irrevocable trusts, asset protection trusts, spendthrift trusts, support and education trusts, discretionary and non-discretionary trusts, grantor trusts, and non-grantor trusts. It is not within the scope of this article to define various trusts or discuss any specific types. Any practitioner unfamiliar with trusts who is confronted with a case where a trust is involved is urged either to consult with an attorney well versed in trust and estates law or to undertake the responsibility to become sufficiently knowledgeable to render advice in this area so as to not risk the potential of malpractice.

The family law practitioner in a case whose fact pattern includes one or more trusts nonetheless requires some familiarity with trust terminology and the Probate Code. Trusts have certain commonalities—they have a Trustor (also referred to as the "Grantor" or "Settlor"), who

creates the trust, one or more Trustees who govern the trust based upon the powers granted in the governing trust instrument, and one or more Beneficiaries for whose benefit the trust assets are held. The overriding general principle of trust law is that the intent of the Trustor is to be given effect.[11] This is because a donor has the right to give his/her property to another on any conditions he/she may impose, as such a gift takes nothing from prior or subsequent creditors of the Beneficiary to whom such creditors previously had the right to look for payment.[12] A Trustee has the right and *duty* to protect and defend title for any property in the trust estate.[13]

Trusts in California are governed by PC Division 9 (§§ 15000 *et seq.*). PC sections 15300 *et seq.* sets forth restrictions on voluntary and involuntary transfers from a trust. For example, a spendthrift trust prevents a Beneficiary from assigning potential distributions as security and prevents third-party judgment creditors from satisfying debts with assets held in trust for that Beneficiary until paid to the Beneficiary.[14] If a spendthrift trust is also a support and/or education trust, income or principal can only be reached by a judgment creditor to the extent some portion of the undistributed trust income is not needed for support and education of the Beneficiary, and then, only where a discretionary Trustee has exercised his/her discretion to declare a distribution in excess of such support and the beneficiary has been paid. To the extent the Trustee distributes the whole, all monies in the hands of the beneficiary are potentially available to the judgment creditor. (PC §§ 15302, 15307). Per the Probate Code, station in life is the standard for exercise of discretion regarding distributions for the Beneficiary's support.[15]

Child and spousal support issues are addressed in the Probate Code only when it comes to enforcement of court orders for such support; nothing in the Probate Code is found regarding establishment of support orders against a trust Beneficiary. Those are governed by the Family Code, which includes trust income as income, ante. If a judgment is for child or spousal support, PC section 15305, originally enacted in 1986, has elevated the judgment creditor to preferred creditor status. Generally, a Beneficiary should not be permitted to enjoy the trust interest while neglecting to support his/her dependents,[16] and a minor's right to support cannot be defeated by a spendthrift trust or a support trust.[17] PC section 15305 authorizes a trial court to order a trustee to satisfy an existing support order even where there is a discretionary Trustee or a spendthrift clause (§ 15305(d)), but only (1) pursuant to section 15305(b), where the Beneficiary has the right to compel distributions, or (2) pursuant to section 15305(c), where the Trustee has exercised discretion to issue distributions, and all subject to the requirement that it is equitable and reasonable to do so.[18]

Only one published California case to date interprets PC section 15305: *Ventura County Dept. of Child Support Services v. Brown*.[19] This case, addressing solely the issue of enforcement of extant support orders, is sufficiently fact-specific that it must be cautiously considered. In this case, the public policy of payment of child support outweighed the public policy that an owner of property, such as a trust settlor, may dispose of such property as he/she pleases and may impose spendthrift restraints on disposition of the income, subject only to the exercise of discretion by a trustee.[20] The relevant facts of the case are that the support payor had seven children with three different mothers and failed to make court-ordered child support payments for fifteen years.[21]He became entitled to distributions from a family trust; the settlor was his mother. One of his children's mothers and the County's Department of Child and Family Services, on behalf of six of the seven children, sued the trustee to force him to make payments of child support arrearages as well as future payments from the trust estate. The court held that although under California law a court does not have jurisdiction to order a distribution by the discretionary trustee absent an abuse of discretion by that trustee, the discretionary trustee in this case abused his discretion as he, in bad faith, exercised that discretion to distribute no income to the child support judgment debtor-beneficiary, with the intent to avoid enforcement of the child support judgments, thus rendering the trustee's discretion subject to control of the court.[22] The court cited PC section 16081(a) which imposes the duty of good faith on a trustee.

The lesson of the *Ventura County* case is that under the right set of facts and circumstances, a trustee can be forced to exercise discretion to enforce support judgments, but such facts and circumstances are rare. Nothing in the case suggests that it can reliably be cited as giving the court jurisdiction to initiate support orders against a trust and it could be considered misleading the court to do so.

Turning to discoverability of trust income and assets, the analysis likewise rests on competing policies. Strong public policy favoring discovery rights in litigation matters is reflected in case law liberally construing discovery statutes in favor of disclosure and upholding the right to discovery wherever reasonable and possible.[23] The purpose of discovery is to obtain all facts relative to a claim or defense.[24] CCP section 2017.010 permits the discovery of any matter, not privileged, relevant to the subject matter of the pending action or motion if it is admissible or appears reasonably calculated to lead to discovery of admissible evidence. This is both broad in that it allows a request for even inadmissible evidence if it will lead to admissible evidence, but also limited in that requested information must be relevant to the case at hand.[25] "Relevant to the subject matter" includes information that might reasonably assist

a party in evaluating the case, preparing for trial, or facilitating settlement.[26]

Juxtaposed with discovery rights is the strong public policy protecting individual privacy rights.[27] The court must balance the right to discover relevant facts with the right of non-parties to maintain reasonable privacy regarding their financial affairs.[28] In evaluating claims for protection of confidentiality, courts are vested with discretion. They must consider and weigh *inter alia* the purpose for which discovery is sought, the effect disclosure will have on the parties and trial, the nature of objections, and the ability of the court to make alternate orders for partial disclosure, disclosure in another form, or disclosure provided the requesting party meets specified burdens or conditions just under the circumstances. Where possible, a court should impose partial limitations rather than denial. The court can accommodate both disclosure and confidentiality by deleting names, sealing the information except on further order of court, and holding *in camera* hearings.[29]

In balancing these competing policies in a family law case involving community property rights, the court held in the oft-cited *Schnabel* opinion that any discovery must be tailored to protect the interests of the requesting party in obtaining a fair resolution of the issues, while not unnecessarily invading the privacy of the non-party, including, on request, by protective orders.[30] Simply put, and frequently reiterated, parties cannot use discovery for improper fishing expeditions.[31]

Given the foregoing, practitioners in a family law matter involving child or spousal support where one or both parties have beneficial trust interests are faced with analyses regarding whether and what information regarding a trust is practically, realistically, and appropriately obtainable. If representing the party seeking support from a payor-beneficiary, the question is how to propound discovery to ensure it is narrowly tailored to avoid protective orders and/or discovery sanctions. If representing the support payor, the question becomes how to respond with sufficient information to avoid motions to compel and attendant discovery sanctions.

Whichever party one represents, relevance of the information sought is key to the overall analysis. It is simplistic and incorrect to assume that all information about the assets and income of a trust is relevant in a support case. It is not the extent of the money or other assets residing in the trust, nor income generated by the trust, which control, but rather to what trust assets or income does the beneficiary actually have access. This important distinction lies at the heart of the holding in *Marriage of Williamson*, decided in 2014.[32]

In *Williamson*, husband was the beneficiary of one of eighteen sub-trusts within a family trust structure involving third party beneficiaries and contingent beneficiaries. During the parties' lengthy marriage they enjoyed a high marital standard of living funded by husband's tax-free distributions from the one sub-trust plus other parental gifts. Wife sought discovery concerning the trusts in the dispute over child and spousal support, where husband had low paying employment and the otherwise recurring parental gifts were now terminated. Notwithstanding a dramatic decrease in husband's ability to pay support, as compared to the marital standard of living, the trial court on husband's motion for protective order limited discovery of only the express language in the family trust specifically allocating income to husband and describing his interest in the trust, further redacted to prevent disclosure of third party beneficiaries and contingent beneficiaries, as well as, most significantly, of trust assets.[33] In an earlier case likewise involving the scion of a wealthy family who was claiming a dramatic decrease in income available for support, *Marriage of DeGuigne*,[34] Justice Corrigan pointed out that notwithstanding known family trust assets of an estimated $3.8 million, the assets were not under the control of the husband-payor; thus, the trust assets were irrelevant in the support calculus. The Court of Appeal affirmed the protective order in *Williamson*, stating that discovery may be limited when the intrusiveness of the request outweighs the likelihood that the information sought will lead to the discovery of admissible evidence, citing CCP section 2017.020(a), and in line with the reasoning of *DeGuigne*.

The *Williamson* holding reflects not only the conflict between rights of discovery and rights of privacy for third parties, but also limitations on sources of support despite otherwise broad public policy affirming support obligations. *Williamson* serves as a limiting roadmap in our support cases involving trusts.

Note that the party seeking support orders in *Williamson* did not even obtain the entirety of the governing trust instruments, although there is no discussion in the opinion of the full extent of discovery sought. The issue of sharing the governing trust instrument does merit further attention by counsel for both parties, insofar as it may be critical to determining the interest of the beneficiary in the trust, whichever side of the argument one is on. The history of distributions alone may not tell the entire tale, but that information is clearly relevant. The trust instrument not only identifies the grantor but it may also provide information not otherwise obtainable as to the grantor's intent, the purposes of the trust, the full extent of the trustees' powers and discretion, any future beneficiaries such as the parties' children, and how and when distributions may be made. This type of information may then be relevant to determining what income is or is not available to the beneficiary, and thus discoverable under *Williamson*. For the party representing the trust beneficiary, disclosure of the actual trust instrument subject to confidentiality protections may be helpful in showing the unreasonableness and lack of relevance of further inquiry into trust income and assets.

The seminal questions on both sides involve the extent of the beneficiary's control over distributions and whether there are third parties whose privacy rights must be protected. For example, in assessing the beneficiary's control: Are distributions automatic or discretionary? Is there any limit as to amount or purpose? Is the trustee independent of the beneficiary? Is the trust a support trust and/or a spendthrift trust? Who has ultimate decision-making authority over distributions? Is the grantor/settlor also the beneficiary? What is the history of distributions? Have any been requested and denied?

