

Family Law Monthly

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Volume 2009 • Issue No. 11

Effect of Death on Proceeding

HIGHLIGHTS

ATTORNEY'S FEES

- British Orders for Payment of Wife's Attorney's Fees Are Unenforceable Under Uniform Foreign Money-Judgments Recognition Act (see Page 386)

CHILD CUSTODY

- Court Erred by Extending Comity to Greek Court's Decision Denying Father's Hague Convention Petition (see Page 390)

FAMILY LAW COURTS

- Diana Richmond discusses the Elkins Task Force Recommendation that children's voices be heard, in *Point of View* (see Page 385)

MARRIAGE

- Daughter Lacks Standing to Seek Annulment of Decedent's Allegedly Fraudulent Confidential Marriage (see Page 398)

PROCEDURE IN GENERAL

- Court Erred by Quashing Wife's Subpoena for Husband's Nonprivileged Medical Records (see Page 405)

A complete table of contents appears on the next page.

How to Perfect and Prosecute a Breach of Fiduciary Duty Claim Against the Estate of a Deceased Spouse

*By Larry L. Hines, Esq.**

Envision the scenario where a family law practitioner is representing a wife in the midst of an intense marital dissolution action. The husband has management of many complex businesses and the practitioner has asserted major breach of fiduciary duty claims on behalf of this client. The husband suddenly dies. The divorce action comes to an abrupt end and the client is now sitting at the practitioner's desk and asks "So what do we do now?" The answer to this question is the subject to this article.

Unfortunately, the Family and Probate Code statutes that govern this area do not lay out a clear path to follow and the risk of making a mistake is high. Family Code Section 1101(d)(2) provides that an action may be commenced upon the death of a spouse. But, apart from this brief statement, the Family Code remains silent on the process. So, to properly advise the client on what to do, the practitioner either must go to the library and, with a shaky hand, open the dreaded "Probate Code" or immediately put the client in the hands of a knowledgeable probate litigation practitioner (emphasis on the word "litigation practitioner" as compared to a probate practitioner who is more familiar with run of the mill creditor claims). But even here, a family law practitioner cannot just assume that since the divorce has ended, he plays no further role. Quite to the contrary, a family law practitioner should either be capable of pursuing the breach of

continued on page 380

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COVER STORY

How to Perfect and Prosecute a Breach of Fiduciary Duty Claim Against the Estate of a Deceased Spouse—By Larry L. Hines, Esq.) 379

POINT OF VIEW

Children’s Voices, From the Elkins Task Force—By Diana Richmond, Esq. 385

ATTORNEY’S FEES

Orders
British Orders for Payment of Wife’s Attorney’s Fees Are Unenforceable Under Uniform Foreign Money-Judgments Recognition Act—*In re Marriage of Lyustiger* (Civ. No. C057861; Ct. App., 3d Dist. 9/29/09) 386

CHILD CUSTODY

Abduction
Court Erred by Extending Comity to Greek Court’s Decision Denying Father’s Hague Convention Petition—*Asvesta v. Petroustas* (Civ. No. 08-15365; U.S. Ct. App., 9th Cir. 9/4/09) 390

CHILD SUPPORT

Support Guidelines
Briefly Noted—*In re Marriage of Knowles* (Civ. No. C057851; Ct. App., 3d Dist. 10/6/09) 396

JUVENILE COURTS

Indian Child Welfare Act
Briefly Noted—*In re Damian C.* (Civ. No. D054918; Ct. App., 4th Dist., Div. 1. filed 9/17/09; ord. pub. 10/8/09) 397
Reunification
Briefly Noted—*S. T. v. Superior Court* (Civ. No. B216686; Ct. App., 2d Dist., Div. 1. filed 8/28/09; ord. pub. 9/18/09) 397

MARRIAGE

Annulment
Daughter Lacks Standing to Seek Annulment of Decedent’s Allegedly Fraudulent Confidential Marriage—*Pryor v. Pryor* (Civ. No. B207398; Ct. App., 2d Dist., Div. 4. 9/29/09) 398
Legal Effects
Briefly Noted—*Estate of Pryor* (Civ. No. B207402; Ct. App., 2d Dist., Div. 4. 9/29/09) 403

PARENTAGE ISSUES

Presumptions
Briefly Noted—*In re J. O.* (Civ. No. B211535; Ct. App., 2d Dist., Div. 4. filed 9/9/09; ord. pub. 10/7/09) 404

PROCEDURE IN GENERAL

Discovery
Court Erred by Quashing Wife’s Subpoena for Husband’s Nonprivileged Medical Records—*Manela v. Superior*

Court (Civ. No. B214447; Ct. App., 2d Dist., Div. 3. 9/22/09) 405

SPOUSAL SUPPORT

Effect of Bankruptcy
Briefly Noted—*Sternberg v. Johnston* (Civ. Nos. 07-16870, 08-15721; U.S. Ct. App., 9th Cir. 10/1/09) 410

TAXATION

Filing Status
Husband Living Apart From Wife Must File as Married Absent Legal Separation—*Argyle (Von H.) v. Commissioner* (Civ. No. 6820-08; U.S. Tax Ct. 9/17/09) 411
Spousal Support
Court Allocates Payments of Combined Child and Spousal Support Arrearages First to Nondeductible Child Support—*Heydt (David and Jennifer) v. Commissioner* (Civ. No. 13093-08S; U.S. Tax Ct. 9/24/09) 412

SUBJECT INDEX 413

TABLE OF CASES 414

Cross-references are made in this publication to
**CALIFORNIA FAMILY LAW
PRACTICE AND PROCEDURE, 2nd ed. (7 vols.),
CALIFORNIA FAMILY LAW TRIAL GUIDE
(5 vols.), and
CALIFORNIA JUVENILE COURTS:
PRACTICE AND PROCEDURE (1 vol.)**
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continued from page 379

fiduciary duty claims against the deceased spouse’s estate or, at a minimum, educate the probate litigation practitioner. Why? Because, in most instances, it will be the family law practitioner who knows and understands the breach of fiduciary duty rules and must therefore be the one to educate the probate litigation practitioner. Accordingly, the principles discussed in this article will apply equally to family law practitioners as well as probate and trust estate litigation practitioners. The failure to properly understand what constitutes a breach of fiduciary duty and how it can be perfected and prosecuted after the death of a spouse can have serious financial consequences to a client and, if mistakes are made, can lead to claims of professional negligence.

Because the statutory law in this area is not well defined, the short answer for the client is that, once an estate has been opened, both a Probate Code Section 850 petition as well as a creditor’s claim should be

filed. If the deceased spouse had transferred assets to a trust, it also may be necessary to open a separate trust estate because those assets would be reachable to pay any money award against the estate if the probate assets themselves are not sufficient [*see* Prob. Code § 19001]. To understand why both a Section 850 petition and a creditor's claim should be filed requires an understanding of what constitutes a viable breach of fiduciary duty and the nature of the remedies available for a breach.

What Constitutes a Breach of Fiduciary Duty Claim?

The purpose of this article is not to suggest specific types of breach of fiduciary duty claims, but rather to alert practitioners to what they must know, understand and investigate as soon as they begin representing a client in a dissolution action and, as in the scenario above, following the death of a spouse.

The California Legislature has set forth the rules governing a breach of fiduciary duty in Family Code Sections 721, 1100, 1101 and 2102. The family law and probate practitioners should carefully study this statutory scheme because there are very few cases in the area. Family Code Section 721, as amended by the Legislature in 1991, sets forth in relevant part the fundamental fiduciary duty between spouses:

“(b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. *This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, . . .*” [Emphasis added.]

The statute clearly imposes a duty of the *highest good faith and fair dealing on each spouse*. No other

fiduciary duty exceeds this level. This has been described as a higher duty than simply a duty of good faith, which was the language of the prior statute. It requires a spouse to act with the “utmost good faith” [In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1437–38]. The statute continues by providing that the confidential relationship is a fiduciary relationship subject to the same rights and duties of non-marital business partners as provided in Corporations Code Sections 16403 (Access to Records), 16404 (Duty of Loyalty) and 16503 (Transfer of Partnership Interest). Finally, the statute makes it clear that the fiduciary duty includes those enumerated in the Corporations Code, *but it is not limited by them*.

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The core question for the family or probate practitioner is whether a spouse's conduct constitutes a breach of fiduciary duty. The answer to this question depends upon a careful analysis of the spouse's conduct to determine whether the extraordinary high standards set forth in Family Code Section 721 have been breached. The two key questions are: (1) Was a spouse's conduct consistent with the highest duty of good faith and fair dealing? and (2) Was your client's interest in the community estate impaired, or would it be impaired, by the other spouse's conduct?

The heart and soul of what constitutes a breach of fiduciary duty is found in Family Code Section 1101(a). This section says that a spouse has a claim against the other spouse for any breach of fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, whether it is a single transaction or a pattern or series of transactions.

Knowing what remedies are available for a breach of fiduciary duty is the most critical part of the analysis because it is the nature of the remedy that requires the use of both a Section 850 petition and a creditor's claim.

What Remedies Are Available For a Breach of Fiduciary Duty Claim?

Family Code Section 1101(g) specifies that the remedies for breach of a fiduciary duty "shall include, but not be limited to" an award to the other spouse of 50 percent or an amount equal to the value of 50 percent of any asset "undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs." The statute also provides that the value of the asset should be determined to be its highest value, which could be the date of the breach, the date of the sale or disposition of the asset, or the date of the award by the court. If the breach also constitutes fraud under Civil Code Section 3294, the court can then award 100 percent of the asset or an amount equal to the value of 100 percent of the asset. [Fam. Code § 1101(h)]

It is arguable that Code of Civil Procedure Section 377.42 could limit damages. This section permits damages against an estate which could have recovered had the decedent lived, except for Section 3294 damages and "other punitive or exemplary

damages." But Family Code Section 1101 specifically authorizes an action against an estate and should control, and would in any event allow damages up to 50 percent of the value plus interest. Thus, the family court has virtually unlimited discretion to formulate a remedy for a breach of fiduciary duty.

The important point here is that while Family Code Section 1101 gives the court the discretion to award to the aggrieved spouse one-half of any undisclosed or wasted asset, or even 100 percent of an asset under Section 1101(h) if the breach falls in the area of fraud as defined in Civil Code Section 3294, in the vast majority of cases the issue does not involve an undisclosed asset, but rather the squandering of funds in circumstances that would constitute a breach of fiduciary duty. This would include, for instance, spending money on a girlfriend, making a gift to a third person without a spouse's consent [*see* Fam. Code § 1100(b)], selling or encumbering real property without both spouses' consent [*see* Fam. Code § 1102(a)], or other transfer or wasting of community funds or assets under circumstances that would constitute a breach. Accordingly, in these instances, practitioners must understand that the only remedy available in the family court or later probate court is to *award money damages equal to 50 percent or more of the value of the wasted or lost asset*, plus attorney's fees and court costs, because the wasted funds or assets no longer exist. This is a critically important point to remember because it dictates how a client's rights are to be protected after death of a spouse.

With this overview of the breach of fiduciary duty rules in mind, this article will now address what must happen upon the death of a spouse to perfect and prosecute a claim against the deceased spouse's estate.

How Do You Perfect and Prosecute Breach of Fiduciary Duty Claims Against the Estate of a Deceased Spouse?

The first step in perfecting a claim is to determine the proper procedure. Family law and probate practitioners are familiar with the Probate Code Section 850 petition because it is frequently used, after a spouse's death, as a way for the surviving spouse to obtain his or her share of the community assets from the decedent's estate. Using a Probate Code Section 850 petition is typically an easier and less expensive

approach than filing a separate civil action for declaratory relief.

But, when only money damages can be sought as a remedy, a Section 850 petition cannot be used. Probate Code Section 850 is found within Part 19 of Division 2 of the Probate Code, the title to which reads: “Conveyance or Transfer of Property Claimed to Belong to Decedent or Other Person.” Consistent with this title, the only part of Probate Code Section 850 relevant to a community property claim is subsection (a)(2)(C), which allows a petition when real or personal property is held by others:

“(C) Where the decedent died *in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another.*” {Emphasis added.}

This section is specifically designed for, and in fact is limited to, an *action* to reach out and bring back to its rightful owner the possession of real or personal property. For example, in a divorce action where one spouse dies, Section 850 permits the surviving spouse to file a petition in the estate seeking a transfer of his or her 50 percent interest in the community assets. *This section applies because the property exists and is in the possession of the estate.*

The prerequisite to using Section 850 is that *someone still must possess real or personal property that can be recovered.* Accordingly, Probate Code Section 856 provides that “if the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the personal representative . . . to execute a conveyance or transfer to the person entitled thereto . . .” Again, a prerequisite is that someone holds personal or real property [see *Estate of Sayles* (1982) 130 Cal. App. 3d 275, 279–280].

Similarly, Probate Code Section 855 also relates to the existence of personal or real property and simply provides that *if an action can be brought under Part 19*, which relates only to a conveyance or transfer of real or personal property, then “*to the extent that the matters are related factually to the subject matter of a petition,*” related claims can be included in the petition. There is no case law interpreting Section 855, but if read in context with the other statutes that make up Part 19, it is clear that a person *must first be*

entitled to file an action “under this part,” and the only basis applicable to the estate of a deceased spouse is Section 850(a)(2)(C), where the decedent died “in possession of, or holding title to, real or personal property.”

This *clear condition* to the use of a Section 850 Petition fails in the case of a breach of fiduciary duty claim when there no longer exists any of the wasted real or personal property that led to the breach. The only remedy that a spouse has in that circumstance is to ask the court for an award of money damages, plus attorney’s fees and court costs.

When the remedy sought is not an interest in property, but is instead money damages, what must the attorney do? The statutory scheme set forth in the Probate Code requires a creditor claim to be filed on behalf of the surviving spouse. Probate Code Section 9000(1) defines a claim to include money damages that arise because of the liability of a decedent whether in contract, tort, “or otherwise.” Probate Code Section 9002(a) requires that all claims be filed in the manner provided “in this part”; also, *Probate Code Section 9100(a) requires that a creditor claim be filed within four months after the date Letters are issued or 60 days after the date of Notice of Administration is mailed or personally delivered to the creditor.* When Probate Code Sections 9000(1) and 9100(a) apply, the time limitation in Probate Code Section 9100(a) also controls, and all other general statutes of limitation—specifically, the one-year statute of limitations found in Code of Civil Procedure Section 366.2—no longer apply.

The reason why Probate Code Section 9100 trumps the more general Code of Civil Procedure Section 366.2 is that Probate Code Section 1000 states that regular civil action rules apply only if the Probate Code does *not* have its own rule. Probate Code Section 1000 says in part:

“Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice in, proceedings under this code.”

