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July 26, 2016

Hon. Tani Gorre Cantil-Sakauye, Chief Justice, and
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Depublication Request for *In Re the Marriage of Cooper*
Court of Appeal, Third Appellate District (C073014)

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Supreme Court:

The Association of Certified Family Law Specialists requests that the Supreme Court depublish the opinion of the Court of Appeal, Third Appellate District, in *In re Marriage of Cooper* (C073014, ordered published May 27, 2016). The opinion deviates materially from long established precedent and creates great confusion and uncertainty. The opinion creates an untenable split between the intermediate appellate courts that will strain the resources for family courts and family law litigants because the uncertainty creates an incentive to litigate those cases. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 requires the trial judge in each case to decide which opinion is better-reasoned.

Statement of Interest

The Association of Certified Family Law Specialists (ACFLS) is a nonprofit, statewide bar association with approximately 632 members certified by the State Bar of California, Board of Legal Specialization, as family law specialists. Since its founding at the inception of the certification of family law specialists by the State Bar, ACFLS has played an active public policy role when the Appellate Courts, Legislature and Judicial

Council consider matters of significance to family courts, family court populations or the family law bar. ACFLS has appeared as amicus in many family law appellate cases, including cases where the organization's participation was invited by the appellate court. ACFLS has also filed amicus briefs in several cases. Attached for the Court's reference is an article written by Leslie Shear, Co-Chair of the ACFLS Amicus Committee, listing our amicus briefs.

ACFLS has an active amicus committee that reviews cases and makes recommendations to the Executive Committee and Board of Directors regarding letters in support of publication or depublication of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs. The within depublication request is being made after a unanimous vote of the amicus committee and approval of the Board.

ACFLS has no direct ties to or interest in the litigants in *Cooper*.

Summary of Reasons Requesting Depublication.

ACFLS concurs with the positions raised in the letters previously provided to this Court in support of depublication:

- A. Letter dated 6/8/16 from Andrew Stein.
- B. Letter dated 7/16/16 by the Family Law Litigators
- C. Letter dated 6/23/16 from Robert Marmor.

- 1) The opinion disregards the law regarding transmutions; transmutions must satisfy Family Code section 852 before the presumption of Family Code section 2581 applies. Under *Cooper*, separate property funds were transmuted by virtue of a presumption without any of the formalities required by Family Code section 852(a). *Cooper* failed to recognize transmutation concepts and leading transmutation opinions. *In re Marriage of Lafkas II* (2015) 237 Cal.App.4th 921; *In re Marriage of Bonvino* (2015) 241 Cal.App.4th 1411; *In re Marriage of Valli* (2014) 58 Cal.4th 1396; *In re Marriage of Benson* (2005) 36 Cal.4th 1096; *Estate of MacDonald* (1990) 51 Cal.3d 262.
- 2) Probate Code section 5305 expressly permits tracing notwithstanding contrary language in Family Code sections 2581 and 2640. Given that it is settled law that the more specific statute controls over a more general one, the Third Appellate District should have applied Probate Code section 5305 and based its decision thereon. Recently, in *In re Marriage of Brandes* (2015) 239 Cal.App.4th 1461, tracing was

permitted to determine the character of funds in a joint account used to acquire stock in husband's company.

The Opinion Does Not Meet the Standards for Certification (Publication) and The Opinion Fails to Correctly Apply Existing and Well-Settled Law.

The opinion disregards the law regarding transmutations pursuant to Family Code section 852 and tracing pursuant to Probate Code section 5305. This opinion meets none of the standards for certification as set forth in 2016 California Rules of Court, rule 8.1105(c). As it is wrongly decided, publication of this case would create inconsistency in the law and unreliability as to the expectations of parties as to the characterization of their property and the allocation of their interests.

Conclusion.

Leaving *Cooper* intact as a published decision will be extremely costly for family law litigants and result in trials that clog already overstrained family law courtrooms. It will also cause confusion and deprive litigants of uniformity and consistency with the treatment of a spouses' interest in property as it fails to correctly apply existing and well-settled law regarding transmutations and tracing. ACFLS urges the Court to depublish the opinion.

Sincerely,



Debra S. Frank, CFLS
Member, ACFLS Amicus Committee

ACFLS : AN INFLUENTIAL “FAMILY” FRIEND OF THE APPELLATE COURTS

Leslie Ellen Shear, CFLS, CALS, IAML

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Co-chair ACFLS Amicus Committee

ACFLS’s amicus work is one of the most powerful ways that our organization and members contribute to the development of family law in California. While our amicus briefs on impact cases (see sidebar) are the most visible, ACFLS acts as a friend-of-the-court in other ways, including publication and depublication requests, and letters in support of California Supreme Court review.

Appellate justices and staff attorneys have to be generalists. Few were family law practitioners. ACFLS plays an important role in educating appellate courts about the evolution of California family law and the impact of possible holdings on family courts and the families they serve. The appellate courts show that they value ACFLS’s participation by almost always granting our publication requests, and by occasionally requesting amicus briefing on significant pending cases, as they did in *Elkins v. Sup. Court*.