With respect to other beneficiaries and terms of the trust instrument relating only to them, under *Williamson* this information is not relevant in discovery, and must be redacted. If there are provisions regarding the interests of the beneficiary's children, and if the grantor's intent was to create a generation-skipping trust to avoid taxation, it may be arguable as in the *Ventura County* case that the grandchildren are the intended beneficiaries of the trust, and a discretionary trustee abuses discretion by failing to declare a distribution out of which a child support judgment creditor can satisfy an existing court order. Such an argument may give rise to narrow discovery relevant to that issue. This argument, however, does not appear persuasive where the request is for a support order based *ab initio* on the possibility of future distributions that the discretionary trustee will thereafter have to be ordered to make. The exceptional circumstances of the *Ventura County* case are absent in such a fact pattern.

In all, the tension between the policy of liberal discovery and the right of privacy in family law support cases involving beneficial trust interests appears to weigh heavily in favor of third party privacy rights, while it appears nonetheless to be an area of developing law. If there is "good cause" in the form of beneficiary control, trustee relatedness, or bad faith, discovery rights will arguably be greater. It is doubtful, however, that regarding this most private institution of wealth transfer, "good cause" based on speculation or mere argument can be shown for discovery of the assets or income of a trust whose beneficiary is the payor or recipient of child or spousal support, but who cannot compel distributions and/or who has no history of receiving trust distributions. Likewise, under the present state of the law, it is unlikely that broad discovery inquiries akin to fishing expeditions concerning the trust or trustee will be permitted, no matter the disparity in income or seeming inequities between the parties themselves.

Judge Isabel R. Cohen served as a judge for twenty years, six of the last seven in the Family Law Department of the Los Angeles Superior Court, hearing complex trial and motion matters. Since retirement from the bench in 2000, Judge Cohen has been engaged in private dispute resolution, mostly in family law. Her work encompasses mediation, private adjudication, and service as a discovery referee. Judge Cohen can be contacted at judgeicohen@gmail.com; (323) 465-5336.

Judith R. Forman, a CFLS since 1986, has participated frequently as a speaker at local and national family law panels and symposia and as an author on family law topics from custody of children to custody of copyrights. She is recognized in Best Lawyers in America, the Bar Register of Preeminent Women Lawyers, and LA Magazine's Top 50 Women Lawyers Southern California. Judy chairs the Advisory Council of the Harriett Buhai Center for Family Law and sits on the Board of Directors of AFCC-California. Judy's email: jrf@familylawcounsel.com.*

William S. Ryden has been practicing exclusively in the area of family law for 35 years. Mr. Ryden has been a partner in the law firm of Jaffe and Clemens since 1985. Mr. Ryden is a certified family law specialist and a member of the American Academy of Matrimonial Lawyers. Mr. Ryden has been recognized as a Southern California "Super Lawyer" by the Los Angeles Times Magazine since 2005 and has been included in "Best Lawyers of America" since 2006.

* Terry A. Steen made invaluable contributions to this article which are much appreciated by the authors.

1 We do not refer here to trusts created by the parties together during marriage into which only community assets have been transferred and which presumably will be revoked upon termination of the marriage.

2 *Marriage of Hamer,* 81 Cal. App. 4th 712 (2000).

3 FC § 4053.

4 *Id.*

5 *Mejia v. Reed*, 31 Cal. 4th 657, 570-71 (2003).

6 *Pearlstein v. Pearlstein,* 137 Cal. App. 4th 1361 (2006).

7 *Id. at* 1375-76.

8 *Marriage of Alter,* 171 Cal. App. 4th 718 (2009); *Marriage of Scheppers*, 86 Cal. App. 4th 646 (2001); *County of Kern v. Castle,* 75 Cal. App. 4th 1442 (2001).

9 FC § 4320.

10 *In re Marriage of Wilson,* 51 Cal. App. 3d 116 (1975); *In re Marriage of Schmir*, 134 Cal. App. 4th 43 (2005). *But see, In re Marriage of Edwards,* 52 Cal. App. 3d 12 (1975) (Passage of time alone is insufficient to justify termination of spousal support).

11 PC § 21102(a); *see also, Booge v. First Tr. and Sav. Bank of Pasadena,* 64 Cal. App. 2d 533-35 (1944).

12 *Canfield v. Security-First Bank,* 13 Cal. 2d 1, 30-31 (1939).

13 For example, an invalid writ levied on exempt property would seriously interfere with trust administration and thus it is the trustee's duty to defend against such legal action. *Hearst v. Hearst,* 123 F. Supp. 756, 758 (1954).

14 http://legal-dictionary.thefreedictionary.com/spendthrift+clause (last visited Oct. 7, 2015).

15 PC § 15307; *see also*, *Hearst,* 123 F. Supp. at 756, 758; *Canfield,* 13 Cal. 2d at 30-31.

16 The Law Revision Commission Comment to PC § 15305.

17 *Id.*

18 *Id.*; PC § 15305.

19 The Law Revision Commission Comment to PC § 15305; *Ventura Cty. Dept. of Child Support Services v. Brown*, 117 Cal. App. 4th 144 (2004).

20 *Ventura Cty. Dept.,* 117 Cal. App. 4th at 155 (citing *Hurley v. Hurley,* 309 N.W.2d 225 (Mich. 1981)).

21 *Id.* at 147-48.

22 *Id.*

23 *Deyo v. Kilbourne,* 84 Cal. App. 3d 771, 781 (1978) (citing *Greyhound Corp. v. Super. Ct.,* 56 Cal. 2d 355, 377 (1961)); *Emerson Electric Co. v. Super. Ct.,* 16 Cal. 4th 1101, 1108 (1997); *see also*, WEIL & BROWN, CAL. PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL *2* ¶ 8:812, at 8E-97 (The Rutter Group).

24 *Deyo,* 84 Cal. App. 3d at 781.

25 CCP § 2017.010.

26 *Gonzalez v. Super. Ct. (City of San Francisco),* 33 Cal. App. 4th 1539, 1546 (1995).

27 *Calcor Space Facility v. Super. Ct. (Orange),* 53 Cal. App. 4th 216, 219-223 (1997); *Valley Bank of Nev. v. Super. Ct. (San Joaquin),* 15 Cal. 3d 652 (1975).

28 *Id.* at 657-58 n.26.

29 *Id.* at 658.

30 *Schnabel v. Super. Ct.*, 5 Cal. 4th 704, 714 (1993) (*Schnabel I*).

31 *Calcor Space Facility, 53 Cal. App. 4th 216, 219-223 (1997).*

32 *Marriage of Williamson,* 226 Cal. App. 4th 1303 (2014).

33 *Id.* at 1319.

34 *Marriage of de Guigne,* 97 Cal. App. 4th 1353, 1358 (2002).

PRESIDENT'S MESSAGE

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

2015 was a successful year for ACFLS. The 23rd Annual Spring Seminar went well despite a surprise power outage. In addition to the success of the Spring Seminar, our local chapters excelled at providing high quality CLE programs. All of the ACFLS committees/directors worked extremely hard this past year to ensure the ongoing vitality of all of our endeavors, including, but not limited to, this outstanding journal. I did want to acknowledge two specific committees that went above and beyond in 2015. Our Amicus Committee, co-chaired by Leslie Shear and Stephen Temko, was very active this past year and sought publication of many appellate decisions that will have an impact on various areas of family law. The entire committee is commended for its excellent work, as the committee must act within very short time frames, which is not easy considering the breadth of many of the decisions. The letters that are drafted by the committee are superb in quality and as of the writing of this column, all of the requests for publication have been granted!

The Legislative Advisory Committee, chaired by Dianne Fetzer, assisted by Associate Legislative Director Michele Brown, was also quite busy in 2015. The committee not only reviewed all pending family law legislation (including SB 594, which amends Family Code section 3111), but they also worked (and continue to work) with other interested stakeholders drafting legislation to address the issues raised by *Marriage of Davis,* 61 Cal. 4th 846 (2015). Ms. Fetzer and Ms. Brown represented ACFLS in the legislature very well this past year and as a result of their actions, ACFLS continues to significantly influence family law legislation in the State of California.

2016 should also be a terrific year for ACFLS.

The 24th Annual Spring Seminar will be held on April 1-3 in Rancho Mirage. The Spring Seminar Committee, co-chaired by Diane Wasznicky and Seth Kramer, as well as the entire board, is diligently working on providing the best seminar yet. This year's seminar, "Spousal Support: An In-depth Analysis for the 21st Century," has outstanding faculty and will once again be moderated by Garrett Dailey and include a fantastic Judicial Responder Panel. This year's seminar should not be missed.

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.

We have an excellent board this year and I believe that the board will work together very well. We have a few new board members and I am looking forward to their involvement on the board and the new energy and ideas they will generate. In addition, we have many returning board members, most in the same position as last year, some in different positions. All of last year's board members who are continuing on the board, whether in the same position or in a new position, are extremely dedicated to the organization and will undoubtedly continue to serve the organization in an exemplary manner.

In 2016, we are looking to continue to improve on all that we do as an organization. On behalf of the Board of Directors, I wish you all a Happy New Year!

EDITOR'S COLUMN

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

During the last few months, while getting the material ready for this edition of the Journal of Association of Certified Family Law Specialists, the debate on Davis has continued to rage. I have been participating in the lively and thoughtful discussions through my involvement with various bar associations and the ACFLS Legislative Advisory Committee. Our Legislative Committee, along with other family law stakeholders, including representatives from Flexcom, AFCC, AAML, the family law sections of the Beverly Hills Bar Association, and the Los Angeles County Bar Association, continue to work with counsel of the State Assembly and Senate Committees on Judiciary to draft Anti-Davis legislation. Throughout the last year, ACFLS provided input to the California State Legislature on selected bills and proposed legislation. In this issue, Dianne Fetzer, Legislative Director, Legislative Advisory Committee (Sacramento) provides her annual report with a summary of selected chaptered bills.

This issue begins with the President's message from Jill Barr (Sacramento). She writes about ACFLS's successes throughout the year, acknowledges the work of all its committees, and highlights the extraordinary work of two, the Amicus Committee and the Legislative Advisory Committee. Leslie Shear provided a review of ACFLS's Amicus work in her article published in the fall 2015 edition of the ACFLS Journal, "An Influential 'Family' Friend of the Appellate Courts." In its continuing role "in educating the appellate courts about the evolution of family law and the impact of possible holdings on litigants," the Amicus Committee is now making the extraordinary request to seek depublication of a recent Court of Appeal case, *Marriage of Bonvino*, as they assert the opinion misapplies the law and will cause confusion and needless litigation. In November 2015, the Second District held in Marriage of *Bonvino* that if property is acquired during marriage with both separate and community funds, the transmutation requirements of section 852 must be satisfied before the reimbursement provisions of section 2640 apply.