Also, the legislative note to Code of Civil Procedure Section 366.2 reflects that Probate Code Section 9100 controls. It says, in part:

“Under these procedures, a creditor’s claim may be extinguished before expiration of the one-year limitations period by failure to file a claim. Prob. Code §§ 9002 (probate), 19004 (trust). Conversely, filing of a claim tolls the one-year limitations period. Prob. Code §§ 9352 (probate), 19253 (trust). [23 Cal.L.Rev.Comm. Reports 901 (1993) (Annual Report, App.5)]”

Herein lies the heart of the problem in how and when to perfect and prosecute a breach of fiduciary duty claim against a decedent spouse’s estate. *While a Section 850 petition may be filed within one year from when letters are issued, the lawyer must file a creditor claim within the critical four-month period.* The claim also must be specific and must set forth each separate breach of fiduciary duty. Although Probate Code Section 9104(b) does permit a claim to be amended later to quantify the amount of damages and to put in more specificity as to the breach of fiduciary duty claims, the original claim *cannot* be amended to add new and different claims or to enlarge the amount involved.

It should now be evident that the Probate Code does not give practitioners a clear path to follow in perfecting a breach of fiduciary claim. If the entirety of Part 19 of Division 2 is not analyzed carefully, a practitioner could easily see the language in Probate Code Section 855 (which says that related claims can be included in the petition) and conclude that a money award under Family Code Section 1101 could be included. The mere fact that we have to reason our way through Probate Code Section 850 et. seq. and Sections 9000, 9002, and 9100 to reach an answer is exactly why a practitioner should always play it safe and file both a Section 850 petition and a creditor claim.

And as a final word of caution, there are other time line pitfalls. Prior to a spouse’s death, Family Code Section 1101(d)(1) requires that an action for breach of fiduciary duty be commenced by an aggrieved spouse within three years of the date that the spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred. Accordingly, a family law practitioner must determine early on whether there is conduct that

constitutes a breach of fiduciary duty and make sure that any claim is filed within this three-year limitation. This can have the effect of placing a heavy burden on the practitioner because he or she must become intimately familiar with the history of the marriage, especially as to finances, very early on in the representation of a client.

Also, if assets have been transferred by the decedent into a trust and no estate has been opened, Code of Civil Procedure Section 366.2 still runs after one year. In order to stop the statute from running, an estate must be opened by the surviving spouse by using a special administrator. Once the estate is opened, a creditor claim can be filed which will toll the statute until the claim is resolved.

After a spouse’s death, Probate Code Section 9353(a)(1) requires that once a claim has been rejected, a civil suit must be filed within 90 days. Once the practitioner has perfected the client’s claim, the civil suit will then determine the merits. Although the civil suit is a new action, it is related to the probate proceeding and should accordingly be assigned back to the Probate Court for trial. At trial, the probate judge puts on his “family law hat” and decides if there has been a breach, and if so, what is the proper remedy. It is arguable that because the Probate Court has unlimited discretion, it could make an unequal division of community assets to be the remedy. In this instance, the use of a Section 850 Petition could be required.

Is winding your way through the ambiguities of the Probate Code worth the effort? The answer is yes, if the practitioner has carefully investigated the facts of each alleged breach, both as to the evidence and the importance. Not every breach is worth pursuing, but those with merit are, because part of the remedy, which is mandatory, is an award of attorney’s fees.

POINT OF VIEW

*Diana Richmond, Esq.**

Children's Voices, From the Elkins Task Force

The Elkins Family Law Task Force has completed its initial assignment and issued Draft Recommendations with an invitation to comment between October 1 and December 4, 2009. The Recommendations are thorough and wide-reaching, and all caring family law attorneys should take the opportunity to review and comment on them. Many are ambitious and will depend on financial resources not likely available at this time; others are common-sense rule changes that can be readily implemented. The Task Force Recommendations in general enhance due process, access to the court system for unrepresented parties, and protection of the interests of children.

Only one area represents to me a sea change from how family law courts have generally operated to date: Children's Voices. In the San Francisco Bay Area for the last twenty years or more, the custom and practice has been to shield children as much as possible from direct contact with courts (including rules forbidding parents from bringing children to court); and children's voices have been heard generally only through the reports of child custody evaluators or, more rarely, through minor's counsel. (My experience may or may not accurately represent practices throughout the rest of California.) According to the Task Force, studies recognize the

importance of hearing from children in matters affecting their lives, and find that children do better when they are aware of the process and how decisions will be made. The Task Force wants their voices to be heard.

The Task Force recommends that children be given the opportunity to meet with the mediator or evaluator when their participation seems warranted. In balancing the involvement of the child while protecting him or her from feeling caught in the middle or experiencing other trauma, the court should weigh on a case-by-case basis its statutory duty to consider the child's wishes and the probative value of meaningful input from the child. The Task Force recommends the court consider: (a) whether it would benefit the court to question the child; (b) whether it would benefit the child to be questioned by the judicial officer; (c) whether there are drawbacks to questioning the child; and (d) whether a given child should testify at all or, if so, whether in open court or in chambers. If the child's testimony is to be taken, the court should weigh the need to take testimony in open court with parents and attorneys present, or to create an environment in which the child can be open, such as a closed hearing with only attorneys present, or in chambers without attorneys or parents. In cases involving abuse and neglect, the court should consider whether the child's point of view and information the child has would be probative in determining the risk to the child of testifying.

The Task Force recommends adoption of additional factors in the decision whether to appoint minor's counsel. Minor's counsel's role is defined as representing "the best interests of the child," as distinguished from representing what the child desires. Minor's counsel should not make recommendations or file a report, testify, or otherwise present anything other than proper pleadings, consistent with his or her role as an attorney (rather than as a substitute evaluator). If a child wishes his or her desire to be expressed to the court, minor's counsel would be mandated to convey the child's desire to the court. Judicial officers should be required to take a class on the appropriate use of minor's counsel. The Administrative Office of the Courts should collect data on cases in which minor's counsel has participated, to determine and evaluate consequences of children's greater involvement in family law proceedings.

* Ms. Richmond is a Certified Family Law Specialist practicing in San Francisco (Law Offices of Sideman & Bancroft, LLP.). She is a Fellow of the American Academy of Matrimonial Lawyers and is the former chair of the State Bar Family Law Section. Ms. Richmond has served as an editorial consultant to the CAL. FAM. LAW MONTHLY since 1984 and is an editorial consultant for Kirkland, Lurvey, Richmond & Wagner, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed. (Matthew Bender).

Statutory definitions of child custody and visitation would be reframed in terms of “parenting time.” This recommendation revisits prior similar initiatives, mirroring the reframing used in other states and countries to emphasize responsibility for the child rather than “ownership” (my word, not that of the Task Force). This change is to be one of nomenclature only, not of substantive law.

Not all of these recommendations are ground-changing, but the emphasis on child participation is a significant shift.

The scope of the Recommendations is too broad for me to comment meaningfully on all of them in this column. I personally see much wisdom and great thoughtfulness in the Recommendations as a whole. I focus on just one section as an inducement for each of you to read this significant report, form your own opinions, and submit your own response. The Task Force renders responses simple by providing a form at the end of its report. To access the Draft Recommendations, go to www.courtinfo.ca.gov/jc/tflists/elkins.htm.

ATTORNEY'S FEES

Orders

British Orders for Payment of Wife's Attorney's Fees Are Unenforceable Under Uniform Foreign Money-Judgments Recognition Act

In re Marriage of Lyustiger

(Civ. No. C057861; Ct. App., 3d Dist. 9/29/09)
— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1594

By Nicholson, J. (Sims, Acting P.J., Butz, J., concurring)

The court of appeal held that a trial court erred by enforcing two British domestic relations court orders for payment of attorney's fees, which were in the nature of "support" and therefore beyond the scope of the Uniform Foreign Money-

Judgments Recognition Act (UFMJRA—Code Civ. Proc. § 1713 et seq.)

Facts and Procedure. A husband (Nikolai) and wife (Natalija) were both born in Russia. Nikolai relocated to the United States, and became a U.S. citizen; Natalija relocated to Germany, and became a German citizen. The spouses met in England, the United States. In February 2003, Natalija gave birth to a daughter (Lillian) in California.

Nikolai and Natalija then relocated to Russia. In February 2005, Natalija relocated by herself to England to resume her legal training. The spouses had apparently initiated divorce proceedings in Russia; and in May, a Russian court issued a divorce decree. Then, in August, Natalija filed a petition for divorce in the High Court of Justice (High Court or British court) in London. Nikolai responded that the High Court lacked jurisdiction, because the marriage had already been dissolved. Nevertheless, the High Court issued two orders requiring Nikolai to pay 50,000 British pounds for Natalija's attorney's fees. Nikolai refused to pay. Eventually, the High Court stayed the divorce proceedings pending Nikolai's payment of the attorney's fees, because Natalija lacked the funds to go forward.

Specifically, the first British court order, issued in November 2005, provided that “[Nikolai] shall pay to the wife . . . the sum of [27,500 British pounds] by way of *interim maintenance* . . .” [Emphasis added.] The order further stated that (1) 25,000 British pounds were to be applied “towards [Natalija's] legal fees, such monies to be held by her solicitors exclusively for the purpose of funding her legal fees and any balance [as of a certain date] is to be accounted for . . .”; and that (2) 2,500 British pounds were to be applied “for [Natalija's] general maintenance.”

A second order similarly provided for Nikolai to pay “interim maintenance” of 30,000 British pounds, with 25,000 British pounds allocated to “legal fees”, and 5,000 British pounds allocated to “general maintenance”. Both orders were made pursuant to the British Matrimonial Causes Act of 1973, which states: “On a petition for divorce . . ., the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, . . . as the court thinks reasonable.”

In February 2006, Natalija asked a California trial court to enforce the portions of the British orders that awarded attorney's fees, for a total of 50,000 British pounds. The trial court ruled that the orders were enforceable under the Uniform Foreign Money-Judgments Recognition Act (UFMJRA—Code Civ. Proc. § 1713 et seq.), and ordered Nikolai to pay Natalija the U.S. dollar equivalent of 50,000 British pounds. Nikolai appealed.

Overview of Applicable Statutes. The appellate court reversed. It explained that in 1967 California adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA—former Code Civ. Proc. §§ 1713–1713.8); and in 2007 California adopted an amended version (UFMJRA—Code Civ. Proc. §§ 1713–1724). Because the amended UFMJRA applies only to actions initiated after its effective date of January 1, 2008, the original UFMJRA governed the present case. However, the amended UFMJRA clarifies that “[it] does not apply to a foreign-country judgment . . . to the extent that the judgment is . . . a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations” [see Uniform Foreign-Country Money Judgments Recognition Act of 2005, § 3(b)(3)].

For purposes of the present case, the appellate court continued, there are four relevant UFMJRA provisions. First, a foreign judgment is enforceable “in the same manner as the judgment of a sister state” [see former Code Civ. Proc. § 1713.3]. Second, a “foreign judgment” is defined as any foreign state judgment that grants or denies recovery of a sum of money, “*other than* . . . a judgment for support in matrimonial or family matters” [see former Code Civ. Proc. § 1713.1(2) (emphasis added)]. Third, the UFMJRA “applies to any foreign judgment that is final and conclusive . . .” [see former Code Civ. Proc. § 1713.2]. And fourth, a foreign judgment “need not be recognized if . . . [t]he judgment conflicts with another final and conclusive judgment . . . [or] . . . [t]he proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court . . .” [see former Code Civ. Proc. § 1713.4(b)(4),(b)(5)].

Inapplicability of UFMJRA to Domestic Relations Orders. The appellate court then concluded

that the UFMJRA was, by its own terms, inapplicable to enforcement of the two British orders, because they were for “support” in the context of family law. As a result, the trial court lacked authority to enforce the orders.

The two British orders, the appellate court noted, were made pursuant to the British Matrimonial Causes Act of 1973, § 22, which does *not* expressly provide for an award of attorney's fees. However, under British case law, a British court may award attorney's fees as a matter of *maintenance* of a spouse, because attorney's fees are a legitimate consideration in setting the amount of money that a receiving spouse will need during the pendency of a marital dissolution proceeding. In the British legal system, there is nothing that treats attorney's fees separately from support: instead, attorney's fees are awarded as part of support. Here, the British court's two orders for Natalija's “interim maintenance” included attorney's fees awards totalling 50,000 British pounds.

The appellate court reasoned that the British court's broad interpretation of “support” was consistent with the use of the word “support” by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which issued the original UFMJRA in 1962 and amended it in 2005. As originally issued, the UFMJRA stated that “foreign judgment” means any judgment of a foreign state that grants or denies the recovery of a sum of money “*other than* . . . a judgment for support in matrimonial or family matters” [see former Code Civ. Proc. § 1713.1(2) (emphasis added)]. As amended, the UFMJRA clarifies that it does *not* apply to a foreign-country judgment for divorce, support, or maintenance, or other domestic relations judgment [see Uniform Foreign-Country Money Judgments Recognition Act of 2005, § 3(b)(3)].

Particularly, the appellate court noted, when the NCCUSL amended the UFMJRA, it stated that: “The domestic relations exclusion has been redrafted to make it clear that all judgments in domestic relations matters are excluded from the Act, not just judgments ‘for support’ as provided in the 1962 Act. This is consistent with interpretation of the 1962 Act by the courts, which extended the ‘support’ exclusion in the 1962 Act beyond its

literal wording to exclude other money judgments in connection with domestic matters” [quoting from National Conference of Commissioners on Uniform State Laws, Uniform Foreign-Country Money Judgments Recognition Act (2005), p. 6].

California’s Broad Definition of “Support”. Moreover, the appellate court pointed out, the NCCUSL’s broad definition of “support” is consistent with California law. Although attorney’s fees are usually adjudicated separately from support, the term “support” is broadly defined [citing *In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 429, 31 Cal. Rptr. 2d 313; see Fam. Code § 2030].

The *Benjamins* court, the appellate court explained, stated that the term “support” is “broadly defined as a source or means of living; subsistence, sustenance, or living.” Thus, “the term includes all such means of living as would enable one to live in the degree of comfort suitable and becoming to his station of life.” The *Benjamins* court further stated that the term “maintenance” likewise involves “expansive concepts of means to cover numerous types of living expenses, including health care: [t]he furnishing by one person to another, for his support, of the means of living, or food, clothing, shelter, etc., particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child, or husband and wife . . .” [quoting from *Benjamins*].

