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REPLY TO:

Leslie Ellen Shear, CFLS, CALS, IAML
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March 19, 2015

Hon. James A. McIntyre, Associate Justice
Hon. Patricia D. Benke, Associate Justice
Hon. Gilbert Nares, Associate Justice
California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101
(via electronic transmission)

Re: *In re the Marriage of Winternitz* (D065131)

Dear Justices:

California's Association of Certified Family Law Specialists (ACFLS) requests publication of this Court's opinion in *In re the Marriage of Winternitz* (D065131) under Cal. Rules of Court, rule 8.1120.

Just as there are no perfect trials, there are no perfect child custody evaluations. In most cases, evidence of deviations from best practices should go to the weight and sufficiency of the report and testimony, not to the admissibility. But *Winternitz* would be the first published case to affirm a trial court that admitted and weighed the child custody evaluation report and testimony together with the rest of the evidence presented. Most flaws in the procedures are not fatal – the Court does not consider the fact-finding and analysis of the evaluator in a vacuum. The parties present additional evidence, authority and argument that help shape the judge's consideration of the evaluation and the underlying case.

California has no published opinions addressing when flaws in a child custody evaluation go to the weight and sufficiency of the evaluator's report and testimony rather than to admissibility. Publication of the *Winternitz* decision will prevent the issue from being relitigated in California trial courts without guidance from the Court of Appeal. Challenges to the admissibility of child custody evaluation reports and testimony often cause delay in resolution of time-urgent issues affecting children, great expense for the adult litigants (often including the cost and delay of re-evaluation), and strain the limited resources of family law courtrooms.

It is important for judges, lawyers and litigants to know that while the most egregious errors by custody evaluators call for exclusion of the evaluation evidence, most errors are addressed in the Court's consideration of the weight and sufficiency of the evaluation. Publication will promote wiser decisionmaking about which errors or omissions cause true prejudice to the litigants, and which can be considered with other evidence without "throwing the baby out with the bathwater." Consequently, the holding meets the publication criteria of rule 8.1105(c).

The case resolves an issue of first impression, and promotes the effective and just operation of child custody proceedings in California's family courts. *Winternitz* provides important guidance to judges and lawyers about child custody evaluations in California's family courts that will prove especially valuable in courtrooms with judges who are newly assigned to the family law bench.

The Association of Certified Family Law Specialists (ACFLS) is a nonprofit, statewide bar association with 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.



Fourth District Court of Appeal, Division One
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ACFLS has no direct ties to or interest in the litigants in the *Winternitz* case. E. Stephen Temko recused himself from all consideration of this case because he represents one of the parties. ACFLS's interest is to promote the welfare of children whose lives and care are governed by orders of California Family Courts.

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 de-publication of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs.

ACFLS members represent family law litigants, many of whom are parents. Some of our members have also served as court-appointed minors' counsel in California family courts.

Sincerely,

A handwritten signature in blue ink that reads 'Leslie Ellen Shear'.

Leslie Ellen Shear, CFLS, CALS, IAML
Co-Chair, ACFLS Amicus Committee

(see accompanying proof of service by mail)

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 (ii) Address: **1620 Fifth Ave Ste 800
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- (i) Name: **Kim Marie Robinson** *Attorney for Appellant*
 (ii) Address: **2938 Adeline St
Oakland CA 94608**

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CASE NAME: **Winternitz v. Winternitz**CASE NUMBER: **D065131**

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Date: **March 19, 2015**

G.H. Magruder

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