In "A Challenge to *Lafkas*," Kim W. Cheatum, who wrote the amicus brief adopted in *Marriage of Haines* and also wrote an amicus brief in *Valli*, challenges the reasoning in *In re Marriage of Lafkas* that when Family Code sections 2581 and 852 conflict, the transmutation requirements of section 852 must be met **before** the joint title presumption of section 2851 applies. The *Lafkas* case was also hotly debated on the ACFLS listserve. This opinion was authored by the same justice of the same panel of the Second District that ruled on *Marriage of Bonvino*. Cheatum's comment to the holding in *Bonvino* is "the courts are erroneously sacrificing 2581 on the altar of 852."

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.

I was so excited as a young lawyer to have been appointed by Gov. Jerry Brown to the California Law Revision Commission in 1981. At that time, I was handling criminal cases primarily and transitioning into family law. I was the Vice Chair of the California Law Revision Commission when it studied the issues of marital property presumptions and transmutations and I continue to follow the issues with great interest.

In keeping with the topic of the upcoming Spring Seminar, "Spousal Support, An In-Depth Analysis for the 21st Century," this issue of the Journal includes articles addressing support. The first is our lead article "Irreconcilable Differences? Family Law Discovery and Trusts" by Hon. Isabel R. Cohen, Ret., Judith R. Forman, CFLS, and William S. Ryden, CFLS (Los Angeles). The authors discuss competing public policies that impact the availability of trust assets for support and the discoverability of trust income and assets. They include an in-depth analysis of the *Williamson* case that "reflects not only the conflict

between rights of discovery and rights of privacy for third parties, but also limitations on sources of support despite otherwise broad public policy affirming support obligations. *Williamson* serves as a limiting roadmap in our support cases involving trusts."

In the next article addressing support, "Alimony is Alimony?", Leslie O. Dawson, CPA, examines the IRS requirements for and recent case law on the deductibility of spousal or family support.

Dawn Gray's (Nevada) regular article, "Hot off the Press," summarizes recent cases. The case names and holdings appear in the printed version of the ACFLS Specialist and the complete summaries can be found on the ACFLS website. We also include in the ACFLS Specialist the complete text of Dawn's shorter summaries of "Other Recent Cases of Interest."

ACFLS CLE on DVD/CD/MP3 now includes 15 DVDs that were added to the ACFLS catalog in 2015. They cover a wide range of topics critical to our practices, by prominent family attorneys, judicial officers, and experts in relevant fields.

This issue only includes the Sacramento chapter's seminars and events they have planned for early 2016. Be sure to check your email for the ACFLS Monthly for additional chapter programs.

Heidi Tuffias (Los Angeles), in her column "Holder of the Hope, discusses how we as counsel "have an opportunity as holders of the hope to help our clients identify and create constructive and positive stories" until they are able to see a successful resolution themselves.

We welcome the newly elected members of the ACFLS Board of Directors, and thank all departing Board members for their service. I would encourage anyone who would like to write an article for the ACFLS Specialist to contact me or any of the Editorial Board members: Christine Gille (Los Angeles), John D. Hodson (Solano), Richard Gould-Saltman (Los Angeles), Patricia Rigdon (Los Angeles), and Jason Schwartz (Orange). Many thanks for all their time, effort, and significant contributions to the preparation and completion of the Specialist.

The ACFLS's 24th Annual Spring Seminar, will be held April 1-3, 2016 at the Omni Rancho Las Palmas Resort & Spa in Rancho Mirage, California. ACFLS's Spring Seminar offers in-depth continuing legal education seminar on a selected single topic, with a unique Judicial Responder Panel. Additional information regarding the Spring Seminar is provided in our "Save the Date" column and on the ACFLS website (ACFLS.org). We look forward to seeing you at the ACFLS 2016 Annual Spring Seminar.

Corrections and Clarifications:

The Fall 2015 issue article by Laurel Brauer was mistitled and should have been titled "Declarations: Are They or Are They Not?"

The bio that should have appeared with her article is as follows:

Laurel Brauer is the founder of Brauer Law Group – a firm handling all aspects of Family Law litigation, from pre to post. This declaration issue has Laurel's name on two pending appeals – both awaiting oral argument. Laurel has and continues to be very involved in Family Law leadership – a mirrored balance to the practice. She recently termed off the State Bar Board, but currently sits on the Family Law Executive Boards of the Orange County and Los Angeles Bar Associations as well as the Orange County Chapter of the ACFLS.

A CHALLENGE TO *LAFKAS*

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Lafkas in Brief

Two statutes were enjoying independent, peaceful lives, by legislative design, until the court in *Lafkas* chose to pit them against each other.[1] There, husband acquired a 1/3rd interest in partnership before marriage. But after marriage, he consented to a written amendment to the partnership agreement, which provided: "The name of each of the partners is as follows: John and Jean Lafkas, husband and wife, as to 1/3 interest…."[2] The trial court concluded that "the partnership was acquired in joint form as required by section 2581."[3]

The Court of Appeal agreed that the property was acquired during marriage "in joint form," but otherwise reversed because the case is governed by FC 852(a).[4] At the heart of the reversal is the Court's conclusion that FC 2581 and FC 852 "both evolved [legislatively] in response to *In re Marriage of Lucas* (1980) 27 Cal.3d 808 (*Lucas*)."[5] From this minor conclusion, the Court jumped to its major conclusion, namely, that the Legislature unknowingly created conflict between the two statutes, which merits intervention by the judiciary to resolve the conflict in favor of one or the other.

More specifically: "We conclude that when the provisions of sections 2851 and 852 **conflict**, the transmutation requirements of section 852 must be met **before** the joint title presumption of section 2851 applies."[6] Accordingly, "when a spouse places separate property in joint title form, the transmutation requirements of section 852 must be satisfied **before** the joint title presumption of section 2581 applies. The documents in this case do not contain an express transmutation of husband's separate property interest in the partnership, and therefore, it remained husband's separate property."[7]

The issue is whether the Legislature intended FC 2581 and FC 852 to exist independently of, but in harmony with, each other?

Challenge to *Lafkas*, in Brief

The *Lafkas* court's conclusion that "the transmutation requirements of section 852 must be satisfied **before** the joint title presumption of section 2581 applies" is self-defeating on its face. If filtering the facts through the grid of FC 852 supports the conclusion that separate property has been transmuted to community, no need remains to filter this conclusion through the presumption of community property in FC 2581.

More positively, FC 2581 and FC 852 were enacted at different times, for different purposes, to serve different legal interests. These differences co-exist in harmony, as illustrated by contrasting two different fact patterns with each other. The first is *Lafkas*. The second fact pattern is that instead of amending the partnership agreement as in *Lafkas*, husband signed and authored the following writing: "I agree to change my 1/3rd interest in partnership that I owned before marriage to community property, to be shared equally, 50/50, with my wife."

Both result in a change from separate to community, but for different reasons. The first is supported by the state of mind of the Legislature – a "compelling state interest exists to provide for uniform treatment of property … held in joint title …."[8] The second fact pattern is supported by the intention of husband, which satisfies the "express declaration" requirement of section 852(a).

This is the error of *Lafkas* at its core. The court failed to recognize that FC 2581 is anchored in a compelling state interest, independent of spousal intention, whereas FC 852 is rooted in spousal intention alone.

To begin, it is essential to have a foundational understanding of *Lucas*. From there, the discussion proceeds to how the Legislature's response to *Lucas* (in enacting FC 2581 and FC 2640) was different than its response to the problem of "easy transmutation" (in enacting FC 852); next, how the Supreme Court responded to the Legislature; and finally, if in conflict, why FC 2581 prevails over FC 852.

Kim W. Cheatum has devoted 38 years to the practice of family law, as trial and appellate attorney, writer, teacher, and mediator. His love for family law led him to file amicus briefs in In re Marriage of Haines (1995) 33 Cal.App.4th 277 and In re Marriage of Valli (2014) 58 Cal.4th 1396.

Supreme Court's Foundational Ruling in *Lucas*

Overview: On August 7, 1980, the Supreme Court in *Lucas* announced its rulings, both major and minor. The first involved the joint form presumption of community property (and the presumed absence of a right to reimbursement for separate property), whereas the second related to the principle of transmutation. Each ruling is independent of the other.

Main ruling: Husband and wife acquired during marriage a home, which they chose to title in joint tenancy. Wife contributed the down payment from her separate property.[9] The Supreme Court was presented with two questions: First, what was the character of the jointly titled home? Secondly, if community property, how should wife's separate property contribution be treated?

In response to the first question, the Court ruled that titling an asset during marriage in joint names triggers an elementary expectation of joint ownership. "The act of taking title in a joint and equal ownership form is inconsistent with an intention to preserve a separate property interest. Accordingly, the **expectations** of parties who take title jointly are best protected by presuming that the specified ownership interest is intended in the absence of an agreement or understanding to the contrary [Lucas #1]."[10]

To answer the second question, the Court ruled: "If on reconsideration the house is found to be entirely community in nature, Brenda would also be barred from reimbursement for the separate property funds she contributed in the absence of an agreement therefor. It is a well-settled rule that a 'party who uses his separate property for community purposes is entitled to reimbursement from the community or separate property of the other only if there is an agreement between the parties to that effect [Lucas #2].'"[11] While Lucas #1 and Lucas #2 are related to each other, neither has any relationship to Lucas #3.

Minor ruling: "The purchase contract [for the motorhome] was made out in the name of Gerald alone, but title and registration were taken in Brenda's name only. Brenda wished to have title in her name alone, and Gerald did not object. The motorhome was purchased for family use and was referred to and used by the parties as a 'family vehicle.'"[12] The Supreme Court affirmed trial court ruling that husband transmuted the motorhome from community property to wife's separate property [Lucas #3].

In response to *Lucas*, the Legislature affirmed Lucas #1 by enacting FC 2581 (and overturned Lucas #2 by enacting FC 2640).[13] On the other hand, FC 852 is a different legislative response at a different time to an entirely different concern, namely, the problem of "easy transmutation," as illustrated by Lucas #3, amongst other cases. Thus, whereas FC 2581 is a direct response to *Lucas*, FC 852 is an indirect response.