Similarly, the appellate court observed, legal expenses are properly included in the broad definition of “support”. Legal expenses may become necessary when a spouse is involved in litigation to end a marriage, and those expenses detract from the spouse’s ability to cover other expenses.

Application of Law to Present Case. Therefore, the appellate court reasoned, “[b]ecause (1) ‘support’ is a broadly defined term in California, (2) the NCCUSL intended that ‘support’ in the [UFMJRA] be broadly defined to include all orders in domestic relations cases, and (3) the British order awarded attorney[’s] fees as part of [Natalija’s] ‘maintenance’, which is essentially the same as ‘support’ for the purpose of interpreting California law and the [UFMJRA],” the award of attorney’s fees in the two British court orders constituted “support” under the UFMJRA. As a result, the trial court erred by

enforcing the orders for attorney’s fees under the UFMJRA, which does *not* apply to support orders [see former Code Civ. Proc. § 1713.1(2)].

Commentary

Barbara A. DiFranza

Based on prevailing statutes, the appellate court’s holding is correct. We are left to ponder whether flight from one country to another should insulate defendants from the reach of the marital domicile’s family court. Surely, United States litigants will encounter similar resistance when venturing to the United Kingdom. Making changes to such laws (perhaps by way of treaty) may be the way to ensure that spouses do not evade their marital obligations by a change of address. The task would be an enormous one, however, and likely to add to the domestic court burden. Perhaps this explains why support and support-related orders were simply exempted from the Uniform Foreign Money-Judgments Recognition Act.

Commentary

Dawn Gray

This case is a good reminder that as the world grows smaller, we will be dealing with the law of other countries more often. It is a relatively straightforward interpretation of language in a uniform act, but required evidence of the interpretation of an attorney’s fees award under British law. Husband provided the court with British statutes and case law as well as expert testimony on the issue. This was undoubtedly rather costly. The order Wife was attempting to enforce was for attorney’s fees that the British court had ruled were necessary for her to even proceed in the court in England. So, she has paid attorney’s fees to unsuccessfully collect attorney’s fees that Husband has not paid and without which she cannot proceed with her divorce in England. Although this decision was probably technically correct, one wonders what avenues Wife still has available to her or whether by refusing to pay the attorney’s fees order, Husband can hold Wife’s actions in abeyance in England indefinitely.

Commentary
Kathryn Kirkland

As we are all becoming aware, it is no longer sufficient for family law lawyers to be knowledgeable about the domestic relations laws of the state in which they practice, or even other states in the United States. Now we encounter issues generated in other parts of the world. Mostly those issues involve custody and visitation, but this case does not. This case takes us back into the realm of Civil Procedure (from which we thought we had escaped), and involves a question of statutory interpretation regarding enforcement of money judgments.

The parties in this matter began their marital dissolution saga in Russia, where they obtained a divorce. Then, when Husband thought the matter completed, Wife filed a divorce petition in London in August 2005. The British court ordered that Husband pay support to Wife for her “maintenance” and ordered that Husband pay Wife’s London attorneys the sum of 50,000 pounds as fees in advance.

Husband refused to pay the attorney’s fees, so the British court stayed the marital proceedings until the sum is paid. Husband asked for an appeal from the British court, but it was denied.

Wife filed an action in Yolo County under the Uniform Foreign Money-Judgments Recognition Act (UFMJRA—Code Civ. Proc. § 1713 et seq.) to enforce the attorney’s fees award order against Husband in the United States. (The case is being heard in Yolo County, California, because Husband, now a U.S. citizen resides here. The parties did live together for a time in Yolo County and their daughter was born in Yolo County.) The trial court found that Husband owed the fees to the London attorneys and that the award was enforceable under the Act.

The court of appeal reversed because it found that the British court’s order for attorney’s fees was “maintenance” under the British Matrimonial Causes Act of 1973, § 22. That section provides for “interim maintenance” and/or “general maintenance” in pending litigation, and can include an award for prospective attorney’s fees.

After an analysis of the British statutory and case law, the appellate court found that the award of

attorney’s fees was in the nature of support and therefore not within the purview of the Uniform Foreign Money-Judgments Recognition Act, which specifically exempts family law support judgments.

It is interesting to note that this action in California had to be heard based on the language of the Uniform Foreign Money-Judgments Recognition Act as it read prior to 2007, as there were amendments which became effective in 2007 which clarified that any order in connection with a domestic relations matter was not enforceable under the Act.

Commentary
Bernard N. Wolf

In *Lyustiger*, the court of appeal held that under the domestic relations exception of the Uniform Foreign Money Judgments Recognition Act, a California court could not enforce two British attorney’s fees awards.

The Act contains an exception for support orders. The justices found that the fee awards in question fell under the general umbrella of support, because the British court had made them as part of prospective maintenance orders for the wife. Hence, the fee orders were outside the scope of the Act.

The opinion in *Lyustiger* is correct on the law. For the reasons Justice Nicholson explains in his opinion, the domestic relations exception to the Act precludes enforcement of the orders in question. Still, I wonder whether public policy, and the efficient administration of family law cases, are appropriately served when a spouse can evade compliance with valid orders of a sister nation’s tribunal.

There should be a better way.

Commentary
Marshall S. Zolla

Globalization, in all its myriad facets, has become such an accepted fact of life that its impact on a California family law case is hardly surprising. A British money judgment is entered in a marital dissolution proceeding. Enforcement is attempted in California under the then-operative Uniform Foreign Money-Judgments Recognition Act [UFMJRA-former

Code Civ. Proc. §§ 1713–1713.8 (amended in 2005 as the Uniform Foreign-Country Money Judgments Recognition Act (Code Civ. Proc. §§ 1713–1724)). The trial court saw no impediment to enforcement of the foreign money judgment and entered an enforcement order. The court of appeal reversed.

British case law establishes that an award of attorney's fees is characterized as support. The California Act [the former UFMJRA] does not apply to enforcement of the British orders because foreign support orders are exempt from enforcement. Here is where this appellate tribunal stretches a bit too far. The appellate court concludes that the "broad definition of 'support' is not inconsistent with California law" [citing *In re Marriage of Benjamins* (1994) 26 Cal.App.4th 423; and *Black's Law Dictionary*]. Acknowledging that support in California is normally adjudicated separately from attorney's fees, the justices use a broad definition of support to fall within the exception to the UFMJRA in order to deny enforcement of the British orders. The opinion also relies upon terminology in a report of the National Conference of Commissioners on Uniform State Laws (NCCUSL). Notwithstanding the alphabet soup authority relied upon, this is not an example of tight logic and rigorous craftsmanship. Nevertheless, it provides focus for enforcement of foreign money judgments in the domestic relations arena, an issue we can reasonably expect to see again as parties move and globalization becomes even more pervasive.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §§ 50.02 (duty to support spouse, generally), 62.01 (jurisdiction of court to award attorney's fees, generally), 150.06[2], 151.02[1] (recognition of foreign money judgments).

CHILD CUSTODY

Abduction

Court Erred by Extending Comity to Greek Court's Decision Denying Father's Hague Convention Petition

Asvesta v. Petroutsas

(Civ. No. 08-15365; U.S. Ct. App., 9th Cir. 9/4/09)
— F. 3d —, 2009 U.S. App. LEXIS 19949

By Paez, Cir. Judge (Hug, Jr., Berzon, Cir. Judges, concurring)

The Ninth Circuit Court of Appeals held that a District Court erred by extending comity to a Greek court's denial of a father's Hague Convention petition, when the Greek court's analysis of the merits of the petition misapplied the provisions of the Hague Convention, relied on unreasonable factual findings, and contradicted the principles and objectives of the Hague Convention.

Facts and Procedure. In March 2002, a husband (George) and wife (Despina) were married in Watsonville. George had dual Greek and American citizenship; Despina had Greek citizenship. In January 2003, the couple settled in Capitola. In mid-2005, Despina gave birth to a son. Subsequently, George and Despina's marriage deteriorated, because Despina wanted to reside in Greece and George wanted to reside in the United States.

On November 2, 2005, George sent Despina an email asking her permission to "let me gradually open a chapter of my life in Greece" when the child was "a little older." The email concluded: "If you don't agree . . . I have to ask you for a divorce. . . . Go to Greece with the child and we will see how I will come to Greece to visit him."

On November 8, Despina and the child left for a visit with family members in Greece. Despina had George's written consent, which stated: "I hereby consent to [Despina] to travel with our son . . . between the following dates[:] November 8,

2005—December 8, 2005.” The child was not yet six months old.

According to George, Despina informed him on November 19 that she would *not* be returning from Greece. On November 29, George informed Despina that he had reported her to U.S. authorities for abducting the child. On November 30, George commenced a marital dissolution action; later, after a hearing at which Despina was represented by counsel, a Santa Cruz County trial court (California court) granted George temporary custody of his son.

On December 5, Despina commenced a divorce action in an Athens court. On December 9, an Athens court granted Despina temporary custody of her son.

On January 25, 2006, after marital dissolution proceedings in which Despina was represented by counsel, the California court (1) found that the child’s “habitual residence” was Santa Cruz, California, (2) awarded George sole legal and physical custody of his son, and (3) ordered Despina to return the child to George “immediately”.

On February 20, George filed a petition for return of his son with the United States Central Authority under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention—October 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49; implemented by the International Child Abduction Remedies Act (ICARA—42 U.S.C. § 11601 et seq.)). The U.S. Central Authority transferred the petition to Greece’s central authority. Eventually, George’s Hague Convention petition was filed with the Piraeus One-Member Court of First Instance (Greek Hague Court); and an Athens court stayed Despina’s custody proceeding pending resolution of the Hague Convention petition.

On March 23, the Greek Hague Court held a hearing at which both George and Despina appeared. According to Despina, both were represented by counsel and participated fully; according to George, neither he nor his lawyer was permitted to speak, and a nonlawyer representative of the Greek government who appeared on George’s behalf was unfamiliar with the facts and inadequately represented George’s interests.

The next day, the Greek Hague Court dismissed George’s petition for return of his son. It concluded

that Despina had *not* illegally removed and retained the child in Greece, because (1) George “consented . . . to [the child’s] move and stay in Greece, giving for this purpose to [Despina] a related written permission and suggesting to her to stay in Greece . . .”; (2) George was “not virtually exercising the right of custody . . . at the time of [the child’s] move, since . . . [George] was indifferent to his family’s obligations, he was not engaged in the minor’s care and was indifferent to his psychosomatic development”; and (3) there was “a severe danger that the minor’s return [would] expose him to mental tribulation, since he [would] be deprived of his mother’s presence, affection, love and care at the delicate age of 12 months . . .”

George filed a “cassation appeal” challenging the legal conclusions of the Greek Hague Court. An interim opinion by one member of the Greek Supreme Court stated that the Greek Hague Court had erred as a matter of law by failing to follow procedural rules of evidence. Thus, it was considered likely that the Greek Supreme Court would eventually reverse the Greek Hague Court’s decision.

With the cassation appeal pending, George asked an Athens court to grant him visitation with his son. While this request was pending, George and Despina entered into a voluntary settlement agreement establishing a schedule for George’s visitation in Greece. George also asked a Piraeus court to recognize the California court’s order granting him temporary custody of his son. However, his request was denied, and this denial was affirmed on appeal.

On April 23, 2007, after a long-delayed hearing, an Athens court awarded Despina temporary custody of her son, and granted George supervised visitation in Greece. One month later, the California court awarded George temporary sole custody of his son, and ordered the parents to mediate their custody and visitation dispute in Greece.

In July, acting under color of the California court’s custody order, George took his son from supervised visitation, fled from Greece to Canada, and returned with his son to California. Despina reported George’s action to Greek authorities as a child abduction, and filed criminal charges against George for kidnapping.

On October 31, Despina filed a Hague Convention petition in federal District Court for return of the

child to Greece. She alleged that George had abducted the child from Greece, the child's habitual residence. Following an evidentiary hearing, the District Court orally granted Despina's petition. It stated that the question it faced was "whether it should . . . accord comity to the [Greek Hague Court's] order . . ." The District Court observed that "the Hague order entered in Greece could be criticized as giving undue weight to matters that are not properly considered under the Hague convention." Nevertheless, it concluded that it had "no legal choice other than to grant the petition," given that George had failed to comply with either the Greek Hague Convention order or the California court's order to mediate custody and visitation issues in Greece.

On January 17, 2008, the District Court ordered that the child be returned to Greece, "the minor child's habitual residence." The District Court stayed the child's return pending appeal, and George timely appealed.

Inquiry Is Limited to Comity Issue. The Court of Appeals reversed. First of all, it stated that the sole inquiry was whether the District Court properly extended comity to the Greek Hague Court's denial of George's petition for return of his son under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention—October 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49; implemented by the International Child Abduction Remedies Act (ICARA—42 U.S.C. § 11601 et seq.)).

The Court of Appeals then concluded that the District Court *improperly* extended comity, because the Greek Hague Court's analysis of the merits of George's petition "misapplies the provisions of the Convention, relies on unreasonable factual findings, and contradicts the principles and objectives of the Hague Convention." In particular, the Court observed that the Greek Hague Court's ruling improperly focused on matters relevant to a determination of the underlying custody dispute, and also made findings that were plainly unsupported or contradicted by the evidence. Therefore, the Court remanded for an analysis by the District Court of the merits of Despina's Hague Convention petition, with particular attention given to a determination of the child's habitual residence.

"Comity of Nations" Governs Recognition of Foreign Nations' Decrees. Regarding comity, the Court of Appeals explained that the extent to which the United States honors the judicial decrees of foreign nations is governed by "the comity of nations" [*citing* *Wilson v. Marchington* (9th Cir. 1997) 127 F.3d 805, 808]. Stated simply, the guiding principle of comity is that "[when] there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, . . . the merits of the case should not, in an action brought in this country . . ., be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact" [*quoting from* *Hilton v. Guyot* (1895) 159 U.S. 113, 202–203, 16 S. Ct. 139, 40 L. Ed. 95].

Comity, the Court noted, "is at the heart of the Hague Convention." Thus, when comity is at issue, a court's analysis properly begins "with an inclination to accord deference to" a foreign court's adjudication of a Hague petition [*quoting from* *Diorinou v. Mezitis* (2d Cir. 2001) 237 F.3d 133, 142, 145]. However, federal appellate courts that have considered whether to extend comity to foreign Hague Convention judgments have looked closely at the merits of the foreign court's decision in determining whether to extend comity [*citing* *Diorinou* (comity extended); *Carrascosa v. McGuire* (3d Cir. 2008) 520 F.3d 249 (comity *not* extended)]. Consequently, the Court of Appeals decided that it could decline to extend comity to the Greek Hague Court's judgment "if it clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness."