ACFLS is not constrained in the same ways that counsel for the parties are. When ACFLS appears as amicus, we do so as a neutral voice, not an advocate for a litigant. We are free to discuss the issues from multiple angles without worrying if an approach is good for a client litigant. ACFLS has argued for family law fairness, for policies promoting the welfare of children in custody cases, and has weighed in on same-sex parentage, adoption and marriage - the central civil rights issue of our era.

Steve Temko, CFLS, CALS, AAML and I co-chair the committee. Each of us is dual-certified by the Board of Legal Specialization in family law and appellate law. We have a strong committee of ACFLS members who work actively with us almost every week. ACFLS members interested in joining the committee should contact President Jill Barr.

The Amicus committee depends upon members and others to alert us about pending appeals on important family law issues, significant petitions for review to the California Supreme Court, and recent unpublished family law decisions by the intermediate appellate courts. If you are aware of an appellate case that might be a good candidate for an amicus brief or letter, please email me at lescfls@me.com and Steve at estemko@aol.com. Please note that the time frames for amicus action are very brief, so we appreciate early alerts. The committee prefers to read the court documents only, and prefers not to receive “lobbying” from counsel or parties about these matters. Committee members often recuse themselves where they have represented the litigants in the matter before us.

The committee sometimes works with other *amici* including but not limited to the two California AAML chapters, the Los Angeles County Bar Family Law Section, and the California Domestic Violence Appellate Project.

This year ACFLS has been particularly successfully in seeking publication of important unpublished family law cases, including *Marriage of Metzger*, *Marriage of Winternitz*, *Altafulla v. Ervin*, *Marriage of Honer*, *Marriage of Siegel*, and *Marriage of Brandes*. Only published opinions are citable authority in California (Cal. Rules of Court, rule 8.1105), so we are on the lookout for important decisions that meet the publication criteria of Cal. Rules of Court, rule 8.1105.

The amicus committee meets via email to review and discuss amicus requests. Ideally, requests for amicus briefs and letters supporting or opposing Supreme Court review should come to us when the opening brief, writ petition, or petition for review) and the respondent’s brief or answer are available for us to consider. We appreciate receiving any replies as soon as they are filed. We circulate these to the entire committee for discussion. Usually one committee member will volunteer to take a closer look and report to the committee as a whole.

There is only a 20-day window between the issuance of an unpublished appellate decision and the deadline for requesting publication.

We sometimes get asked at the last minute to join in seeking publication of a case. Usually it simply is not possible to do so.

The amicus committee reviews and votes upon amicus requests, and then makes recommendations to the President and the Executive Committee. The Executive Committee then makes a recommendation to the Board of Directors. Since the Board only meets every few months, it often is necessary to poll the Board by email for approval. With approval, the matter returns to the committee for drafting and editing of a brief or letter.

Working on ACFLS's amicus projects is one of the most rewarding parts of my career and the source of many memories. I particularly remember going to observe oral argument in *Marriage of Buzzanca*. I was sitting in the audience as an observer (neither prepared nor dressed for an appearance). I had asked my husband to drive as I had been up late the night before working on some deadline or other. A television crew was filming the proceedings for a network news magazine. One of the justices asked a question of the appellate lawyer representing the minor child. He responded, "I think Ms. Shear is a better person to address that," and suddenly I was doing oral argument, on camera. I must have said something sensible because my remarks at oral argument got cited in the opinion. When the matter was submitted, a member of the television crew turned the camera on me and asked me to state and spell my name. The adrenaline had been used up, and I was unable to spell my own name.

FAMILY PRIDE: ACFLS' AMICUS BRIEFS

In re Marriage of Buzzanca (1998) 61 Cal.App.4th 1410
In re Marriage of Kelso (1998) 67 Cal.App.4th 374
Lammers v. Superior Court (2000) 83 Cal.App.4th 1309
In re Marriage of Harris (2001) 92 Cal.App.4th 499 and
In re Marriage of Harris (2004) 34 Cal.4th 210
Montenegro v. Diaz (2001) 26 Cal.4th 249
In re Marriage of Scheppers (2001) 86 Cal.App.4th 646
In re Marriage of LaMusga (2005) 32 Cal.4th 1072
K.M. v. E.G. (2005) 37 Cal.4th 13
Elisa B. v. Superior Court (2005) 37 Cal.4th 108
Kristine H. v. Lisa R. (2005) 37 Cal.4th 156
Elkins v. Superior Court (2007) 41 Cal.4th 1337
Strauss v. Horton (2009) 46 Cal.4th 364
In re Marriage of Margulis (2011) 198 Cal.App.4th 277
Rand v. Board of Psychology (2012) 206 Cal.App.4th 565
Hollingsworth v. Perry (2013) 133 S.Ct. 2652
In re Marriage of Valli (2014) 58 Cal.4th 1396

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a citizen of the United States and a resident of the county aforesaid. I am over the age of eighteen years and not a party to the within action; my business address is 1875 Century Park East, Suite 700, Los Angeles, California 90067.

On July 26, 2016 I served the foregoing document described as:

**Letter dated July 26, 2016
on behalf of the Association of Certified Family Law Specialists
to the Supreme Court of California
requesting Depublication of In Re Marriage of Cooper**

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and caused same to be deposited in the United States mail at Los Angeles, California, addressed as follows:

Third District Court of Appeal
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

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I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date; or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 26, 2016, at Los Angeles, California.



DEBRA S. FRANK