Legislature's Responses to *Lucas*

Different times: In 1983, the Legislature enacted sections 2581 and 2640 in "Stats. 1983, ch. 342, §§ 1-4.)"[14] The Legislature later clarified that "those sections apply to all proceedings commenced on or after January 1, 1984."[15] In 1986, the Legislature further expanded the reach of the presumption of community property to include all property acquired during marriage "in joint form."[16]

In 1984, the Legislature enacted section 852, in "Stats. 1984, ch. 1733, § 3, p. 6302."[17] Section 852's effective date is "January 1, 1985."[18] Both statutes were also enacted for different purposes.

Different purposes: "The legislative history [of Assembly Bill No. 26, which contained both 2581 and 2640] reveals two concerns: the need for a community property presumption affecting joint tenancy property to aid the courts in the division of marital property [Lucas #1], and an unexplained desire to abrogate the rule, attributed solely to *Lucas, supra*, 27 Cal.3d 808, that 'precluded recognition of the separate property contribution of one of the parties to the acquisition of community property [Lucas #2].' (citation omitted.)"[19]

Thus, the Legislature's clear intention was to codify the substance of Lucas #1 in section 2581 and to abrogate Lucas #2 in section 2640. But this intention is entirely divorced from the Legislature's intent in enacting FC 852, which was to remedy the problem of "easy transmutations," of which Lucas #3 is one of many examples.

"It thus appears from an examination of the Commission report that section [852] was intended to remedy problems which arose when courts found transmutations on the basis of evidence the Legislature considered unreliable. To remedy these problems the Legislature decided that proof of transmutation should henceforth be in writing, and therefore enacted the writing requirement of section [852]."[20] These "unreliable" transmutation cases are also referred to as the "easy transmutation" cases. "[S]ome of the **'easy transmutation' cases which section [852] was intended to overturn** involved non-oral conduct or signed writings."[21] Lucas #3 was cited as one example amongst many that section 852 was intended to overturn.[22] FC 2581 and FC 852 additionally serve different legal interests.

D*ifferent legal interests*: The *Lucas* presumption of community property is grounded in common "expectations" that property titled during marriage in joint names is equally owned.[23] In enacting FC 2581, the Legislature more than honored these "expectations." It flanked them with the protection of "public policy" on one side, and "a compelling state interest" on the other side.

> The Legislature hereby finds and declares as follows:
>
> (a) It is the **public policy** of this state to provide uniformly and consistently for the standard of proof in establishing the character of property

> acquired by spouses during marriage in joint title form ….
>
> (b) The methods provided by case and statutory law have not resulted in consistency … but rather, have created confusion … and, as a result, spouses cannot have reliable **expectations** as to the characterization of their property ….
>
> (c) Therefore, a **compelling state interest** exists to provide for uniform treatment of property. Thus, … Sections 2581 and 2640 … apply to all property held in joint title …. [24]

In fact, the state interest is so compelling that FC 2581 applies even if husband "did not realize wife was added to the title."[25] "More significantly … the general consensus is that §2581 applies to property 'initially acquired before marriage, the title to which is taken in joint form by the spouses during marriage.'"[26] The transfer of an asset owned before marriage to joint names during marriage is not subject to the protection of FC 852, but it is protected by two other statutes.[27]

While FC 2581 is intent neutral, FC 852 is intent active. "[W]e conclude that a writing signed by the adversely affected spouse is not an 'express declaration' for the purposes of section [852(a)] *unless* it contains language which expressly states that the characterization or ownership of the property is being changed."[28] "[T]he writing must reflect a transmutation on its face, and must eliminate the need to consider other evidence in divining this **intent**."[29] For example, "[o]ur close review of the record reveals that no substantial evidence supported the finding that Margery **intended** a transmutation…. In fact, there is absolutely no record evidence relating to Margery's **intentions or state of mind** when she signed the adoption agreements."[30] Both statutes enjoy other differences that allow them to live harmoniously with each other.

Different legal effects: FC 2581 triggers one process – a presumption of community property. Oppositely, FC 852 mandates three possible outcomes – a change in character from separate to separate, from community to separate, or from separate to community.

Different defaults: FC 2581 defaults to a change of character (from separate to community), unless the presumption is rebutted by a writing evidencing an intention not to change. FC 852 has a different default – there is no change in character (of any kind), "unless" there is a writing evidencing an intention to change.

Like the Legislature's record of enactment, the Supreme Court's following record of interpretation contains nothing to suggest a conflict between the two statutes under scrutiny.

Supreme Court's Interpretation of Legislature's Response

Since their enactments over 30-years ago, the Supreme Court has enjoyed several opportunities to interpret FC 2581 and FC 852.[31] Like the Legislature's enactment record, the Supreme Court's interpretation record does not support the *Lafkas* court's conclusion that "when a spouse places separate property in joint title form, the transmutation requirements of section 852 must be satisfied **before** the joint title presumption of section 2581 applies."[32]

If In Conflict, FC 2581 Prevails Over FC 852

When two statutes conflict, the specific prevails over the general.[33] FC 2581 is clearly more specific. It governs in one limited situation – acquiring property during marriage in joint form. On the other hand, section 852 governs in three situations – transmutations from community to separate, separate to community, and separate to separate.[34] Moreover, FC 2581 is supported by the "expectations of the parties", according to *Lucas*, and "public policy" and a "compelling state interest" in FC 2580, by the Legislature. FC 852 enjoys no such support. Finally, all joint form acquisitions during marriage are mitigated by FC 2640, but not all transmutations under FC 852 are mitigated by FC 2640.

Conclusion

The Legislature mandates that all property acquired during marriage in joint form must be treated uniformly as presumptively community property. The *Lafkas* court admits that the partnership was acquired during marriage in joint form. But the court failed to treat such property the same as all other property acquired during marriage in joint form. Therefore, *Lafkas* was wrongly reasoned and decided.

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1 *In re Marriage of Lafkas,* 237 Cal.App.4th 921 (2015)
2 *Id.* at 927
3 *Id.* at 930. FC 2581(a) provides: "For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property." All references to FC 2581 include its predecessor, CC 4800.1.
4 FC 852(a) provides: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." All references to FC 852 include its predecessor, CC 5110.730.
5 *Lafkas, supra,* 237 Cal.App.4th at 934
6 *Id.* at 940 [emphasis]
7 *Id.* at 926 [emphasis]
8 FC 2580(c)
9 *Lucas, supra,* 27 Cal.3d at 810-811
10 *Id.* at 815 [emphasis added]
11 *Id.* at 816
12 *Id.* at 817-18

13 FC 2640(b) provides: "In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source." All references to FC 2640 include its predecessor, CC 4800.2.
14 *In re Marriage of Buol,* 39 Cal.3d 751, 755 (1985)
15 FC 2580 (c)
16 *In re Marriage of Heikes,* 10 Cal.4th 1211, 1216 n. 6 (1995)
17 *Estate of MacDonald,* 51 Cal.3d 262, 268 (1990)
18 FC 852 (e)
19 *In re Marriage of Fabian,* 41 Cal. 3d 440, 448-49 (1986)
20 *MacDonald, supra,* 51 Cal. 3d at 269
21 *Id.* at 270
22 *Id.* at 270, n. 6
23 *Lucas, supra*, 27 Cal.3d at 815
24 FC 2580 [emphasis added]
25 *In re Marriage of Weaver,* 127 Cal.App.4th 858, 865 (2005)
26 Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2015) ¶ 8:415, p. 8-147, and cases cited therein
27 The first protection is that all interspousal transactions that advantage one spouse are subject to scrutiny under Family Code section 721(a) – whether the circumstances are sufficiently pleasing to the fiduciary standard so as to render both spouses competent to transact with each other. See *In re Marriage of Haines* (1995) 33 Cal.App.4th 277 The second form of protection is that a FC 2581 transfer is subject to the mitigating influence of FC 2640, quoted in relevant part in endnote 13. This means that at the time of joint titling, there is no net change in either balance sheet – no addition of value to community and no subtraction of value from separate property. Thereafter, if market forces result in appreciation, the community is limited to sharing 50/50 in the increased value. Conversely, if market forces result in depreciation, the community value is zero (and separate property is lessened to the extent of the decrease in value from the time of joint titling).
28 *MacDonald, supra,* 51 Cal. 3d at 272
29 *In re Marriage of Benson,* 36 Cal.4th 1096, 1106–1107 [emphasis added] (2005)
30 *MacDonald*, *supra*, 51 Cal. 3d at 267 [emphasis]
31 For FC 2581, see *In re Marriage of Hilke,* 4 Cal.4th 215 (1992), *In re Marriage of Fabian,* 41 Cal.3d 440 (1986), and *In re Marriage of Buol,* 39 Cal.3d 751 (1985). For FC 852, see *In re Marriage of Benson,* 36 Cal.4th 1096 (2005) and *Estate of MacDonald,* 51 Cal.3d 262 (1990).
32 *In re Marriage of Lafkas, supra*, 237 Cal.App.4th at 926
33 *In re Marriage of Haines, supra*, 33 Cal.App.4th at 301
34 FC 850

UPCOMING CHAPTER PROGRAMS

Sacramento Chapter:

January 26, 2016

Ann Fallon, CFLS and Matt Taddei (life insurance expert)

Life Insurance

February 23, 2016

Beverly Brautigam, CPA

Divorce Taxation: Tips, Tricks and Traps

March 22, 2016

Emily Doskow, Esq.

Mindfulness in the Minefields

ALIMONY IS ALIMONY?

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One would assume that if a marital settlement agreement describes a payment from one former spouse to another as "alimony" or "spousal support," the payments would be taxable to the recipient and deductible by the payor. However, as discussed below, there are many instances where the designated payments may or may not comply with the Internal Revenue Service (IRS) definition/requirements for spousal support.

Basic IRS Requirements for Spousal Support/Alimony

Let's review the basics. Spousal support or alimony is generally, but not always, intended to be tax deductible by the paying spouse and included in income of the recipient spouse. Child support is not. Unallocated family support may be tax deductible by the paying spouse and included in the income of the recipient spouse even though a portion of the support is obviously for the children. Deductibility for family support follows the same rules as spousal support.