Greek Hague Court's Analysis Deviated From Hague Convention's Approach. The Court of Appeals then examined the Greek Hague Court's decision as a whole, as well as each individual ground relied on by the Greek Hague Court, to determine whether the District Court properly extended comity.

First, the Court of Appeals noted that the Hague Convention clearly sets forth that a court considering a Hague Convention petition should *not* consider matters pertaining to the underlying custody dispute, such as the child's best interests. These matters are reserved for the courts of the child's

habitual residence. Instead, the Convention requires a court to perform objective inquiries pertaining to determining the child's habitual residence and whether or not the child was wrongfully removed or detained [*citing* Elisa Perez-Vera, Hague Conference on Private International Law 430, P 19 (Perez-Vera Report); *see* Hague Convention, arts. 3, 12, 13, 16].

Here, the Court said, the Greek Hague Court "strayed from the objective inquiries prescribed by the Convention," because its factual findings centered on the breakdown of George and Despina's relationship, and on George's treatment of Despina, including his alleged infidelity, failure to be the sole family breadwinner, and his refusal to speak to Despina in the final months of their marriage. Furthermore, although the Greek Hague Court concluded that Despina's removal of the child was not "illegal", it was unclear whether this constituted (1) a determination that the removal or retention was not "wrongful", or (2) a basis for an exception to return of the child [*see* Hague Convention, arts. 3, 13(a)]. The same could be said of the Greek Hague Court's determination that George failed to exercise his custodial rights at the time of the child's removal.

Greek Hague Court Failed to Determine Child's Habitual Residence. Next, the Court of Appeals pointed out that the Hague Convention provides that a petitioning party can demonstrate wrongful retention only if the retention is in breach of the party's custodial rights under the law of the child's habitual residence and, at the time of the retention, the party was exercising those rights [*see* Hague Convention, art. 3]. Here, the Court said, the Greek Hague Court failed to make the underlying determination of the child's habitual residence; and also made an erroneous finding that George failed to exercise his custodial rights.

Regarding the child's habitual residence, the Court observed that the Greek Hague Court never concluded that Greece, rather than the United States, was the child's habitual residence. Had it done so, a wrongful removal analysis under Article 3 would have been unnecessary, because the child's return to California would *not* be required under the Convention if California were *not* the child's habitual residence.

Furthermore, the Court went on, the habitual residence determination is central to a court's wrongful

removal inquiry, because the law of the child's habitual residence is used to determine (1) whether the petitioning party has custody rights; (2) whether the party's custody rights have been violated by removal or retention of the child; and, arguably, (3) whether the custody rights were sufficiently "exercised" by the party at the time of the removal [*citing* Friedrich v. Friedrich (3d Cir. 1995) 78 F.3d 1060, 1065 (Friedrich II)]. Consequently, the Greek Hague Court's failure to make a habitual residence determination cast doubt on its entire wrongful removal determination. Without knowing whether the child's habitual residence was California or Greece, the Greek Hague Court could *not* have known the appropriate law to apply with respect to George's custodial rights.

Greek Hague Court Made Inappropriate Factual Findings. In addition, the Court of Appeals continued, the Greek Hague Court made inadequate factual findings in support of its wrongful removal determination. The Greek Hague Court's stated basis for finding that Despina had *not* illegally removed the child was that George, at the time of the removal, was indifferent to his family obligations, not engaged in the child's care, and indifferent to the child's "psychosomatic" development. However, the Court said, these factual findings incorrectly focused on George's treatment of Despina, rather than on his care or treatment of the child.

The Court further observed that the Greek Hague Court failed to make appropriate factual findings regarding George's alleged failure to exercise his custody rights. In fact, a party is required to make only a minimal showing that he or she actually took physical care of the child [*citing* Perez-Vera Report; *Mozes v. Mozes* (9th Cir. 2001) 239 F.3d 1067, 1085]. A person who has valid custody rights under the law of the country of the child's habitual residence "cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child" [*quoting from* Friedrich II]. The Greek Hague Court's factual findings failed to support its legally erroneous conclusion that George failed to exercise his custody rights.

Also, the Court concluded that the evidence contradicted the Greek Hague Court's factual determination that George consented to his son's removal and stay in Greece. The Court explained that the

Hague Convention does *not* require a nation “to order the return of the child if the person . . . which opposes its return establishes that the [petitioning party] consented to or subsequently acquiesced in the removal or retention” [see Hague Convention, art. 13(a)].

Here, the Court said, George’s email statement that Despina should go to Greece with the child did *not* unequivocally demonstrate that George consented to the child’s *indefinite* stay in Greece. Also, George’s written consent to Despina’s *travel* with the child was limited to the period between November 8, 2005 and December 8, 2005. Thus there was a lack of evidentiary support for the Greek Hague Court’s finding that George gave his consent.

Greek Hague Court’s Determination of Grave Risk of Harm Was Incorrect. In addition, the Court of Appeals concluded that the Greek Hague Court erred in determining that the child would face a grave risk of harm if returned to California. Under the Hague Convention, one exception to the return of a wrongfully removed or retained child is when “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable position” [see Hague Convention, art. 13(b)].

Here, the Court reasoned, the Greek Hague Court’s determination that the child would be harmed by separation from his mother “at the delicate age of 12 months” was pertinent only to the merits of the underlying custody dispute, which was to be resolved by the courts of the child’s habitual residence. Thus, by inquiring into the child’s best interests and making its determination that the child would be harmed by separation from Despina, the Greek Hague Court stepped out of its role as a Hague Convention tribunal.

Furthermore, the Court said, the Greek Hague Court’s determination that the child faced grave risk of harm if returned to the United States relied on an impermissibly broad interpretation of the Article 13(b) exceptions, which must be “narrowly drawn” [citing *In re Adan* (3d. Cir. 2006) 437 F.3d 381, 395]. In particular, the “grave risk of harm” exception arises in “situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation” [quoting from *Blondin v. Dubois* (2d Cir. 2001) 238 F.3d 153, 162; also citing *Friedrich II, Diorinou*].

In summary, the Court of Appeals expressed its reluctance to ignore a foreign court’s decision under the Hague Convention. However, it stated that its concern with the Greek Hague Court’s analysis went “beyond a mere difference of opinion on the proper application of established law to the facts of the case or a different view of the facts in light of the evidence presented.” Instead, the Court concluded that “the Greek court’s misapplication of key provisions of the Convention and its unreasonable factual findings undermine its decision . . .,” and that “key aspects of the decision contravene the underlying principles of the Convention . . .” Therefore, because the Court of Appeals believed that the Greek Hague Court’s failure to comply with the Hague Convention was “so egregious,” it held that the District Court erred in extending comity to the Greek Hague Court’s denial of George’s Hague Convention petition.

District Court Improperly Considered Father’s Noncompliance With Court Orders. The Court of Appeals also concluded that the District Court erred by granting Despina’s Hague Convention petition, at least in part, on the basis of George’s noncompliance with (1) the California court’s order to mediate custody and visitation issues in Greece, and (2) the Greek Hague Court’s order determining George’s Hague Convention petition.

Here, the Court said, the parties’ conduct was *not* the proper focus of the District Court’s inquiry, because the question actually before the District Court was whether to extend comity to the Greek Hague Court’s judgment. Thus, the District Court’s inquiry should have focused on the process and judgment of the foreign court [citing *Hilton*]. However, the District Court’s error did *not* provide a separate basis for reversal, because the references to George’s actions could be viewed as part of the District Court’s comity analysis.

Commentary

Sharon L. Kalemkiarian

International child “abductions” by a parent have been in the news—and the first thing that we are likely to think of when we see the headlines is “where is the Hague Convention?”. In *Asvesta*, the Ninth Circuit Court of Appeals gives us excellent,

and frank, instruction on the purpose and application of the Hague Convention.

In *Asvesta*, a very young child, with permission, was taken to Greece on vacation by his mother. When she refused to bring the child home, a four-year battle began between father (who lived in California, where the child was born and lived for the first six months of his life) and mother (who wished to remain in Greece). The the U. S. District Court granted a Hague petition, filed by mother, that requested return the child to Greece, making its decision on the basis of comity—deference to a Greek court’s earlier denial of a Hague petition, filed by father, that requested return of the child to the United States. (After the father’s Hague petition was denied, the child was taken by father, without mother’s permission, from Greece.)

There is a fairly complicated procedural history in the case that would provide an interesting fact pattern for a law school exam. But the important and illuminating analysis of the case is this: comity is offered, under *Hilton v. Guyot* (an 1895 case!), when the fundamental principles of fairness have been met in the foreign proceeding (my paraphrasing). However, the Court of Appeals says, fairness in a proceeding is not enough when dealing with a Hague convention matter. In fact, the very principles of the Hague Convention must be upheld and determined in a proper fashion.

In this case, the Greek court failed on almost every count to make the determination required by the Hague Convention to resolve the international custody dispute. The Greek court made no determination of habitual residence of the child (which was California, according to the Ninth Circuit Court of Appeals). The Greek court erred in finding father had consented. And lastly, the Greek court used the “risk of grave harm” provision of the Hague Convention to find that due to the child’s young age, it would be a risk of grave harm to return him to father. This particularly did not sit well with the Ninth Circuit bench.

This case has very clear and helpful practical advice when litigating a Hague Convention matter. Stick to the structure of the Convention, and don’t try to litigate the best interests of the child in the Hague Convention tribunal.

Commentary

Kathryn Kirkland

Our mobile society increasingly brings issues under the Hague Convention to litigation in our federal courts. This case raises a question that has not occurred very often up to now. It is the issue of “comity” to a foreign judgment. Given the increasing amount of litigation not only in United States courts but also in foreign courts, the question of “comity” will most likely become more common.

“Comity” is a term most of us have only the vaguest recollection of, from our law school days. Certainly, as family law lawyers, it seems to be an alien term. So, back to the classroom for a moment. The Court of Appeal defines “comity” by citing to the seminal case of *Hilton v. Guyot* (1895) 159 U.S. 113, which is cited in several subsequent cases:

Comity is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.” The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by “the comity of nations”. Extension of comity to a foreign judgment is “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”

As the Ninth Circuit says, the child in this case, now four years old, has been the center of a custody battle on two continents since he was six months old. Mother took him to Greece and then wouldn’t bring him back. Father filed a Hague petition with the Greek court. The Greek court ruled that it did not have to return the child to the United States. A different Greek court ordered supervised visits for Father.

During one of the supervised visits, Father took the child and fled from Greece to Canada and then to California. Mother then filed her Hague petition in the federal District Court in northern California. The District Court found that it had to honor the Greek court’s findings in its Hague ruling because of “comity”.

The Ninth Circuit reversed. After a detailed analysis of the “findings” by the Greek court, the Ninth Circuit found that the Greek court had not

properly conducted a Hague hearing, had not adjudicated the key issue of “habitual residence” of the child, and had based its ruling on impermissible facts—facts relevant to the merits of a custody and visitation dispute, not facts that were relevant to a determination of the issue of the “habitual residence” of the child and to possible exceptions under the Hague Convention itself.

Although “comity” is not an issue family law practitioners expect to encounter, this case is useful reading because it is a clear explication of the “why” of the Hague Convention and almost a blueprint for how to present evidence for a Hague petition, either to obtain or to defeat an order for return.

In this case, the “wrongful taking” occurred prior to any formal legal action being commenced. It nevertheless illustrates the importance of specifying in any order regarding children which country is the child’s “habitual residence”.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §§ 150.06[1][a] (recognition of foreign divorce judgments through comity, generally), 142.50 (overview of Hague Convention), 142.52 (Hague Convention actions in U.S. courts).

CHILD SUPPORT

Support Guidelines

Briefly Noted

In re Marriage of Knowles

(Civ. No. C057851; Ct. App., 3d Dist. 10/6/09)
— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1634

By Nicholson, Acting P.J. (Robie, Butz, JJ., concurring)

The court of appeal held that a trial court violated Fam. Code § 4057.5(a)(1), which prohibits consideration of a subsequent spouse’s income when modifying child support, by considering all of the community property income of a father and his subsequent spouse in modifying the father’s child support obligation.

Procedural Posture. Appellant father challenged an order of the Butte County Superior Court, which modified his child support obligation. The trial court considered, as the father’s income, all of the community income of the father and his subsequent spouse.

Overview. The appellate court observed that the trial court considered all of the community property income, including the subsequent spouse’s half, when calculating the father’s support obligation. In doing so, the trial court made no finding of extreme or severe hardship. Thus, the trial court violated Fam. Code § 4057.5(a)(1). Income generated from community property was community income, and an equal, undivided interest in that income was attributable to each spouse. Under Fam. Code § 4008, the obligor parent’s community interest in the income of the subsequent spouse might be looked to in discharge of the child support obligation, but the trial court could *not* consider the subsequent spouse’s community income in calculating the child support obligation. The trial court erred when it failed to make that distinction and interpreted § 4008 as allowing it to consider the subsequent spouse’s community income in calculating the child support obligation. The appellate court found it unlikely that the trial court would have arrived at the same amount had it properly applied the law.

Outcome. The appellate court reversed the order and remanded the matter for the trial court to make a new determination concerning the father’s child support obligation, without violating Fam. Code § 4057.5. Watch for the full discussion of this case in next month’s issue.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., Chs. 41 (child support orders), 42 (modification of child support orders); CALIFORNIA FAMILY LAW LITIGATION GUIDE, Units 10 (modification), 32 (child support). This summary was derived from *LEXIS Case Summaries* [see 2009 Cal. App. LEXIS 1634].

JUVENILE COURTS

Indian Child Welfare Act

Briefly Noted

In re Damian C.

(Civ. No. D054918; Ct. App., 4th Dist., Div. 1. filed 9/17/09; ord. pub. 10/8/09)
— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1655

By McConnell, P.J. (McDonald, Aaron, JJ., concurring)

The court of appeal held that a juvenile court erred in finding that the Indian Child Welfare Act (ICWA—25 U.S.C. § 1901 et seq.) did not apply to a dependent child. Unsuccessful attempts by the child's family to establish their relationship with a Navajo or Yaqui tribe did not release a social services agency from its obligation to provide notice to the tribes, because the question of membership in a tribe rests with the tribe itself.

Procedural Posture. Appellant mother sought review of jurisdictional and dispositional orders from the San Diego County Superior Court, in a dependency proceeding initiated by respondent social services agency concerning her minor son.

