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REPLY TO:

Stephen D. Hamilton, CFLS  
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February 2, 2017

Honorable Conrad L. Rushing, Administrative Presiding Justice  
Sixth District Court of Appeal  
333 West Santa Clara Street, Suite 1060  
San Jose, CA 95113  
[via electronic filing]

RE: *In re the Marriage of M.K. and K.K.*, H042619, filed 1/23/17

Dear Justice Rushing:

The Association of Certified Family Law Specialists (ACFLS) requests publication of this Court's opinion in *In re the Marriage of M.K. and K.K.* This request is made pursuant to Cal. Rules of Court, rules 8.1105 and 8.1120.

The ACFLS Amicus Committee reviews appellate opinions for possible requests to publish, depublish or to seek review. For this case, three members of the Amicus Committee (Garrett Dailey, Leslie Shear and Stephen Temko) did not participate in the process based on their involvement in *M.K. and K.K.* However the remainder of the Amicus Committee unanimously supported publication, which request was then approved by the full ACFLS Board of Directors.

## DISCUSSION

### 1. The Opinion Explains an Existing Rule of Law [CRC 8.1105(c)(3)]

One of the most difficult evidentiary issues faced by family law practitioners in custody and visitation matters is addressing the mental health of the parties. The difficulty arises in the inherent conflict between maintaining a party's privacy rights versus obtaining as much information as possible to assist the trial court in determining what custodial orders are in the best interests of the children.

*M.K. and K.K.* explains and applies existing law from non-family law matters to this issue and articulates a clear standard that will benefit all family law practitioners:

If a party allows their spouse to share and receive confidential information from the party's psychiatrist in order to promote and advance the care being received, the privilege provided by Evid. Code §1014 is not waived.

This finding expands upon existing family law. While Evid. Code §1014 was discussed in *Simek v. Superior Court* (1981) 117 Cal. App. 3d 169, *Simek* dealt with the patient-litigant exception and not with a waiver by disclosure of the confidential communications to the other party.

## **2. The Opinion Addresses an Apparent Conflict in the Law [CRC 8.1105(c)(5)]**

*M.K. and K.K.* also addresses a distinction between mental health and medical records and therefore addresses an apparent conflict with the decision in *Manela v. Superior Court* (2009) 177 Cal. App. 4<sup>th</sup> 1139. As the opinion in *M.K. and K.K.* notes:

But [Petitioner's] reliance on the physician-patient privilege is weakened by the legislative and judicial recognition that the protections offered by the psychotherapist-patient privilege apply more broadly than those accorded patients by the physician-patient privilege. (See Legislative Committee Com. to § 1014 [this privilege "provides much broader protection than the physician-patient privilege"]; see also *In re Lifschutz*, supra, 2 Cal.3d at p. 439 [recognizing greater degree of confidentiality legally provided for psychotherapy than for other medical treatment].)

Publication of the opinion in *M.K. and K.K.* would therefore clarify what could otherwise be viewed as an apparent conflict in the law.

## **3. The Opinion Involves a Legal Issue of Continuing Public Interest [CRC 8.1105(c)(6)]**

In addition to its contributions to the legal issues concerning privacy in one's psychiatric records, *M.K. and K.K.* also involves another significant legal issue: how to protect such information when it is in possession of an adverse party. The opinion in *M.K. and K.K.* endorsed the resolution adopted by the trial court: issuance of a gag order. Specifically, the trial court ordered the appellant "not to disseminate confidential information related to the psychotherapeutic treatment of her former husband." In the digital age, with litigants having the

ability to publish confidential information regarding the other party on social media, a published opinion allowing for the imposition of a “gag” order to prevent such publication would serve the public interest in protecting and maintaining the privacy rights conferred by Evid. Code §1014.

### CONCLUSION

Given the sensitive issues raised in the case, ACFLS is mindful of the privacy concerns of the parties. Notwithstanding the statement under Rule 8.1105(d) that the “potential embarrassment of a litigant ... should not affect the determination of whether to publish an opinion...”, ACFLS believes the opinion should be published. As recently modified, the parties are identified by initials only, as permitted under Cal. Rules of Court, rule 8.90(b)(10).

ACFLS is a nonprofit, statewide bar association with approximately 679 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 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 depublishation of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs.

The ACFLS Board of Directors and Amicus Committee members involved in this request have no direct ties to or interest in the litigants or their attorneys in this matter. As stated above, the three members who have connections to this case were excluded from all discussions regarding this request as well as from the preparation of this letter.

Sincerely,

*Stephen D. Hamilton*

Stephen D. Hamilton, CFLS  
Member, ACFLS Amicus Committee

cc: Seth Kramer, President, ACFLS

**PROOF OF SERVICE BY MAIL & ELECTRONIC MAIL**

I am a resident of the County of San Luis Obispo; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1277 Grand Avenue, Suite A, Arroyo Grande, CA 93420.

On February 2, 2017, I served the within **REQUEST FOR PUBLICATION, ACFLS** on the interested parties in said action, by electronic mail and by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Arroyo Grande, California, addressed as follows:

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury that the foregoing is true and correct. Executed February 2, 2017, at Arroyo Grande, California.



Kaylee Kubiak

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