Under Internal Revenue Code § 71 and Regulation § 1-71-1T, any payment between spouses or former spouses will qualify as alimony or separate maintenance, if all of the following requirements are met:

1. The payments must be made in cash—not a debt instrument or property.
2. The payments must be made to or on behalf of a spouse or former spouse. The recipient spouse must approve the payment to be made on his or her behalf.
3. The payments must be made pursuant to a judgment of dissolution, legal separation, written agreement incident to dissolution, written separation/support agreement, or temporary support order.
4. The instrument does not state that the payments will not be taxable/deductible.
5. Except for temporary support orders, the parties must not be members of the same household when payment is made.
6. The duration of the payment obligation is limited by the recipient's death.
7. The payments may not be fixed as child support or subject to a contingency related to a minor child.
8. A joint return is not filed.

The IRS takes the position that if the payments meet these requirements, they will be treated as "alimony"; if they don't meet the requirements, they won't. These rules are intended to prevent the IRS from having to look beyond the support orders and agreements, something most taxpayers want. These rules seem pretty clear, don't they? Upon further examination, as detailed in the following sections, this is not always the case.

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Payment Must Be Made Pursuant to a Divorce Decree or Written Separation Agreement

Looking at Requirement #3, what constitutes a written support agreement? Contrary to popular belief, this does not have to be a court order. The parties can enter into a written agreement as long as the terms are clear and the recipient has signed or acknowledged the agreement in writing. However, a paying spouse's letter alone to the recipient spouse does not qualify as a *written agreement* for support, even though the recipient spouse accepted the payments specified in the letter.[1] Similarly, a draft unsigned marital settlement agreement does not constitute a valid support agreement since it was not a "meeting of the minds."[2] Finally, support payments made while a temporary order is being drafted also do not qualify as alimony.[3]

This particular requirement can be rather Draconian when it comes to voluntary payments during the pendency of the divorce proceedings. Unfortunately, the IRS has

consistently ruled against the paying spouses in these situations.[4] They always comment that while the voluntary payments are admirable, they are, nonetheless, not deductible. While high-earning spouses should be encouraged to do the right thing by offering support, it should be clear that they should either enter into a written agreement with their soon-to-be-ex-spouse, or pay a lower amount under the assumption it will not be deductible.

Also pertaining to Requirement #3, the term "made pursuant to" cannot be over-emphasized. The IRS has historically taken a hard-line position that, for the payments to be deductible, they must occur ***after*** the parties have entered into the agreement or court order.[5] The only exception is a nunc pro tunc order correcting an error in the original order.

The payments cannot be retroactively classified/designated as deductible spousal support, even by the court. In *Ali v. Commissioner*,[6] the IRS denied a deduction despite the family court retroactively deeming the payments as spousal support. This is an important case for family law attorneys and judges to read.

Liability for Payment Must Terminate Upon Death of the Recipient Spouse

Let's turn to Requirement #6—the liability for the payments must terminate at the death of the recipient spouse. This is one of the mechanisms that the IRS uses to prevent non-taxable property settlements from being disguised as deductible alimony.

If alimony terminates at the death of the recipient by operation of state law, the agreement or order may be silent on this requirement. California Family Code section 4337 automatically terminates *alimony* upon the death of the recipient. Relying on this rule, however, could create a circular argument. That being, if payments are alimony, they automatically terminate upon the recipient's death; but to meet the definition of alimony, the liability for the payment must terminate upon the recipient's death. To avoid any such possible debate with the IRS, the agreement should specifically state that the payments terminate at the recipient's death.

The *Crabtree*[7] case recently emphasized that the IRS will not engage in complex evaluations of state law in this area and emphasizes the need to include a clause that terminates support upon the death of the recipient.

Under the *Kean*[8] and *Berry*[9] cases, family support will automatically terminate upon the death of the recipient spouse if custody of the children automatically reverts to the paying spouse. However, it is still best to specifically state the payments pursuant to alimony and family support orders will terminate at the death of the recipient spouse to avoid potential problems with the IRS.

If the instrument requires continued payment after the payee's death, none of the payments are deductible—before or after the payee's death.[10] Furthermore, the recipient does not have to actually die to cause the support payments to be deemed non-deductible. A court ordered payment of attorney fees is generally not deductible spousal support because the fee order would remain even if the recipient died.[11]

The *LaPoint*[12] case involved a baseball player paying his former wife certain amounts and assigning his rights under an MLB arbitration claim. The agreement indicated the payments were to be used for his ex-wife's "support, maintenance and education," but also stated that the agreement was binding on the parties' heirs. Since the payments would have survived his ex-wife's death, the IRS ruled these were not alimony.

In the last few years, there have been some interesting and important rulings addressing when payments will not terminate upon the death of the recipient spouse and therefore will not be classified as alimony.

The first is *Rood v. Commissioner*,[13] which ruled that non-modifiable support as to duration does not qualify as deductible alimony since the payments would survive the recipient's death. Thus, while non-modifiable spousal support can still be negotiated, there must be an exception that the payments terminate upon the death of the recipient.

Most recently, the *Iglicki*[14] case is both interesting and somewhat unnerving. In *Iglicki,* the husband was ordered to pay child support under a Maryland marital settlement agreement. Under the terms of the agreement, if the husband defaulted on this obligation, he was immediately liable for additional spousal support payments which terminated in the event of his ex-wife's death. The husband defaulted on everything and his ex-wife filed suit in Colorado where he was then living. She filed a "verified entry of judgment" for all the arrearages including the spousal support arrearages.

The ex-husband made payments per the judgment and claimed a certain portion as alimony. The ex-wife also reported some of the payments as taxable alimony. Nonetheless, the IRS denied him the deduction for all of his payments arguing they do not terminate upon the ex-wife's death. Given that the payments were being made pursuant to a separate judgment (not the original marital settlement agreement), we can assume that there was no language terminating the payments in the event of the ex-wife's death. This would make sense and, had this been the end of the case, it would not be so notable.

Unfortunately, the Tax Court continued by adding a rather disturbing discussion that Colorado law treats payments of future spousal support differently than arrearages. Under Colorado law, future payments of spousal support would automatically terminate upon an ex-wife's death. However, an "order enforcing spousal support arrears" becomes a final money judgment and does not terminate upon the death of the recipient.

Why do we care? California law also makes the distinction between future and past due support. The death of the support recipient terminates the obligation to pay future spousal support, but does not extinguish any past due support.

Does this mean that any late payment of spousal support is no longer deductible? Are year-end reconciliations and payments of additional support no longer deductible? Does a late payment cause all of the support payments to be non-deductible? While these all may seem like ridiculous conclusions that could possibly affect many spousal support situations, this case raises these very questions. *Iglicki* may just be a poorly argued, isolated ruling … but we should all be aware of this case.

The final issue pertaining to Requirement #6 concerns substitute payments. If the agreement states that spousal support payments terminate on the recipient's death, but they are replaced with substitute payments, none of the original or substitute payments are deductible as alimony.[15]

Child Support

There are three ways payments will be considered child support.

1. Payments fixed or treated as child support in the instrument.
2. Contingency relating to a child. If payment is reduced on the happening of an event related to the child. Examples include the child reaching a certain age, attaining a specified level of income, death, marriage, graduation, leaving the household, or becoming employed.
3. Reduction associated with contingency relating to a child of the payor.
   a. If payments terminate within six months of a child turning eighteen, twenty-one, or local age of majority, they will be presumed to be child support.
   b. Multiple reduction rule. A reduction is "clearly associated" with a contingency relating to a child if payments are to be reduced on two or more occasions which occur not more than one year before or after a different child attains a certain age between eighteen and twenty-four, inclusive. This certain age must be the same for each child.

The contingency tests and child support presumptions outlined in #2 and #3, above, are rebuttable by either the IRS or a taxpayer by showing a different reason for the reduction. It should be noted that if the payor returns to court after a contingency related to a child occurs, the support payments could be reduced without triggering reclassification to child support. The contingency rules only apply to provisions built into an order ahead of time.

Attorneys must be creative and careful in drafting family support provisions to provide reductions that do not trigger any of the child support presumptions.

The following are a few relevant cases discussing deductible alimony versus non-deductible child support in cases involving un-allocated family support:

In *Baur v. Commissioner,*[16] the husband was ordered to pay his ex-wife monthly family support in the Marital Settlement Agreement (MSA). Unfortunately, the MSA contained a provision that decreased the family support payments when the child was emancipated. The rest of the language in the MSA supported deductibility for the family support including termination upon the ex-wife's death. After an IRS audit began, the husband obtained a revised order from the Family Court indicating the scheduled decrease was a "scrivener" error. The Tax Court rejected his argument ***and*** the Family Court's statement that the decrease was not intended to be part of the original agreement. The Tax Court pointed to the section of the agreement where the parties acknowledged that they understood all of the terms of the agreement. The husband lost and the amount of the scheduled decrease was reclassified as non-deductible child support.

Delong v. Commissioner[17] is a 2013 ruling in which the IRS argued that a family support award naturally contained child support and, therefore, fixes an amount related to the child. The Tax Court ruled that there was no specific amount "fixed" as child support and, further, no provision for a decrease upon a contingency related to a child described above. Fortunately, this appears to be an isolated case of the IRS trying to make this argument.

Excessive Front-Loading of Spousal Support ("Recapture")

"Recapture" is another mechanism the IRS uses to prevent otherwise non-taxable property settlements from being disguised as deductible alimony. Recapture requires the payor of support to report as ordinary income an amount equal to the "excess payments" in the third post-separation year. Recapture, if applicable, occurs in the third calendar year of a permanent support order and has nothing to do with when separation occurred.

The recapture rules apply only to the first three full-calendar years of spousal support payments. Any support award less than three years in duration will most likely trigger recapture. Spousal support buy-outs may still be made as deductible by spreading them over the three-year recapture period. After the third calendar year, the payments may be lowered without concern for the recapture rules.

Recapture does not apply if the recipient spouse dies or remarries within the first three years, but will apply if support terminates due to the recipient cohabitating. Even more harsh, if the support decreases due to the paying spouse's unemployment or decreased income during the first three years, recapture will still apply.

Recapture does not apply if payments are a percentage of income so long as the paying spouse has no control over the income and the percentage remains the same. This prevents *Ostler/Smith*[18] bonus or stock option payments from triggering recapture.

Recapture does not apply to temporary support orders, only to permanent awards pursuant to the divorce judgment.