Overview. The mother stated that she might have Indian ancestry through the maternal grandfather, who reported that his father might have Indian heritage and identified two federally recognized tribes. The juvenile court found that the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., did not apply. The appellate court held that the information provided by the grandfather was a reason to know, within the meaning of Welf. & Inst. Code § 224.3(a), (b)(1), and Cal. Rules of Court, Rule 5.481(a)(5)(A),(b)(1), that the child might be an Indian child, and thus triggered the requirement to make further inquiry. California's intent to enforce stringent standards for ICWA notice was evident in Welf. & Inst. Code §§ 224(d), 224.2(b). The social services agency was required to provide notice to the federally recognized tribes identified by the grandfather, even though the family had been unsuccessful in establishing its Indian heritage, because the

question of membership in a tribe rested with the tribe itself. The grandfather's statement that he lacked sufficient information to determine whether the family in fact had Indian heritage did not release the agency from the obligation to provide notice.

Outcome. The appellate court affirmed the jurisdictional and dispositional orders and remanded to the juvenile court with directions (1) to vacate its finding that the ICWA did not apply, (2) to instruct the agency to complete the ICWA inquiry and notice, and (3) to advise the parents of their ICWA rights if the child were determined to be an Indian child within the meaning of the ICWA.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., Ch. 176 (Indian Child Welfare Act); CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE, 2009 ed., Ch. 2 (dependency). This summary was derived from *LEXIS Case Summaries* [see 2009 Cal. App. LEXIS 1655].

Reunification

Briefly Noted

S. T. v. Superior Court

(Civ. No. B216686; Ct. App., 2d Dist., Div. 1. filed 8/28/09; ord. pub. 9/18/09)

— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1552

By Rothschild, J. (Mallano, P.J., Miller, J., concurring)

The court of appeal held that a juvenile court prejudicially erred at a six-month review hearing by believing that it lacked discretion to continue reunification services for an incarcerated father who did not satisfy all three criteria found in Welf. & Inst. Code § 366.21(g)(A)-(C).

Procedural Posture. At a contested six-month review hearing, a juvenile referee of the Los Angeles County Superior Court terminated the reunification services of petitioner father and set a permanency planning hearing. The father's child had been placed with grandparents at birth, on a petition by respondent Department of Children and Family Services, because of exposure to methamphetamine and both parents' incarceration. The father sought writ review.

Overview. The juvenile court based its decision on findings that the father did not have regular contact, had not made substantial progress in resolving his problems, and had not demonstrated the capacity to complete the objectives of a treatment program. The appellate court held that the juvenile court erred in believing that it had no discretion to continue reunification services if the father did not satisfy all three criteria found in Welf. & Inst. Code § 366.21(g)(1)(A)-(C). The error was prejudicial because a number of factors weighed in favor of extending services, including the Legislature's policy of encouraging reunification for incarcerated parents by easing the difficulties such parents encountered in attempting to obtain services and maintain contact with their children. The father's inability to participate in rehabilitative services and his inability to have contact with his daughter due to incarceration were not the only facts to consider, but they were important considerations, given the child's safe placement with her paternal grandparents, the father's shortly expected release from prison, and his apparently sincere desire to reunite with his daughter.

Outcome. The appellate court granted a writ directing the juvenile court to vacate its order and to reconsider continuing reunification services and setting a permanency planning hearing.

References: CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE, 2009 ed., Ch. 2 (dependency). This summary was derived from *LEXIS Case Summaries* [see 2009 Cal. App. LEXIS 1552].

MARRIAGE

Annulment

Daughter Lacks Standing to Seek Annulment of Decedent's Allegedly Fraudulent Confidential Marriage

Pryor v. Pryor

(Civ. No. B207398; Ct. App., 2d Dist., Div. 4, 9/29/09)

— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1608

By Epstein, P.J. (Manella, Suzukawa, JJ., concurring)

The court of appeal held that a daughter lacked standing to seek annulment of her decedent father's allegedly fraudulent confidential marriage to his caregiver former wife.

Facts and Procedure. In 1981, a husband (Richard) and wife (Jennifer) were married; in 1982, they divorced. Richard, a well-known comedian and actor, had six children.

In the mid-1980's, Richard was diagnosed with multiple sclerosis, and his condition subsequently deteriorated. In 1994, Jennifer became a care custodian for Richard. In 2001, pursuant to a confidential marriage license, Richard and Jennifer remarried. Around this time, Richard revised his estate plan to leave substantial assets to Jennifer, rather than to his children [for these case facts, see companion appeal, Estate of Pryor (Civ. No. B207402, Ct. App., 2d Dist., Div. 4, 9/29/09) 2009 Cal. App. LEXIS 1609, discussed briefly under Marriage: Legal Effects, below].

In 2005, Richard died. At some point after his death, Richard's daughter (Elizabeth) learned of his remarriage. In July 2007, Elizabeth petitioned to annul Richard's 2001 marriage to Jennifer, on the ground of fraud [see Fam. Code §§ 2210(d), 2211]. Jennifer responded with a motion to quash the petition, on the grounds that Elizabeth lacked standing and that her petition was time-barred [see Fam. Code § 2211(d)].

A trial court granted Jennifer's motion to quash and dismissed Elizabeth's petition with prejudice. In making its ruling, the trial court considered and harmonized the holdings of *Greene v. Williams* (1970) 9 Cal. App. 3d 559, 88 Cal. Rptr. 261, and *In re Marriage of Goldberg* (1994) 22 Cal. App. 4th 265, 27 Cal. Rptr. 2d 298. The trial court concluded that *Greene* stood for the proposition that a nullity action alleging a voidable marriage does *not* survive the death of a spouse; and that *Goldberg* stood for the proposition that a nullity action alleging a voidable marriage *does* survive the death of a spouse if the decedent spouse *initiated* the action but died before the conclusion of the action.

On appeal, Elizabeth argued that reversal of the trial court's order dismissing her petition to annul Richard's marriage was compelled by (1) Fam. Code § 2211, which authorizes a nullity proceeding based on fraud, (2) "interpretive case law," (3) survivability of a cause of action for fraud, and (4) Code Civ. Proc. § 338, the three-year statute of limitations for fraud. Elizabeth also argued that reversal was compelled by California public policy against permitting caregivers to exploit their wards' dependence for their own benefit, as evidenced by the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA—Welf. & Inst. Code § 15600 et seq.).

Legislature Controls Subject of Marriage. The appellate court affirmed. First, it explained that under well-settled California law, the Legislature "has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated . . ." [quoting from *Lockyer v. City and County of San Francisco* (2004) 33 Cal. 4th 1055, 1074, 17 Cal. Rptr. 3d 225, 95 P.3d 459]. Moreover, "[w]ith the right of action for annulment of a marriage so statutory in nature, it is for the Legislature to prescribe when and by whom such litigation may be commenced" [quoting from *McClure v. Donovan* (1949) 33 Cal. 2d 717, 728, 205 P.2d 17; also citing *Estate of Gregorson* (1911) 160 Cal. 21, 116 P. 60].

Marriage Is Not Void. Next, the appellate court rejected Elizabeth's contention that Richard's confidential marriage license was forged, making the marriage illegal, so that the marriage was void, *not* voidable, and subject to collateral attack [citing *Estate of DePasse* (2002) 97 Cal. App. 4th 92, 118

Cal. Rptr. 2d 143]. The appellate court distinguished *DePasse* on its facts, noting that the couple's marriage there was invalid because a marriage license is mandatory for a valid California marriage, and the couple there had married without *any* marriage license.

Marriage Is Not Voidable. The appellate court then acknowledged that Elizabeth's claim that Richard's signature on the confidential license had been forged would operate to bring her action within the fraud provisions of the annulment statutes. Fam. Code § 2210, it explained, specifies the conditions in which a marriage is voidable—or capable of being annulled—and one of those conditions is if the consent of either party was obtained by fraud [see Fam. Code § 2210(d)].

However, the appellate court observed, under Fam. Code § 2211, "a proceeding to obtain a judgment of nullity *must* be commenced within the periods, *and by the parties*, as follows: . . ." [see Fam. Code § 2211 (emphasis added by appellate court)]. Furthermore, a proceeding to nullify a marriage on the basis of fraud must be commenced "*by the party whose consent was obtained by fraud*, within four years after the discovery of the facts constituting the fraud" [see Fam. Code § 2211(d) (emphasis added by appellate court)]. Thus, the appellate court said, the plain meaning of the statutory language "is that only a defrauded spouse may institute an action for annulment based on fraud, within four years of discovery of the fraud."

The appellate court noted that the Legislature has granted standing to seek annulment to persons other than *spouses* in some circumstances: for example, to a parent when a minor marries before the age of consent, or to a relative when a spouse is of unsound mind [see Fam. Code § 2211(a),(c)]. However, when a spouse is capable of protecting his or her interests, *only* that spouse has standing to initiate an annulment proceeding on the basis of fraud, consent obtained by force, or physical incapacity [see Fam. Code § 2211(d),(e),(f)].

Thus, the appellate court reasoned, the language of Fam. Code § 2211 establishes that, with respect to standing, the Legislature has treated the various grounds for annulment differently. Moreover, the Legislature's decision to extend standing to a third party only if a spouse is a minor or of unsound mind

operates to establish the Legislature's intent that an injured spouse has *exclusive* standing to commence an action for annulment based on fraud, force, or physical incapacity. Thus, under Fam. Code § 2211, Elizabeth lacked standing to bring an action to annul Richard's marriage.

The appellate court also rejected Elizabeth's argument that Fam. Code § 2211(d) should be interpreted to allow a nullity action based on fraud to survive after a spouse's death, because the subdivision—unlike the subdivisions regarding bigamy and unsound mind—did *not* expressly require that such a nullity action commence within the lifetime of one of the spouses. The appellate court reasoned that it was unnecessary for the Legislature to state that annulment based on fraud had to be sought in a spouse's lifetime, because the Legislature had already stated that annulment based on fraud could only be commenced by a defrauded spouse.

Case Is Not Governed by General Rule Regarding Survival of Cause of Action. Next, the appellate court rejected Elizabeth's contention that the present case was governed by Code Civ. Proc. § 377.20(a), which states the general rule that a cause of action survives the death of the plaintiff. The appellate court pointed out that Code Civ. Proc. § 377.20(a) provides: "*Except as otherwise provided by statute*, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period" [Emphasis added by appellate court.]

Here, the appellate court reasoned, Fam. Code § 2211(d) is a statute that "otherwise provides", because it states that an action for nullity based on fraud must be commenced by the defrauded spouse. Under well-settled law, "a specific provision relating to a particular subject will govern with respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates" [quoting from *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal. 4th 571, 577, 7 Cal. Rptr. 2d 245, 828 P.2d 147]. The appellate court found additional support for its conclusion in *In re A. C.* (2000) 80 Cal. App. 4th 994, 96 Cal. Rptr. 2d 79, in which the *A. C.* court stated that "[h]ad the Legislature wished to allow a successor in interest to proceed under [Welf. & Inst.

Code § 826, a statute limiting standing,] the Legislature could have expressly stated that intent."

The appellate court also pointed out that the California Supreme Court has concluded that the fact that marriages challenged on the ground of fraud are not declared void, along with the fact that the right to have such marriages annulled is closely limited as to both persons and time, "indicates clearly the intent of the legislature that these marriages are to be regarded as merely voidable, and that the only manner of avoiding them is that provided by the code. If the parties who are alone recognized by the statutes as entitled to have the marriage annulled do not, during its existence, see fit to avoid it, a stranger to the marriage should not be permitted to question its validity in a collateral proceeding" [quoting from *Gregorson*].

The appellate court then observed that "[t]he substance of the statutory scheme for annulment has not been significantly changed since the Supreme Court decision in *Gregorson*. In the nearly 100 years which have passed since then, the Legislature has chosen to leave the provisions limiting standing to annul a marriage virtually unchanged." Therefore, under Fam. Code § 2211(d), the specific, controlling statute, Elizabeth lacked standing to attempt to annul Richard's marriage to Jennifer on the basis of fraud.

In addition, the appellate court pointed out that its conclusion that Code Civ. Proc. § 377.20 was *not* the controlling statute was supported by the *Greene* decision. In *Greene*, an appellate court concluded that the general rule which states that a cause of action survives a plaintiff's death is *not* applicable to matrimonial causes, even if one of the parties was a minor when the marriage was performed. Agreeing with the *Greene* court's analysis, the appellate court observed that "[s]ince a third party is never accorded standing to seek annulment based on fraud, the cause of action does not survive the death of the defrauded spouse."

Also, the appellate court distinguished the *Goldberg* decision, which held that a nullity action on the ground of fraud survives a spouse's death when the action is commenced by the spouse but is still pending at the spouse's death. Here, the appellate court said, no action for nullity based on fraud was commenced by Richard, and therefore there was no pending action that survived under Code Civ. Proc. § 377.20. Because Fam. Code § 2211(d) was *not*

satisfied, the general rule regarding survival of causes of action could *not* confer standing on Elizabeth.

Statute of Limitations Is Not Tolloed. Next, the appellate court rejected Elizabeth's argument that the statute of limitations for bringing an annulment action based on fraud had been tolled until the confidential marriage and changes to Richard's estate plan were discovered by Elizabeth. Here, it reasoned, the tolling provision applied only to an action commenced by Richard, and not to an action by a third party like Elizabeth who lacked standing.

Public Policy Argument Should Be Addressed to Legislature. Finally, the appellate court considered Elizabeth's argument that public policy concerns were present, following enactment of the Elder Abuse and Dependent Adult Civil Protection Act, because Jennifer had formerly served as Richard's caregiver. This argument, the appellate court said, "is more properly addressed to the Legislature than to the courts."

The appellate court acknowledged Elizabeth's concerns "about caregivers inducing their dependents into confidential marriages in order to gain influence over their estates," and agreed that the policy of protecting elders and dependent adults was implicated. However, it pointed out that the Legislature had not, even after the *Greene* decision, chosen to amend either Fam. Code § 2211(d) or the EADACPA in order to confer standing on a third party to bring an annulment action based on fraud as successor to a dependent or elder adult. Therefore, the appellate court concluded that the Legislature "was aware that a third party may not initiate a petition for annulment based on fraud under [Fam. Code § 2211(d)] after the death of the defrauded spouse and was content to leave that rule in place."

Commentary

Hon. Richard E. Denner, Judge (Ret.)

It is settled law that death of a married person ends the marital relationship and no action for divorce can continue unless a status judgment dissolving the marriage was entered. That is not always true of cause of action for annulment of the marriage.