The amount that must be recaptured in the third post-separation year is the sum of the excess payments made in the first post-separation year plus the excess payments made in the second post-separation year. If deductible payments in the first post-separation year exceed the

average of payments in the second and third years by more than $15,000, the excess over $15,000 is recaptured in the third year. If payments in the second year exceed payments in the third year by more than $15,000, the excess over $15,000 is recaptured in the third year.

An easier guide—there is no recapture if Year 2 is greater than Year 1 minus $7,500 and Year 3 is greater than Year 2 minus $15,000.

Because individuals report income and deductions according to the cash basis, recapture may cause problems for a paying spouse who is delinquent in his or her obligation. For example, if the payments are delayed in the first year, brought current in the second, and then back to normal in the third, the decrease between the second and third year may trigger recapture.

If recapture applies, the recipient will be entitled to a deduction from gross income in the third year. If the deduction exceeds the recipient spouse's third-year income (i.e., causes negative income), the excess deduction will be lost. There is no provision in the tax code indicating the recipient may carryover the excess deduction. Thus, recapture can be disappointing for both parties.

Summary

Deductible spousal or family support must meet the various requirements outlined in Internal Revenue Code § 71 and the associated regulations. Special attention to these rules is critical to both the paying spouse and the recipient. As the IRS will likely audit both parties in a support-related dispute, ambiguity in this area will not serve either party.

1 *Keegan v. Comm'r*, T.C.M. 1997-359.
2 *Milbourn v. Comm'r*, T.C. Summary Op. 2015-11.
3 *Faylor v. Comm'r*, T.C.M. 2013-143.
4 *Martin v. Comm'r*, T.C. Summary Op. 2013-31; *Larievy v. Comm'r*, T.C.M. 2012-247; *Rafferty v. U.S.*, 102 AFTR 2d 2008-5153.
5 *Larievy*, T.C.M. 2012-247; *Rafferty,* 102 AFTR 2d 2008-5153.
6 T.C.M. 2004-284. *See also Mercurio v. Comm'r*, T.C.M. 1995-312; *Larievy*, T.C.M. 2012-247.
7 *Crabtree v. Comm'r*, T.C.M. 2015-163.
8 *Kean v. Comm'r,* 407 F.3d 186 (3rd Cir. 2005).
9 *Berry v. Comm'r*, T.C.M. 2005-91.
10 Reg. § 1.71-1T , Q&A 10 & 11.
11 *Ribera v. Comm'r*, T.C.M. 1997-38 (*aff'd* 9th); *Hampers v. Comm'r*, T.C.M. 2015-27.
12 *LaPoint v. Comm'r*, T.C.M. 2012-107.
13 T.C.M. 2012-122.
14 *Iglicki v. Comm'r*, T.C.M. 2015-80.
15 Reg. § 1.71-1T, Q&A 13 & 14. *See also Okerson v. Comm'r*, 123 T.C. No. 14.
16 T.C.M. 2014-117.
17 T.C.M. 2013-70.
18 *In re Marriage of Ostler and Smith,* 223 Cal. App. 4th 114 (1990).

2015 LEGISLATIVE WRAP-UP

DIANNE M. FETZER, CFLS | LEGISLATIVE DIRECTOR | SACRAMENTO COUNTY | DIANNE@FETZERLAW.COM

The following is a summary of the first year for the 2015–2016 legislative term. These are some of the selected bills on which ACFLS has provided input to the California State Legislature and which have been chaptered into law. There are many other bills that were introduced, but never made it into law, some because we worked successfully to defeat them, and others that were not passed despite our efforts to support them. Unless specified directly below, these bills became law as of January 1, 2016.

1. The following bills have been Chaptered:

AB 139: Nonprobate transfers: revocable transfer upon death deeds. This bill amends sections 2337 and 2040 of the Family Code and some probate code sections. This legislation allows for a Transfer upon Death Deed under certain circumstances that allows a party to avoid probate and transfer real property to third parties; a provision was placed in the ATROs to protect the community property of the parties.

AB 365: Child custody proceedings: testimony by electronic means. This bill amends section 3012 of the Family Code and requires the court to allow a party, whose deportation or detention by the federal Department of Homeland Security materially affects his or her ability to appear in person at a child custody proceeding, to present testimony and evidence and participate in mandatory child custody mediation by electronic means, including telephone, video teleconferencing, or other means, to the extent that this technology is reasonably available to the court and protects the due process rights of all parties.

AB 380: Marriage: putative spouses. This bill amends section 2251 of the Family Code and requires the court, only upon request of a party who is declared a putative spouse, to divide the quasi-marital property that would have been community property or quasi-community property if the marriage was valid, as if it were community property. This bill was sponsored by the Conference of California Bar Associations (formerly the Conference of Delegates.)

AB 439: Protective orders: batterer's program. AB 439 requires restrained parties who are ordered to attend a batterer's program to 1) register for the program by a deadline date set by the court, but no later than thirty days from the date the restraining order is issued: and 2) upon enrollment into the program, sign all necessary consent forms for the program to release proof of enrollment, attendance records, and completion or termination reports to the court and the protected party or his or her attorney. Currently, victims of domestic violence do not have a way of monitoring the restrained party's enrollment and progress in a court ordered batterer's program. The intent of this legislation is to increase accountability, increase safety of protected parties, and improve the court's ability to make orders in the best interest of children. This bill was sponsored by Flexcom.

AB 494: Restraining orders: protection of animals. This bill relates to civil harassment cases and amends CA Code of Civil Procedure section 527.6, as well as certain sections in the Welfare and Institutions Code. AB 494 extends protections to companion animals of protected parties in restraining orders issued in juvenile dependency cases, civil harassment cases, and elder abuse cases. Animal abuse is often correlated with family violence. It has been found that many persons who abuse their family members and intimate partners also threaten, injure, or kill their victims' pets, as a very effective way to intensify the effects of their abusive

Ms. Fetzer is an Advisor to the Family Law Executive Committee for the State Bar of California, having served as its Secretary for several years. She is on the Sacramento County Judiciary Review Committee and a member of the Family Law Sections of the American Bar Association, the State Bar of California, and the Sacramento County Bar Association, and a member of the National Association of Counsel for Children, the Association of Family and Conciliation Courts, and the AFCC/ACFLS Families in Crisis Joint Task Force. She has acted in various capacities as a volunteer for non-profit community groups and has been a panelist and presenter for CEB, Minor's Counsel seminars, the University of the Pacific, and the McGeorge School of Law.

behavior. Previous to this legislation, pets were only protected in domestic violence restraining orders. This legislation brings all types of restraining orders in alignment with the protections provided by the Domestic Violence Prevention Act. This bill was sponsored by Flexcom.

AB 536: Mutual domestic violence. This bill amends section 6305 of the Family Code. AB 536 ensures that when the court is determining whether to issue mutual domestic violence restraining orders, each party must present his or her written evidence of abuse by using a mandatory restraining order application form. Prior to this legislation, the court would sometimes issue mutual domestic violence restraining orders based on a written request that contained a responsive declaration. AB 536 specifies that both parties must submit their written requests for domestic violence restraining orders using the mandatory Judicial Council restraining order application form. This bill was sponsored by Flexcom.

AB 610: Child support: suspension of support order. This bill repeals section 4007.5 of the Family Code (which sunset) and then adds it back to the Family Code in an amended format. This bill is emergency legislation introduced to extend the statute to 1/1/20 and makes other changes by repealing the old version of the code. By operation of law, as soon as the period of a payor's qualifying incarceration commences, support is set to zero. The bill specifies that the existing child support order goes back into effect on the first day of the first full month after release without limiting the obligor's right to file a motion to modify.

This applies to all child support cases not just DCSS cases as the prior 4007.5 statute did. A report is required by the Judicial Council by 2019 and the statute sunsets again in 2020. (The original statute was a pilot project that was supposed to have a report issued; nothing had been done and the statute was sunsetting.)

AB 960: Parentage: assisted reproduction. This bill amends sections 7613 and 7613.5 of the Family Code. This bill provides that the donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction is treated as if the donor were not the natural parent of the child, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child. In addition, it provides, if the semen is not provided to a licensed physician and surgeon or a licensed sperm bank, that the donor of semen for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if the donor were not the natural parent of the child, if either the donor and the woman agreed in a writing prior to conception that the donor would not be a parent, or a court finds by clear and convincing evidence that the child was conceived through assisted reproduction and that, prior to the conception of the child, the woman and the donor had an oral agreement that the donor would not be a parent. Further, the bill also provides that the donor of ova for use in assisted reproduction is treated as if she were not the natural parent of a child thereby conceived unless the court finds satisfactory evidence that the donor and the woman intended for the donor to be a parent. This bill also creates a new form for assisted reproduction that provides clarity regarding a person's intent to be a legal parent if he or she is using assisted reproduction that results in a child at the time of conception from a known sperm or ova donor. The bill also states that the use of this form, if signed prior to the conception of a child, is presumed to satisfy the writing requirement described above.

AB 1049: Parent & child relationship. This bill amends sections 7612, 7960, and 7961 of the Family Code. This bill states that a person's offer or refusal to sign a voluntary declaration of paternity may be considered as a factor, but shall not be determinative as to the issue of legal parentage in any proceedings regarding the establishment or termination of parental rights. In addition, this bill requires a nonattorney donor facilitator to direct his or her client to deposit client funds in an independent, bonded escrow account or a trust account maintained by an attorney, subject to specified withdrawal requirements, just as a nonattorney surrogacy facilitator is required to do. (This bill was sponsored by the Adoption committee.)

AB 1081: Protective orders. This bill amends sections 527.6, 527.8, and 527.85 of the Code of Civil Procedure, amends sections 242, 243, and 245 of the Family Code, and amends sections 213.5 and 15657.03 of the Welfare and Institutions Code. This bill permits either party to request a continuance of the hearing, as specified, which the court would be required to grant on a showing of good cause. Additionally, it permits the request to be made in writing before or at the hearing or orally at the hearing, and would additionally authorize the court to grant a continuance on its own motion. If the court grants a continuance, the bill requires that any temporary restraining order that had previously been granted remain in effect until the conclusion of the continued hearing, and authorizes the court to modify or terminate any temporary restraining order. Further, the bill modifies the requirements for notice to a respondent so that the respondent is warned that if he or she does not attend the hearing, the court may make orders against him or her that could last up to five years. Lastly, in a matter in which a civil harassment, workplace violence, or elder or dependent adult abuse temporary restraining order or order after hearing prohibiting harassment or abuse is sought, the bill provides that the respondent is entitled, as a matter of course, to one continuance for a reasonable period to respond to the petition.