What is unusual about *Pryor* is that the petition for annulment is not filed by a party to the marriage, but

by a surviving child of the husband. The rule is clear. A request for annulment for fraud can't be initially brought by someone other than a party to the marriage. It is unclear to this commentator what the result would have been if the child petitioned on behalf of her father before his death.

For attorneys, consideration should be given to the fact that different rules apply to requests for annulment than apply to dissolution, and some thought should be given to whether an alternate request for nullity should be made as well as a request for dissolution. Survivability of the action after death is not the only consideration. Since an action for nullity requires more than a summary trial, a bifurcation is not easy to obtain.

Commentary

Barbara A. DiFranza

I was struck by how fast the appellate court opinion marched by Elizabeth's contention that Richard's signature was forged.

If a person's signature was forged on application for a marriage license, how can it be established that the person was married at all? Fraudulently induced consent should certainly be distinguished from a total lack of consent. Is it now open season for caregivers who have access to the victim's identification to hire an unemployed actor to masquerade as the victim at the clerk's office? This appellate case says such a marriage would be insulated from attack by the death of the victim.

Elder abuse is often only uncovered after the death of its victims. If the victim is of unsound mind when marrying, that victim is unlikely to recover his or her mental faculties before death, in order to be able to file and complete an annulment.

The "by the parties" language should not be allowed to be construed to be "otherwise provided by statute." The Elder Abuse Act, being remedial, should be liberally construed to effect its objects. To clarify this, the legislature ought to amend the Act to delete that "by the parties" language and to clearly allow time for a posthumous annulment to be brought in circumstances such as were alleged by Elizabeth.

I believe this case ought to be depublished.

Commentary
Dawn Gray

Hey, did you hear the one about the kid who tried to have her father's marriage to her stepmother annulled after he died? I can just picture Richard Pryor doing a standup routine on that line alone. This case is short on backstory so we don't know Elizabeth's motives for bringing the action, although it doesn't matter to the analysis. Now we know that a "cause of action" for nullity does not survive a spouse's death—which is completely consistent with the rule that marriage terminates either on divorce or death, whichever comes first. But did we ever really doubt that?

Commentary
Stacy D. Phillips & Michael B. Hanasab

Imagine if a father allows his minor daughter to get married, in what would be deemed a voidable marriage. Assume that the daughter is a famous teen movie star who earns a significant income and then, in a freak accident, she dies. Concerned that he would not get his share of his daughter's estate, the father runs to court to seek to annul his daughter's marriage.

What if the court allows the parent to do this? What if the court holds that the parent has standing after the death of his daughter to annul the marriage? It is a voidable marriage after all. Think about the consequences. The daughter's husband, who believed that he was married and lived a married life with his wife, could lose all rights to inherit from his deceased spouse's estate. Even more basic, the husband could lose the title of being the widower of the deceased spouse and even the title of being married to the deceased spouse. The parent, who probably was at the wedding and celebrated the union, could try to take all this away after the death of his child—seemingly contrary to the deceased spouse's wishes, who died as a married person. What an unjust outcome.

Thankfully, this is exactly what the court in *Pryor* avoided. The *Pryor* case, involving the late comedian, Richard Pryor, dealt with a similar fact pattern of the above hypothetical, except in reverse. Richard's daughter (Elizabeth) sought to annul Richard's marriage after Richard's death. Interestingly,

Elizabeth made a big deal out of the fact that Richard's wife had been Richard's caregiver prior to the marriage. Elizabeth does not highlight the fact that the wife married Richard for the second time; they had been married in the early 1980's. While *Pryor* did throw some curve balls, such as the fact that the daughter was unaware of Richard's marriage to his wife, as Richard was secretly married via a confidential marriage license, the facts are basically the same.

The *Pryor* court ensured that justice prevailed in holding that the daughter did not have standing to annul her deceased father's marriage on the grounds of fraud, due to the fact that nullity must be brought by the defrauded spouse. Richard Pryor once said, "I don't see myself getting married again, but if I do, it will be forever." It appears that Richard was right on, as the court in *Pryor* held that only the married person can seek to annul a marriage on the grounds of fraud and that a third party does not have standing to bring a lawsuit.

The Court did make it clear that if the deceased party brought an annulment action prior to death, then died, that the annulment action would survive, and a party, such as the administrator of the estate, would be allowed to be substituted into the annulment action on behalf of the deceased party. Again, this makes complete sense, as it appears that this would go along with the deceased party's intent and wishes.

Commentary
Marshall S. Zolla

Although this case emanates from the life and marriage of comedian Richard Pryor, it is no laughing matter. Richard Pryor married, divorced, and in 2001 remarried Jennifer, a woman who had been a prior caretaker. He had six children. Richard died in 2005. One of his children, Elizabeth, petitioned to annul her father's marriage to Jennifer on the ground of fraud. Elizabeth, "styling herself as successor in interest to Richard," contended that her petition was not about the status of Richard's marriage but instead was about the disposition of his estate. The trial court dismissed the nullity petition, holding that Elizabeth lacked standing to annul the marriage and, in any event, the petition was time-barred under Family Code Section 2211(d). As to her argument that the case

came within the Elder Abuse Act because Jennifer formerly served as Richard's caregiver, the trial court held that such a policy argument should be the province of the Legislature, not the courts. The court of appeal affirmed.

The context of a care custodian receiving a donative transfer from a dependent or elder adult is one of increasing importance and concern as our population ages. The companion case to *Pryor v. Pryor*, involving the same cast, is *Estate of Pryor*, handed down the same day. That case concerns the presumptive disqualification of a care custodian from receiving a donative transfer from a dependent or older adult pursuant to Probate Code Section 21350. A spouse is exempt from application of the presumption under Section 21351. The court of appeal held that there exists nothing in the statutory scheme or the legislative history to warrant the judicial creation of an exception to the rule that a spouse may lawfully receive a donative transfer.

A care custodian is defined in Section 15610.17 of the Welfare & Institutions Code. *Bernard v. Foley* (2006) 39 Cal. 4th 794, involved donative gifts by the transferor to two care custodians who were not health care professionals. The *Bernard* court held that "when an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian even though the care relationship arose out of a preexisting personal friendship rather than a professional or occupational connection."

This is an area where family law practitioners can act as wise counselors as well as proficient technical advisers. The role of caregiver, or care custodian, involves not only often overlooked legal entanglements, but personal sacrifice, family tensions, and emotional stress. Some resource material which may be valuable in assessing and addressing these issues include:

1. The Bottom Line, Official Publication of the Law Practice Management and Technology Section of the State Bar of California, Beware the Caregiver (August 2008) p. 14 [common pitfalls concerning the hiring of caregivers, and how to avoid them];

2. Carol Levine, Always On Call, When Illness Turns Families into Caregivers, Vanderbilt University Press (2004);

3. Nell Carter, An Uncertain Inheritance, Writers on Caring for Family, Harper Collins (2007).

There are more than 30 million informal family caregivers in the United States—individuals who provide ongoing care to seriously ill or disabled family members. Add to that hospice and home health care agencies. Then consider the complexities of insurance coverage, whether long term care insurance, Medicare, Medicaid, or private health insurance plans, let alone the 47 million plus Americans without health insurance coverage. Caregiving, as a rite of passage for so many, is only just beginning to enter our cultural consciousness. The legal complexities inherent in this increasingly large segment of the population compel greater scrutiny and attention. For a recent example of an unpleasant scenario of caregivers, alleged elder abuse, and the conduct of counsel in this context, see *Gdowski v. Gdowski* (2009) 175 Cal. App. 4th 128. The *Pryor* cases and the current crucial debate with respect to the national health care system should serve to focus our attention on the myriad legal and other societal issues which accompany caregivers and those they serve.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §§ 10.03[3] (fraud as rendering marriage voidable), 10.41[3] (confidential marriage license), 12.02 (general nature and effect of nullity proceeding), 12.03 (void and voidable marriages), 12.10 (fraud as basis for nullity proceeding).

Legal Effects

Briefly Noted

Estate of Pryor
(Civ. No. B207402; Ct. App., 2d Dist., Div. 4, 9/29/09)
— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1609
By Epstein, P.J. (Manella, Suzukawa, JJ., concurring)

The court of appeal held that care custodians who marry their charges do not have the same burden as other care custodians to prove, pursuant to

Prob. Code §§ 21350 and 21351, that donative transfers from dependent or elder adults in the custodians' care are not the product of fraud, duress, menace, or undue influence.

Procedural Posture. Pursuant to Prob. Code § 21350, plaintiff, the daughter of a well-known comedian and actor, petitioned to set aside donative transfers made by her late father to defendant care custodian, who entered into a confidential marriage with plaintiff's father in 2001. The Los Angeles County Superior Court dismissed the action. Plaintiff appealed.

Overview. This case concerned the presumptive disqualification of a care custodian from receiving donative transfers from a dependent or elder adult. Plaintiff's theory was that defendant's status as care custodian for plaintiff's father beginning in 1994 rendered defendant ineligible to receive transfers under § 21350, and that the 2001 marriage did not cancel out defendant's care custodian status. Plaintiff asserted that defendant could *not* invoke the spousal exception to the presumption set forth in Prob. Code § 21351(a), because the marriage was the product of undue influence and fraud. The appellate court found nothing in the statutory scheme or the legislative history to warrant the judicial creation of an exception to the rule that a spouse may receive a donative transfer. The Legislature did not adopt such an exception, and it was the exclusive province of that body to do so. While the appellate court recognized the possibility that unscrupulous care custodians might persuade a dependent adult to enter into marriage to avoid the presumption of § 21350, it disagreed that its narrow construction of § 21351 would lead to absurd or ridiculous consequences.

Outcome. The appellate court affirmed the judgment of the probate court.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §§ 1.05[9] (inheritance rights of married persons and cohabitants contrasted), 10.04[1] (summary of rights, obligations, and limitations of marriage). This summary was derived from *LEXIS Case Summaries* [see 2009 Cal. App. LEXIS 1609].

PARENTAGE ISSUES

Presumptions

Briefly Noted

In re J. O.

(Civ. No. B211535; Ct. App., 2d Dist., Div. 4. filed 9/9/09; ord. pub. 10/7/09)

— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1650

By Manella, J. (Epstein, P.J., Suzukawa, J., concurring)

The court of appeal held that a juvenile court erred in finding that a man's presumed father status under Fam. Code § 7611(d) was rebutted by his failure to contact or provide support for his children for many years, when rebuttal of the man's presumed father status would leave his children fatherless.

Procedural Posture. Appellant, the alleged father of three children, challenged an order of the Los Angeles County Superior Court, which (1) ruled that he was not the children's presumed father, and (2) made jurisdictional findings under Welf. & Inst. Code § 300(b) and (g), based on appellant's failure to provide support for many years. Appellant also claimed that the juvenile court failed to properly comply with the notice requirements of the Indian Child Welfare Act (ICWA—25 U.S.C. § 1901 et seq.).

Overview. The appellate court held that the trial court erred in ruling that appellant was not the children's presumed father. Fam. Code § 7611(d) required nothing more than that the presumed father candidate receive the children into his home and openly hold them out as his natural children. Appellant established those foundational facts to the juvenile court's satisfaction. Given that the sole basis for the juvenile court's ruling that appellant's presumed father status had been rebutted was appellant's failure to keep in contact with and support his family, the juvenile court's ruling lacked support. The juvenile court's factual finding that appellant failed to provide the children with the necessities of life, including food, clothing, shelter and medical care, supported jurisdiction under § 300(g), but not

§ 300(b). There was no causal nexus between the juvenile court's findings of serious injury and the findings relating to appellant. Because the juvenile court did not consider appellant to be the children's presumed father, it failed to inquire about possible Indian ancestry on appellant's side.

Outcome. The appellate court reversed the order declaring appellant to be only an alleged father. It also reversed the finding of jurisdiction under § 300(b). In all other respects, the appellate court affirmed the juvenile court's judgment. On remand, the juvenile court was instructed to enter an order declaring appellant to be the presumed father of the three children, and to make inquiry concerning appellant's possible Indian ancestry as required by the Indian Child Welfare Act.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., Chs. 30 (parent-child relationship), 31 (establishing parentage), 176 (Indian Child Welfare Act); CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE, 2009 ed., Ch. 2 (dependency). This summary was derived from *LEXIS Case Summaries* [see 2009 Cal. App. LEXIS 1650].

PROCEDURE IN GENERAL

Discovery

Court Erred by Quashing Wife's Subpoena for Husband's Nonprivileged Medical Records

Manela v. Superior Court

(Civ. No. B214447; Ct. App., 2d Dist., Div. 3. 9/22/09)

— Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1561

By Kitching, J. (Klein, P.J., Aldrich, J., concurring)

The court of appeal held that (1) a trial court abused its discretion by quashing a wife's

subpoena for her husband's adult medical records, when the husband had waived his physician-patient privilege regarding the records; (2) the trial court did not abuse its discretion by quashing the wife's subpoena to the husband's childhood medical records, which were privileged; and (3) the husband's constitutional privacy interests in his medical records were outweighed by the state's compelling interest in protecting the best interests of his child.

Facts and Procedure. In June 2008, a husband (David) sought a marital dissolution, asking that custody of his son (Jacob) be awarded "consistent with the best interests of the minor child." His wife (Mira), responded with a request for sole custody of Jacob.

In August, David asked a trial court to award the parents joint physical custody of Jacob. Mira responded by filing declarations alleging that David suffered from a seizure disorder that affected his ability to care for Jacob. Specifically, she claimed that (1) David experienced regular seizures lasting from 45 seconds to 2-1/2 minutes; (2) David's seizures occurred when he awoke from sleep; (3) the seizures caused David's head, neck, shoulders, and one arm to seize in a loud, frightening manner; (4) the seizures caused David to temporarily lose the ability to speak; (5) the seizures often caused David to vomit; and (6) David had prescriptions for Tegretol, allegedly a seizure medication.

David responded that he had a mere "tic" that was controlled by medication. In support of his request for joint custody, he filed a declaration from his neurologist (Dr. Gross). Dr. Gross' declaration stated that (1) for the past nine years he had treated David for hypnagogic movements, a tic disorder; (2) David's condition was controlled by Tegretol; and (3) there was no neurological reason preventing David from caring for Jacob. Subsequently, Mira issued subpoenas to a physician (Dr. Cohen) who had examined David and discussed his seizures in her presence in 2007, and to a physician (Dr. Morrison) who had treated David for seizures during his childhood. Mira's subpoenas demanded that the physicians produce "[a]ll medical records pertaining to David Manela."

At an order to show cause (OSC) hearing, the trial court stated that the evidence was "quite clear that

[David] does not suffer from seizures as the term is generally recognized” It further observed that David’s tic/seizures only occurred “when he’s ready to go to bed the most [a tic/seizure] lasts is about two and a half minutes, generally quite less. I don’t see that it in any way impairs [David’s] ability . . . to have the child overnight” Consequently, the trial court awarded joint legal custody of Jacob to both parents, along with primary physical custody to Mira and secondary physical custody to David.

David then filed a motion to quash Mira’s subpoenas, arguing that his medical records were protected by the physician-patient privilege. The trial court agreed, and granted David’s motion.

Mira petitioned for a writ of mandate. Before the appellate court, she maintained that David had waived the physician-patient privilege (1) by filing Dr. Gross’ declaration and thus “tendering” the issue of his alleged seizure condition, and (2) by discussing his seizures with Dr. Cohen in her presence in 2007. David maintained that the physician-patient privilege protected all of his medical records; and that, alternatively, his medical records were protected by his federal and state constitutional rights to privacy.

Husband’s Waiver of Physician-Patient Privilege.

The appellate court granted the writ with respect to Dr. Cohen, but denied the writ with respect to Dr. Morrison. First, it explained that “there can be no discovery of materials which are privileged,” and that, to the extent the physician-patient privilege applies to materials, “it bars discovery” [quoting from *Palay v. Superior Court* (1993) 18 Cal. App. 4th 919, 925, 926, 22 Cal. Rptr. 2d 839].

Next, the appellate court pointed out that the physician-patient privilege is codified in Evid. Code § 994, which provides that “the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by . . . [t]he holder of the privilege” Moreover, under Evid. Code § 992, “‘confidential communication between patient and physician’ means information . . . transmitted between a patient and his physician in the course of that relationship and in confidence by a means which . . . discloses the information to no third persons other than those who are present to further

the interest of the patient in the consultation or those to whom disclosure is *reasonably necessary* for the transmission of the information or the accomplishment of the purpose for which the physician is consulted” [Emphasis added by appellate court.]

However, the appellate court continued, under Evid. Code § 912(a), “the right of any person to claim [the physician-patient privilege] is *waived* with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.” [Emphasis added.]

Here, the appellate court reasoned, David waived his physician-patient privilege with respect to Dr. Cohen by (1) allowing Mira to be present at his August 2007 examination, and (2) consenting to disclosure of a significant part of the physician-patient communication to her on that date. Because David provided no evidence that Mira’s presence was reasonably necessary for Dr. Cohen’s treatment and diagnosis of David, the physician-patient communication on that date was rendered nonconfidential and unprivileged.

The appellate court acknowledged that disclosure of information “that is itself privileged” does not constitute a waiver of any privilege [see Evid. Code § 912(c)]. However, it rejected David’s argument that his consent to disclosure of Dr. Cohen’s communications to Mira was protected by the marital communications privilege [see Evid. Code § 980]. It pointed out that the marital communications privilege *cannot* be invoked in a “proceeding brought by or on behalf of one spouse against the other spouse” [see Evid. Code § 984(a)]. Because this was a proceeding brought by one spouse against the other spouse, and because David had waived the physician-patient privilege, the communications between David and Dr. Cohen that were made in Mira’s presence were *not* protected by *either* the marital communications privilege *or* the physician-patient privilege.

Nevertheless, the appellate court went on, David’s voluntary disclosure of his communications with Dr. Cohen (through Mira’s presence) and Dr. Gross (through the physician’s declaration) did *not* relate back to his communications with Dr. Morrison, who had treated David when he was a teenager. The purpose of the physician-patient privilege is

(1) to preclude humiliation of the patient by disclosure of his ailments, and (2) to encourage the patient's full disclosure to the physician of information necessary for effective diagnosis and treatment [*citing* *Binder v. Superior Court* (1987) 196 Cal. App. 3d 893, 898, 242 Cal. Rptr. 231]. When David spoke with Dr. Morrison, the appellate court reasoned, David reasonably believed that he could fully and freely discuss his medical condition. Therefore, David's waiver of the physician-patient privilege with respect to Dr. Cohen and Dr. Gross did *not* waive his physician-patient privilege with respect to Dr. Morrison.

Husband's "Tender" of Issue of Alleged Medical Condition. Next, the appellate court rejected Mira's contention that David's medical records were not privileged, under the patient-litigant exception to the physician-patient privilege, because David had "tendered" the issue of his tic/seizure disorder.

Under Evid. Code § 996, the appellate court noted, "[t]here is *no* privilege . . . as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by . . . [t]he patient." [Emphasis added.] However, the patient-litigant exception usually arises in the context of a personal injury action; in addition, a defendant does *not* tender his or her medical condition by simply denying a plaintiff's allegations regarding his or her medical condition [*citing, e.g., Koshman v. Superior Court* (1980) 111 Cal. App. 3d 294, 168 Cal. Rptr. 558 (in child custody dispute, mother did not tender issue of alleged drug overdose)].

Here, the appellate court observed, David did *not* raise the issue of his tic/seizure disorder in his pleadings or in his application for custody of Jacob. Instead, Mira raised the issue in her response, and then filed evidence regarding the issue. David merely denied the allegations, and then submitted evidence in support of his denial.

Furthermore, the appellate court reasoned, in contrast to a personal injury litigant who might seek to deny access to medical records related to the litigant's alleged personal injuries, David did *not* seek custody on the ground that he had a tic/seizure disorder, and actually would have preferred that the alleged disorder not be an issue at all. Therefore, David did *not* tender the issue of his alleged tic/seizure disorder within the meaning of the patient-litigant exception.

Constitutional Privacy Protection of Husband's Medical Records. Finally, the appellate rejected David's argument that his medical records were protected by his right to privacy under the federal and state constitutions.

The appellate court acknowledged that David's medical records fell within the scope of the constitutional right to privacy. However, it explained that the constitutional right to privacy is *not* absolute, and may be outweighed by supervening concerns. The state has a sufficient interest in discovering the truth in legal proceedings that it may compel disclosure of confidential material, including an individual's medical records. Such an intrusion on constitutionally protected areas of privacy merely requires a balancing of the juxtaposed rights and the finding of a compelling state interest [*citing Palay*].

Here, the appellate court reasoned, the state had a compelling state interest in promoting the best interests of David's child Jacob. It is state policy that the child's best interest is the "primary concern" of the trial court in making child custody orders [*see* Fam. Code § 3020(a)]. Thus, David's alleged tic/seizure disorder was something that the trial court could, and should, consider in determining Jacob's best interests [*citing* *In re Marriage of Carney* (1979) 24 Cal. 3d 725, 736, 157 Cal. Rptr. 383, 598 P.2d 36 (consideration of condition of quadriplegic father in child custody dispute)].

In considering a disabled person's condition, the appellate court explained, the state Supreme Court has directed that a trial court should (1) inquire into the person's actual and potential physical capabilities, (2) learn how the person has adapted to the disability and manages the disability's problems, (3) consider how other household members have adjusted to the disability, and (4) take into account the special contributions the person may make to the family despite the disability. Weighing these and other relevant factors together, the trial court should then determine whether the parent's condition would in fact have a lasting adverse effect on the child's best interests [*citing Carney*].

Here, the appellate court decided, David's alleged disorder could be potentially significant, in that Mira had stated in her declaration that Dr. Cohen had advised that Jacob not be left alone with David.

Therefore, the state's interest in protecting Jacob's best interests outweighed David's privacy interests regarding Dr. Cohen's medical records that related to David's tic/seizure disorder.

However, the appellate court noted, an impairment of the privacy interest will *not* pass constitutional muster unless it is *necessary* to achieve the compelling state interest [*citing Palay*]. Here, Mira's subpoena sought more information than was necessary to protect Jacob's best interest, because the subpoena demanded that Dr. Cohen produce "all" of David's medical records. In fact, the appellate court said, Mira had "only shown good cause to obtain nonprivileged documents relating to [David's] tic/seizure disorder."

In addition, the appellate court noted that on remand the trial court should consider (1) reviewing the subpoenaed documents *in camera*, or assigning the task to another judicial officer, and (2) issuing a protective order limiting the dissemination of David's private medical records.

Commentary

Hon. Richard E. Denner, Judge (Ret.)

In a battle over custody a patient's medical condition may well be relevant, but it is clear that just raising the custody issue does not cause a waiver of the physician-patient privilege. Just how relevant the medical condition is, is another issue. If a physical handicap such as noted in *Marriage of Carney* is not a ground on which to base a custody order, it is not clear what is. In this case, the privilege was lost in one examination, because the patient's wife was in the room at the time of the exam. No reason was offered for her presence. However, since she could help with any treatment out of the office, wasn't this a good reason? Apparently this reason was not offered to the court. This may well be a case where the patient failed to think of why she was there and then offer the reason.

Commentary

Sharon L. Kalemkiarian

Well, I learned something that I think I should have known. You go to the doctor, and take along

your spouse just because you like the company, or you want to be sure that you each hear all of what the doctor says. You later divorce—and you are in a custody proceeding. Guess what—your records can be subpoenaed from that doctor, because the conversation was no longer protected by the privilege as a third person was present! This issue has never come up in a case in my practice—but I sure will be looking for it now. The marital privilege does not apply—since the custody proceeding is "one spouse against the other".

There are some other very interesting evidentiary gems in the case. While intuitively we know that our clients do not put their medical condition at issue simply by "denying" an allegation that has been made or that they think will be made, this is often a question when drafting a declaration. Do you acknowledge what you believe the other side will say about alcohol abuse or drug abuse, in an attempt to diffuse the issue? Or does that open the door? This court says you have *not* opened the door, as long as it is a defensive statement. But be careful—medical evidence should not be offered to make one's case—that will clearly open the door.

Another interesting element of the case. The Father argues that his medical records should be protected by his right to privacy, despite the presence of his wife at the appointment. The appellate court here says no—that right is not absolute, and in fact, the state's need of information to make a good decision for children outweighs the privacy right of the father.

However, a protection for our clients is still available. This court advises that to protect his reputation, the document should be reviewed *in camera*. Always a wise request.

Commentary

Stacy D. Phillips & Karnig G. Dukmajian

In this seemingly straightforward decision, the Court of Appeal held that in a child custody dispute, the physician-patient privilege did not prevent the disclosure of the father's medical records relating to his neurological condition. The Court found the father waived the privilege due to the mother's presence during the father's intake

examination and his communications with his neurologist. Conversely, the Court also held that the father did not waive the physician-patient privilege with respect to his medical records in the possession of his seizure doctor who had treated him when he was a teenager, since those physician-patient communications were not in the presence of a third person, and because the father's communications with the neurologist did not "relate back" to his communications to the seizure doctor years earlier.

One may view this split decision as a fair outcome—on the one hand, respecting the father's privileged information to a reasonable extent, and on the other hand, allowing the mother access to some of the father's medical records. However, the decision is "split" only on its face. In reality, the mother's access to only the neurologist's records will likely provide her with all the information that she will need to accomplish her stated goal: to use evidence of the father's neurological condition to limit his ability to share custody of their only child.

From a policy standpoint, the decision may be problematic, as it may undermine the state's policy of promoting marriage. Among the foundations of lasting marriages are the spouses' support of one another through life's difficulties. In this case, the father was dealing with such a difficulty, and—presumably—the mother was present at the neurologist's appointment to offer her support. While offering that support, she gleaned medical information about the father. For the mother to then use that information against the father in a custody dispute seems unfair, at the least, and counter-intuitive to state policy. The decision may further undermine the state's policy of promoting marriage due to its encouraging spouses not to partake in honest, open communication with one another. In holding that the father waived the physician-patient privilege as a result of his decision to have his wife present at his first appointment with the neurologist, the appellate court penalized the father for choosing to share personal information with his wife. Instead of seeking to promote honest communication between spouses, the court did the opposite, instilling fear that medical information shared between spouses might one day be used by one spouse against the other.

It is also interesting to note that in distinguishing the waiver of the neurologist's records from the

privileged records of the seizure doctor, the Court stated that "[w]hen father spoke to [the seizure doctor], father reasonably believed he could fully and freely discuss his medical condition." This logic explaining why the father's communications with the seizure doctor were privileged could also be applied to his communications with the neurologist. The father reasonably believed he could fully and freely discuss his medical condition to his neurologist in the presence of his wife.

While the decision seems to hinge on the procedural issues of privileges and waivers, the elephant in the room may be the nature of the underlying proceeding. The appellate court's apparent unwillingness to engage in finding a way around the waiver of the physician-patient privilege was likely a result of the fact that this was a child custody proceeding. Had the physician-patient privilege been at issue in a general civil or criminal context, the court may have been more willing to protect the privilege.

For instance, the appellate court could have held that the disclosure of medical records was unnecessary, because the mother had other avenues to present evidence of the father's condition to the court. The mother had submitted her testimony regarding the father's neurological condition, and there was little fear that the mother's allegations were untruthful (or else the father likely would have offered his medical records to prove her wrong). In addition, the mother had at her disposal various discovery tools to present evidence of the father's condition, including taking the depositions of the his family members and close friends. The Court also had the option of holding that the mother's presence at the medical appointment did not waive the physician-patient privilege by virtue of the marital communications privilege. While the Court briefly discussed this possibility, it immediately rejected it by virtue of Evidence Code Section 984, which states the marital communications privilege does not apply in proceedings by one spouse against the other. The appellate court saw no reason to create an exception to this rule, for instance, by distinguishing child custody cases from more general civil actions. Ostensibly, the appellate court viewed as non-negotiable that, in determining what custodial arrangement is in the child's best interest, the trial court must have access to full information regarding

the father's neurological condition. The state's policy of safeguarding the child's best interest—served, in the appellate court's view, by disclosure of the father's medical records—is so paramount that it trumped the physician-patient privilege.

In response to the father's argument that, even if he waived the physician-patient privilege, his medical records were protected by the constitutional right to privacy, the appellate court left no doubt where its priorities lie. It flatly stated that "the state's interest in protecting the best interests of [the minor child] outweighs father's privacy interests" in the medical records. In addition to having waived the physician-patient privilege, the appellate court held that the father's constitutional right to privacy would not be violated by disclosure of the neurologist's records. *Manela* serves as a jolting reminder of the supremacy of the state's interest in promoting the best interest of minor children.

Commentary

Bernard N. Wolf

Why do I have the distinct impression that there is much more to *Manela* than meets the eye?

The mother in a custody dispute alleges that the father has frequent petit mal seizures. She argues that the claimed seizures should disqualify him from joint custody. The father states that he actually has tics which are controlled by medication. As far as we can tell from the opinion, the mother does not raise any other complaint about the father relating to their child. The mother demands sole custody. The father wants a custody order which serves their child's best interests.