AB 1407: Family law, protective orders: wireless telephone numbers. This bill adds section 6347 to the Family Code. Commencing July 1, 2016, this bill authorizes a court, after notice and a hearing, to issue

an order directing a wireless telephone service provider to transfer the billing responsibility and rights of a wireless telephone number or numbers to a requesting party. The bill also requires that order to be a separate order directed to the wireless telephone service provider that lists the name and billing telephone number of the accountholder, the name and contact information of the person to whom the number or numbers will be transferred, and each number to be transferred to that person. Upon transfer of billing responsibility for and rights to a wireless telephone number or numbers, the requesting party is to assume all financial responsibility for the transferred wireless telephone number or numbers, monthly service costs, and costs for any mobile device associated with the wireless telephone number or numbers. This new statute would not affect the ability of the court to apportion the assets and debts of the parties as provided for in law, or the ability to determine the temporary use, possession, and control of personal property, as specified. A cause of action against a wireless telephone service provider, its officers, employees, or agents, for actions taken in accordance with the terms of the court order is prohibited. This bill requires the Judicial Council to, on or before July 1, 2016, develop any forms or rules necessary to effectuate these provisions.

AB 1519: Family support. This bill amends section 2104(f) of the Family Code. Currently, parties to a marital dissolution or legal separation are required to exchange certain financial information early in the process, known as Preliminary Declarations of Disclosure. Family Code section 2014(f) requires the Preliminary Declaration of Disclosure in dissolution cases to be served within 60 days of filing of the Petition of Dissolution or the Response. This bill adds legal separations to the disclosure time frames of 2014(f). (This bill was sponsored by Flexcom.)

SB 28: Spousal support, domestic violence. This bill adds to Family Code section 4320 a provision that includes any nolo contendere plea included within the documented evidence of domestic violence to be considered by the court when determining an award of spousal support.

SB 340: Dissolution, disclosure. This bill amends section 2110 of the Family Code. This bill creates a narrow exception to the service for dissolution and legal separation declarations of disclosure when a petition was served by posting or publication and the respondent defaulted. SB 340 creates a privacy protection measure that allows courts to protect parties in divorce cases from having to spend time and resources and send highly confidential and personal financial information out when it is clear that the intended recipient is no longer at the last known address and will never see them. (This bill was sponsored by Flexcom.)

SB 594: Child custody. This bill amends section 3111 of the Family Code. This bill specifies that a child custody evaluation, investigation, or assessment, and any resulting report, may only be considered by the court if the evaluation, investigation, or assessment, and any resulting report, is conducted in accordance with the minimum requirements. Specifically, the new statute states:

> A child custody evaluation, investigation, or assessment, and any resulting report, may be considered by the court only if it is conducted in accordance with the requirements set forth in the standards adopted by the Judicial Council pursuant to Section 3117; however, this does not preclude the consideration of a child custody evaluation report that contains nonsubstantive or inconsequential errors or both.

SB 646: Uniform Interstate Family Support Act. This bill amends various provisions of the Family Code relating to support. This bill reflects a mandate of the federal government to adopt the most current (2008) amended language of UIFSA into California statute. This bill brings California into compliance with the requirements of the federal government.

2. Proposed Legislation:

A. Discovery Act legislation: A Sonoma County committee has drafted proposed legislation under the guidance of Commissioner Louise Bayles-Fightmaster that encompasses all family law discovery. This proposed legislation is being sent out for public comment prior to placement.

B. Anti-*Davis* legislation: The following are versions of the Anti-*Davis* legislation on which various organizations have had input and ACFLS submitted for the stakeholders' meeting on November 12, 2015 for discussion; we also discussed the issue of retroactivity as well as other topics:

1. Version 1:

Family Code section 771

(a) The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse. Except as set forth in Sections 3104 and 6922 of the Family Code, "living separate and apart" requires: (1) that either spouse express his or her intent to end the marriage to the other spouse, and (2) objective evidence of conduct consistent with that spouse's intent to end the marriage. It is not required that the spouses live in separate households when determining if they are "living separate and apart", although their physical separation is a factor to be considered in the totality of the circumstances which indicate that a complete and final breakdown of the marriage has occurred.

(b) Notwithstanding subdivision (a), the earnings and accumulations of an unemancipated minor child related to the contract of a type described in Section 6750 shall remain the sole legal property of the minor child.

2. Version 2:

Family Code Section 771: (a) The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, who is living separate from the other spouse, are the separate property of the spouse. To be living separately requires: (1) that either spouse express his or her intent to end the marriage to the other, and (2) objective evidence of conduct consistent with that spouse's intent to end the marriage, considering the totality of the circumstances which indicate that a complete and final breakdown of the marriage has occurred. It is not required that the spouses live in separate households, although their physical separation is a factor to be considered in determining whether the parties are living separately.

(b) Notwithstanding subdivision (a), the earnings and accumulations of an unemancipated minor child related to the contract of a type described in Section 6750 shall remain the sole legal property of the minor child.

3. Version 3:

Family Code section 131 will be added to the Code:

"Date of Separation" is the date that the spouses begin to live separately or apart by establishing both of the following mandatory conditions: (1) that either spouse express his or her intent to end the marriage to the other, and (2) objective evidence of conduct consistent with that spouse's intent to end the marriage, considering the totality of the circumstances which indicate that a complete and final breakdown of the marriage has occurred. It is not required that the spouses live in separate households, although their physical separation is a factor to be considered in determining the date of separation.

Family Code section 771 will be amended with the following language:

After the date of separation each spouse's respective earnings and accumulations are their separate property.

Other Family Code sections:

Possibly amend other statutes to remove "living separate and apart" or "living separately" to replace with date of separation.

HOLDER OF THE HOPE

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Throughout the life of this column I see how much I, we, have grappled with the questions—what is it that we do? How can we do a good job? How do we even know when we do a good job? Lately, I have been considering a new answer to that question and that is that we can be the holder of the hope for our clients that they will find a way out of their conflict. All of our clients come to us in some sort of distress and look to us for solutions. They believe that we can help them and so do we, don't we?

Have you ever encountered a problem that you believe is entirely unresolvable and then somehow it is resolved? If you think about such a situation there is always someone or something who believed it could be resolved. Sometimes we find the hope in a person, or a deity or some other spiritual force, or maybe we believe in a lucky pen or astrology. But somewhere in the story of every problem is a believer that there is a resolution. We know this because if there were no hope for a resolution, we would likely not try to solve a problem at all.

Some post-modern psychological theorists have created a whole body of work focused on narrative theory. Narrative theory asserts that the stories we tell ourselves and each other are powerful. In the most simplistic terms possible, the theory asserts that if we tell ourselves a story of failure, we are likely to fail and if we tell ourselves a story of success we are more likely to succeed.[1]

We as family lawyers hear a lot of stories and tell even more. We explain our version or our client's version of events to decision-makers, other attorneys, mediators, our clients, and ourselves. We take a position and argue for our perspective. In every conversation we have the ability to turn a story of failure into a story of success and we have the opportunity to define success. We can define success as helping to create a post-separation, binuclear family in which all of the family members thrive. We can also define success in the way our clients might define what they say they want in their most despairing moments: "I get everything, he gets nothing, the children know how awful she is, and he is sorry for the way he treated me."

We have an incredible opportunity as holders of the hope to help our clients identify and create constructive and positive stories, such as:

> There is a peaceful, cost-effective resolution to their conflict and we will find it;
>
> The kids are going to be okay and, in fact, thrive;
>
> Our clients are going to financially and emotionally recover;
>
> Our clients are going to be able to find new, fulfilling, romantic relationships;
>
> Our clients are going to figure out how to co-parent successfully.

To be a holder of the hope, we have to believe it. Do we? Can we, after everything we have seen as family lawyers and adults in the world? This is the thing that it hardest for me because I see myself as not a particularly optimistic person and I have seen a lot of suffering families who do not change. Of course, that is the story that I tell myself which we know from narrative theory can also change. So let me try to apply narrative theory to this belief of mine. It is true, I have seen a lot of families in perpetual conflict; however, I have also seen a lot of families in conflict who were able to find their way out. In creating my narrative, I could focus on the families that have not changed or the families that have been able to change. We have all seen people who seemed to hate each other so much but come to a resolution and make hard decisions for the benefit of the whole family. Many of my clients at some point tell me that they are never going to have another relationship, never mind get married, and the vast majority of time they do recover and send me holiday cards or want a prenuptial agreement. There are also people who actually pay off what they owe to me and people I see years later who tell me about their child being in college and thriving, and even those who have told me my work with them made a positive difference.

Heidi Tuffias has been a Certified Family Law Specialist since 1995. She practices in West Los Angeles. Ms. Tuffias focuses her practice on all aspects of family law–related collaborative dispute resolution and settlement-oriented representation of clients, including mediation, consulting attorney, collaborative attorney and pre- and post-nuptial agreements. You can learn more about her practice at www.familylawsolutions.com.

I still must insist on holding on to the treasured parts of my cynical self and know that not every family is going to find its way out of destructive conflict, but also I can sincerely believe that it is possible for members of every family to find a way to resolve their conflict and make the lives they want for themselves. I can help them resolve that conflict and I can be the holder of that hope for them, while they are finding their way, until they can hold it for themselves. My hope is that no client with whom I interact misses the opportunity to achieve their goals and write the story that they want for themselves because there was no one to hold the hope.

1 K. Young & S. Cooper, *Toward Co-Composing an Evidence Base: The Narrative Therapy Revisiting Project*, J. OF SYSTEMIC THERAPIES, vol. 27, no. 1, at 67–83 (2008).

HOT OFF THE PRESS!
JOURNAL EDITION

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Editor's Note:
The holdings from various cases are below. Dawn Gray's extensive summaries of those cases, too lengthy to publish in the Journal, are on the ACFLS website on the ACFLS Family Law Specialist Current Newsletters page. The full text of her short summaries of other cases of interest is also provided below and on the website.

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.

***In re Marriage of Siegel,* 191 Cal. Rptr. 3d 330 (2015)**, decided by the First District on July 28, 2015, ordered published on August 21, 2015.

Holding: In this case, published at the request of ACFLS, the First District reversed a trial court that "construed" a motion to disclose insurance information pursuant to a provision in the parties' marital termination agreement as a motion to enforce the MTA, a remedy that W had not requested in her motion. It held that the trial court's order "far exceeded the relief requested" in the motion and thus denied H due process.

***In re Marriage of Brandes*, 192 Cal. Rptr. 3d 1 (2015).**

Holding: In this case, also published at the request of ACFLS, the Fourth District affirmed in part and reversed in part a trial court's judgment that equitably apportioned Charles's interest in Brandes Investment Partners ("BIP") between the community and Charles's separate estate. It held that the trial court properly applied a "hybrid" *Pereira/Van Camp* apportionment method, correctly determined that the community did not own most or all of the interest in BIP and properly denied Linda prejudgment interest on her share of the community interest in BIP. It reversed the trial court's holding that shares in BIP that Charles purchased during marriage were his separate property, finding that he had failed to rebut the community property presumption that applied to the proceeds of loans obtained during marriage. It also affirmed the trial court's order that Charles pay Linda $450,000 per month in spousal support, disagreeing with Charles that she could provide for her proper support from her share of the community estate.

***In re Marriage of Walker,* No. G050448, 2015 WL 5693299 (Cal. Ct. App. Sept. 28, 2015).**

Holding: In this case, the Fourth District reversed a trial court that divided the proceeds from the sale of the family residence between the parties unequally based on W's argument that she should not be responsible for payment of one of the loans secured by the residence because she had been discharged in a Chapter 7 bankruptcy proceeding. Holding that the liens survived the BK discharge and that the lien in question was discharged by payment in full out of escrow, the panel held that "(u)nder state law, the parties were entitled to equal shares of the proceeds" and that "(t)his result is consistent with bankruptcy law."

Other cases of interest:

***Michaels v. Turk,* 191 Cal. Rptr. 3d 669 (2015):** In this case, the second appellate opinion in this matter, the Fourth District reversed a Riverside County trial court's DVPA TRO issued against a pro per defendant, holding that she did not consent to having a commissioner hear the matter. It held:

> there is no indication in the record that defendant consented to the commissioner presiding over the hearing on plaintiff's request for a restraining order. Plaintiff argues that defendant impliedly consented to the commissioner presiding over the restraining order hearing. He asserts that it is common practice for courts to post notices, which state that where parties do not object, they will be deemed to have stipulated to the authority of the commissioner. He also asserts that it is the defendant's burden to establish such signs were not posted on the day of the hearing, and that

she failed to carry this burden because she relied "only [on] the written record."

Plaintiff's argument was rejected in Frye, where the court held that a stipulation, even one that is constructive in the sense of parties proceeding with actual notice of a posted sign, must be apparent on the record. (Frye, supra, 150 Cal. App.3d at p. 409.) Because there was "no . . . indication in the record" that the appellant had seen a stipulation sign before or during the hearing over which the commissioner presided, the court held that the commissioner's order was void. (Ibid.) That is also the case here. Whether or not stipulation signs were posted in or outside of the courtroom the day of the hearing, there is no indication in the record that defendant saw them. While there are circumstances where consent may be implied from the actions of a party or her counsel, those actions must be apparent from the record. (See e.g., In re Horton (1991) 54 Cal.3d 82, 91-93 [discussing cases where the "doctrine of tantamount stipulation" was applied based on statements or conduct apparent in the record].)

Moreover, Riverside County's local rule on stipulations to commissioners hearing matters as temporary judges further precludes plaintiff's argument for implied consent. That rule states that while stipulation is implied in default and uncontested matters and "when attorneys proceed without objection," self-represented parties "will be asked on the record if they so stipulate." (Super. Ct. Riverside County, Local Rules, rule 5145.) Defendant was representing herself at the hearing, and there is no indication in the record that she was asked to stipulate to the commissioner hearing the matter.

***In re M.M.*, No. D067870, 2015 WL 5634506 (Cal. Ct. App., Sept. 25, 2015):** In this dependency case, the Fourth District affirmed a trial court that deemed the minor's home state (Japan) to have declined to exercise UCCJEA jurisdiction on the grounds that California was the more appropriate forum after the Japanese court declined to discuss the case with a California court. It held that the trial court was not required to inform M that she could commence custody proceeding in Japan before determining that Japan declined to exercise jurisdiction. Also,

viewing the evidence in the light most favorable to the juvenile court's findings, we conclude there is ample evidence in the record to support the juvenile court's finding there was a substantial risk minor will suffer serious physical harm "inflicted nonaccidently" by mother and/or father. Indeed, the record shows that minor not only was present during the December 2 domestic violence incident between mother and father, but that he was "at their feet" during most of the incident and that during some of the incident, father was actually holding minor while mother was hitting father and while father was choking mother.

***In re Emma B.*, No. D067634, 2015 WL 5703693 (Cal. Ct. App. Sept. 29, 2015):** In this dependency case, the Fourth District affirmed a trial court that refused to order paternity testing for a presumed father who did not contest the facts that made him a presumed father. It held that:

(w)e disagree that a biological paternity determination is an essential or relevant issue in the current proceeding, and noted that Michael does not argue that his conduct did not support a finding of presumed father status. He only challenges the trial court's denial of his motion for genetic testing. In the context of a dependency hearing to determine presumed parentage of a child, where the court has identified a presumed father based on marital status and conduct, the issue of biology is not a relevant fact and the presumed father is not entitled to a genetic test. We emphasize that this opinion is limited to the factual situation presented and we do not comment on Michael's future status in other proceedings (e.g. support).

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"Secrets of Effective Attorney's Fees Requests" – *Hon. Alice Vilardi (3/9/15) 1 Hour*

How to Protect Life Insurance – *R. Ann Fallon, CFLS (4/14/15) 1 Hour*

2015 Speakers Series: "The Anatomy of a Family Law Trial" Part One - "May It Please the Court..." Discovery, Pre-Trial Motions, Opening Statement – *Judge Thomas Trent Lewis Stephen Kolodny, Esq., Thomas Stabile, Esq. (4/27/15) 2 Hours*

"Cognitive Bias in Custody Mediations and Evaluations" – *Philip M. Stahl, PhD, ABPP (4/28/15) 1 Hour*

"What to Do When the Child Resists Contact With a Parent: Alternatives to Screaming 'Alienation!'" – *Hon. Marjorie A. Slabach, Ret. and Dr. Robert Kaufman, Ph.D, ABPP (5/12/15) 1.25 Hour*

"How to Deal With the Frustrations of a High Conflict Family Law Practice" – *Frank Dougherty, Ph.D., CFLS (5/26/15) 1 Hour*

"Smoke & Mirrors" - Cash Flow Games People Play – *Ron Granberg, CFLS; John Harding, CFLS, and Mark Luttrell, CPA/ABV/CFF (6/9/15) 1 hour*

2015 Speaker Series: "The Anatomy of a Family Law Trial" Part Two - "Tender the Expert" Direct Cross Examination of Expert Witnesses – *Commissioner David Weinberg; Philip Seastrom, Esq. and Steven Briggs, Esq. (6/29/15) 2 Hours*

"Prosecuting and Defending Contempt The Litigators' Viewpoints."– *Tracy Duell-Cazes, CFLS and Fredrick S. (Rick) Cohen, CFLS (8/25/15) 1 Hour*

"Attorney at Work: How to Best Use a Mental Health Professional" – *Private Judge Lorie Nachlis and Dr. S. Margaret Lee, Ph.D. (9/8/15) 1 Hour*

2015 Speaker Series: "The Anatomy of a Family Law Trial" Part Three - "Call your First Witness ..." Examination of Party & Percipient Witnesses – *Judge Mark Millard and Eleanor Stegmeier, Esq. (9/21/15) 2 Hours*

Statement of Decisions: Nuts and Bolts of Drafting The Request and Proposals as to Content." – *Kimball Sargeant, CALS (9/22/15) 1 Hour*

RECENT SPRING SEMINARS

22nd Annual Spring Seminar 3/21/2014 – 3/23/2014 "Truth or Consequences… The Intricacies of Fiduciary Duties"

Why I Love Fiduciary Duties and Why You Should Love Them, Too –*Dawn Gray, CFLS*

Managing Your Own Client's Compliance with Fiduciary Obligations – *Stephen J. Wagner, CFLS; Edward J. Thomas, CFLS*

Here, There, But Not Everywhere: Unique Problems Involving Fiduciary Duties – *Stephen Temko, CALS, CFLS; Sandra Joan Morris, CFLS*

How Do You Induce the Opposing Party to Comply? – *Sharon L. Kalemkiarian, CFLS; Sharon A. Blanchet, CFLS*

Balancing Business Interests and Fiduciary Duties – *Peter M. Walzer, CFLS; Hon. Mark A. Juhas*

Litigating a Fiduciary Duty Claim – *Stephen J. Wagner, CFLS; Robert E. Blevans, CFLS*

Ask the Judges – the Last Word on "The Intricacies of Fiduciary Duties" – *Hon. Dianna Gould-Saltman; Hon. Thomas Trent Lewis; Hon. Robert A. Schnider (Ret.); Hon. Marjorie A. Slabach (Ret.); Moderator: Garrett C. Dailey, CFLS*

23rd Annual Spring Seminar 3/20/2015 – 3/22/2015 "Submitted: Mastering Rulings, Orders & Judgments"

Orders and Judgments: The Lawyer's Role – *Robert C. Brandt, CFLS, Ronald S. Granberg, CFLS, and John D. Hodson, CFLS*

How to Avoid Embarrassment When Making Pendente Lite Requests – *Hon. John Chemeleski and Hon. Alice Vilardi*

Statements of Decision: The Appellate Point of View – *Justice Dennis Cornell*

Judgments and Marital Settlement Agreements: It All Comes Down to This – *Hon. Erick Larsh, Barbara K. Hammers, CFLS, and Sherry Peterson, CFLS*

Orders Across Borders – *Leslie Ellen Shear, CALS, CFLS, IAML, and California Deputy A.G. Elaine F. Tumonis*

Thoughtful Challenges to Adverse Rulings, Orders and Judgments in the Trial Court – *Stephen Temko, CALS, CFLS, and Hon. Patti Ratekin*

Ask the Judges: The Last Word on "Mastering Rulings, Orders & Judgments" – *Hon. Dianna Gould-Saltman, Hon. Thomas Trent Lewis, Hon. Mark S. Millard, Hon. Marjorie A. Slabach, Ret., and Judge Dennis Cornell (3/22/15) 1.5 Hour*

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