It turns out that the father is a cardiologist and a member of the Orthodox Jewish community of Los Angeles. The mother doggedly pursues the father's medical records in the trial court and court of appeal. The end of the appellate opinion notes the father's concern that the mother is seeking the records to embarrass him and to damage his professional reputation. To me at least, the father's concern seems credible.

The court of appeal carefully takes us through the limitations of the physician-patient privilege. The

court resolves the discovery dispute by permitting the mother to obtain medical records from one of the father's doctors, but not the other one. At the end of the decision, the panel instructs the trial judge to consider reviewing the documents in camera or assigning that responsibility to another judicial officer, and possibly to issue a protective order.

These latter instructions are appropriate. Still, if the father's concerns about the mother's motivations are accurate, the mother has most likely succeeded in embarrassing the father through the procurement of a published opinion that is now a part of California law. Under these circumstances, despite the importance of the discovery issues involved, one wonders whether the appellate opinion would have best been unpublished.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §§ 10.05[4][f] (scope of confidential marital communications privilege), 110.10[4][b], 110.20[2][a] (subpoena duces tecum, generally), 110.12[4][a][iv],[d],[5] (privileged matters in dissolution proceedings); CALIFORNIA FAMILY LAW LITIGATION GUIDE, Unit 20 (evidence issues).

SPOUSAL SUPPORT

Effect of Bankruptcy

Briefly Noted

Sternberg v. Johnston

(Civ. Nos. 07-16870, 08-15721; U.S. Ct. App., 9th Cir. 10/1/09)

— F. 3d —, 2009 U.S. App. LEXIS 21532

By Clifton, Cir. Judge (Hawkins, Berzon, Cir. Judges, concurring)

The Ninth Circuit Court of Appeals held that a former wife's attorney willfully violated the automatic stay in a former husband's bankruptcy proceeding, by fully defending a state court's order issued after the bankruptcy filing that (1) found the husband in contempt for nonpayment of spousal support, and (2) ordered him jailed if he

failed to pay his support obligation in full by a certain date.

Procedural Posture. Appellee debtor filed a Chapter 11 bankruptcy petition and filed an adversary proceeding against appellants, including his ex-wife's attorney, alleging that they willfully violated the automatic stay under 11 U.S.C. § 362. On remand, the Bankruptcy Court found in favor of the debtor and awarded damages, attorney's fees, and costs. The United States District Court for the District of Arizona affirmed. Appellants sought review.

Overview. The debtor's ex-wife asked a state court to hold him in contempt for nonpayment of spousal support. The debtor filed a bankruptcy petition. During a hearing on the contempt request, the debtor informed the state court of his bankruptcy proceeding. The state court found the debtor in contempt and ordered him to pay the judgment or be jailed. The wife's attorney affirmatively opposed the debtor's effort to obtain relief from the order. The Bankruptcy Court concluded that the automatic stay had been violated and vacated the state court's order. The federal appellate court determined that the attorney violated the automatic stay, because (1) the state court order was in violation of the stay since the order did not focus on the debtor's non-estate property, and (2) at a minimum, the attorney needed to alert the state appellate court to the obvious conflicts between the order and the stay, but had failed to do so. The debtor could recover as actual damages only those attorney's fees related to enforcing the automatic stay and remedying the stay violation, not the fees incurred in prosecuting the bankruptcy adversary proceeding in which he pursued his claim for those damages.

Outcome. The Court of Appeals affirmed the portion of the District Court's judgment that held that the attorney violated the automatic stay and was liable for the debtor's actual damages. The Court also affirmed the debtor's damages for interference with his work and emotional distress. The Court then vacated the amount of the award entered by the District Court and remanded for a determination of the appropriate amount.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., § 140.07[1][d] (creditors' rights after commencement of bankruptcy proceeding). This summary was

derived from *LEXIS Case Summaries* [see 2009 U.S. App. LEXIS 21532].

TAXATION

Filing Status

Husband Living Apart From Wife Must File as Married Absent Legal Separation

Argyle (Von H.) v. Commissioner
(Civ. No. 6820-08; U.S. Tax Ct. 9/17/09)
T.C. Memo. 2009-218
By Cohen, Judge

A husband living apart from his wife was denied the right to file federal income tax returns with single filing status in the absence of a decree of divorce or legal separation.

Facts and Procedure. Von's wife filed for divorce in August 2004. The spouses lived separate and apart from then on, but were never parties to a decree of divorce or of separate maintenance. Von filed his 2005 and 2006 federal income tax returns using rates applicable to single taxpayers. The Internal Revenue Service [I.R.S.] determined that his proper filing status was married filing separately. The issue was brought to the Tax Court as part of a review of Von's returns on a number of other grounds.

Separated Spouse Is Required to File as Married Taxpayer. Internal Revenue Code Section 7703(a) provides the general rule for determination of marital status as of the close of the taxable year, providing that "an individual legally separated from his spouse under a decree of divorce or separate maintenance shall not be considered as married." Subsection (b) sets out conditions under which married individuals living apart shall *not* be considered married for purposes of head of household filing status. Thus, the Court determined that neither subsection allowed Von to be treated as married.

The Tax Court cited a previous decision in which it concluded that only an absolute divorce effects a legal separation in Pennsylvania (the state law at

issue in Von's case) as relevant to filing status on a federal income tax return. [Keibler v. Commissioner, T.C. Memo. 1980-75.] The Court rejected the taxpayer's argument in that case that living separate and apart was the equivalent of an absolute divorce under Pennsylvania law. Von was unable to cite any authority that would lead to a different result in his case, and acknowledged that there is no such thing as a decree of legal separation that a Pennsylvania court can order for married parties who live apart. Thus Von was determined to be unable to file as a single taxpayer.

Commentary

Robert Polevoi

This is a rather unusual situation, of course, but provides an opportunity to review some basic law. Married couples who have not yet obtained a final decree of divorce are subject to married filing status unless they are legally separated under a court decree. Merely living in separate residences is insufficient.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., § 160.60[3] (effect of legal separation on filing status).

Spousal Support

Court Allocates Payments of Combined Child and Spousal Support Arrearages First to Nondeductible Child Support

Heydt (David and Jennifer) v. Commissioner
(Civ. No. 13093-08S; U.S. Tax Ct. 9/24/09)
T.C. Summary Opinion 2009-149
By Dean, Special Trial Judge

Payments of combined child and spousal support arrearages are allocated first to nondeductible child support, regardless of any allocation made by a state agency.

Facts and Procedure. David and his wife initiated divorce proceedings in 1980. Among other things, they agreed to payments of child and spousal

support by David, and the stipulation was incorporated in a court order.

In 2005, David and his current wife Jennifer paid \$15,257.76 to a county Department of Child Support Services. That agency applied \$1,339.48 to interest on child support arrearages and \$13,918.28 to interest on spousal support arrearages. At the close of 2005, arrearages on child support totaled \$12,088.29.

On their 2005 federal income tax return, David and Jennifer claimed a deduction of \$15,540 for alimony paid in 2005. The Internal Revenue Service [I.R.S.] denied the deduction and David took the case to the Tax Court.

Payment Must First Be Allocated to Nondeductible Child Support. Federal income tax law permits the deduction of payments that qualify as alimony under Internal Revenue Code Section 71. Payments of child support are specified excluded from alimony tax treatment. Moreover, combined payments of spousal and child support are first allocated to child support to the extent of the child support obligation. [I.R.C. § 71(b).]

The Tax Court disregarded the state agency allocation of the payments and determined that the first \$12,088.29 of the amount paid in 2005 should be allocated to child support, and was therefore nondeductible. The remaining \$3,169.47 was allocated among alimony, interest on alimony arrearages, and interest on child support arrearages, and only the portion allocable to alimony was held deductible.

Commentary

Robert Polevoi

The allocation by the state agency of such large portions of the payments to interest was peculiar and suspect, but apart from their legitimacy, the law requires allocation of payments to child support before alimony, regardless of any agreement between the parties or any other basis of allocation. In other words, payments are nondeductible to the extent of outstanding child support.

Note that this case was decided as a Summary Opinion under the Small Tax Case procedures of the Tax Court. Although these decisions may not be cited as precedent, they typically reflect uncontroversial

applications of settled law to simple facts, and are therefore illustrative of how the federal tax law is applied in practice.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., § 160.03[1] (requirements for alimony tax treatment), 160.04[1] (alimony compared to child support).

CUMULATIVE SUBJECT INDEX

The following is an index of the subject matter covered in the CALIFORNIA FAMILY LAW MONTHLY for the current volume (January 2009 forward). This table directs the subscriber to the page on which each subject is discussed.

	Vol.:Page
ADOPTION	
Indian Child Welfare Act	306
Legislation	1
Postjudgment Procedures	309, 345
Terminating Parental Rights	43, 310
ATTORNEY'S FEES	
Arbitration	72
Awards	142
Community Property as Security	347
Effect of Bankruptcy	113
Orders	142, 386
Recovery by Attorney	113
CHILD CUSTODY	
Abduction	146, 390
Awards to Nonparents	114, 196, 234
Change of Child's Residence	272
False Allegations of Child Abuse	151
Investigation and Report	117
Jurisdiction	46
Legislation	1
Uniform Acts	47, 76, 313, 348
CHILD SUPPORT	
Enforcement	25, 197, 354
Modification	78, 97
Support Guidelines	97, 314, 354, 396
COMMUNITY PROPERTY	
Characterization	48
Division	154
Effect of Bankruptcy	51, 277, 315
Liability for Debts	358
Liens on Real Property	359
Retirement and Pension Benefits	83, 119, 159
Transmutation	221
DEPENDENCY	
Legislation	3
DOMESTIC PARTNERSHIP	
Legislation	4

DOMESTIC VIOLENCE

Legislation	4
-------------------	---

FAMILY VIOLENCE

Child Abuse Reporting	52
Related Criminal Sanctions	17, 238
Restraining Orders	238, 277

GUARDIANSHIP

Terminating Parental Rights	163
-----------------------------------	-----

GUARDIANSHIP AND CONSERVATORSHIP

Legislation	7
-------------------	---

JUDICIAL COUNCIL

Forms, Rules, and Standards	18, 242
-----------------------------------	---------

JUVENILE COURTS

Appealable Orders	244
Appeals	84, 171, 202
Authority of Court Over Minor	244
Confidentiality of Records	172
Contempt	172, 203
Disposition Hearing	56
Evidence	245
Indian Child Welfare Act ...	84, 173, 207, 246, 281, 360, 397
Jurisdiction	208, 281
Jurisdiction Hearing	123, 174, 209, 282, 318
Liability for Support	363
Modification	209
Post-Permanency-Planning Procedures	174
Restraining Orders	175
Reunification	57, 124, 176, 248, 397
Supplemental and Subsequent Petitions	248
Termination of Jurisdiction	363
Terminating Parental Rights	21, 58, 319
Visitation	59, 210

LATE BREAKING CASES

False Allegations of Child Abuse	131
--	-----

MARRIAGE

Annulment	398
Legal Effects	59, 125, 403
Requirements	22, 250

PARENT AND CHILD

Inheritance Rights	60, 283, 320
Parents' Rights	283

PARENTAGE

Legislation	7
-------------------	---

PARENTAGE ISSUES

Presumptions	286, 323, 404
Surrogate Parenting	255

PROCEDURE IN GENERAL

Disclosure Declarations	126
Discovery	287, 405
Jurisdiction	22
Legislation	9
Notice of Appeal	85
Postjudgment Relief	25, 287
Sanctions	86
Service of Process	211
Stay of Proceedings	87

PROPERTY RIGHTS ON DEATH

Effect of Premarital Agreement 90

SPOUSAL SUPPORT

Effect of Bankruptcy 410

Modification 328, 364

TAXATION

Dependency Exemption .. 62, 93, 177, 214, 256, 329, 369

Filing Status 411

Income Tax Returns 330

Innocent Spouse Relief 30, 93, 129, 178, 257, 290

Spousal Support 31, 62, 215, 292, 412

Taxable Income 370

THE BACK PAGE

In re Marriage of Brooks & Robinson 179

CUMULATIVE TABLE OF CASES

The following is a cumulative list of the cases summarized in the CALIFORNIA FAMILY LAW MONTHLY for the current volume (January 2009 forward). This table directs the subscriber to the page on which each case is discussed. Cases having a primary summary in a Special Bulletin are preceded by the volume year and letters SB. Citations to the official reports and other case reporters will be inserted as they become available. Readers should check the subsequent history for each case in the official advance sheets before relying on any case appearing in this table.

Vol.:Page**AB 459** (Would amend Fam. Code §§ 2103, 2104, 2106, 2107) 126**AB 612** (Would amend Fam. Code § 3111; would add Fam. Code §§ 3005, 3045, 3100.5, 3110.6) 117**Adoption of O.M.** (Civ. No. A120844; Ct. App., 1st Dist., Div. 4. 12/22/08) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2446 By Ruvolo, P.J. (Reardon, Rivera, JJ., concurring) 43**Addie (Donald) v. Commissioner** (Civ. No. 7590-08S; U.S. Tax Ct. 8/25/09) T.C. Summary Opinion 2009-129 By Armen, Special Trial Judge 370**Alan S. v. Superior Court** (Civ. No. G041034; Ct. App., 4th Dist., Div. 3. filed 3/18/09; mod. 4/2/09, 4/15/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 378 By Sills, P.J. (Aronson, Ikola, JJ., concurring) 142**Argyle (Von H.) v. Commissioner** (Civ. No. 6820-08; U.S. Tax Ct. 9/17/09) T.C. Memo. 2009-218 By Cohen, Judge 411**Asvesta v. Petroustas** (Civ. No. 08-15365; U.S. Ct. App., 9th Cir. 9/4/09) — F. 3d ___, 2009 U.S. App. LEXIS 19949 By Paez, Cir. Judge (Hug, Jr., Berzon, Cir. Judges, concurring) 390**Bak v. MCL Financial Group, Inc.** (Civ. No. G040130; Ct. App., 4th Dist., Div. 3. 1/30/09) ___ Cal. App. 4th ___, ___ Cal.

Rptr. 3d ___, 2009 Cal. App. LEXIS 133 By Rylaarsdam, Acting P.J. (Aronson, Fybel, JJ., concurring) 86

Barron v. Superior Court (Civ. Nos. H032853, H032884; Ct. App., 6th Dist. filed 3/26/09; ord. pub. 4/23/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 612 By Premo, Acting P.J. (Elia, Duffy, JJ., concurring) 197**Bedwell (Michael Wayne) v. Commissioner** (Civ. No. 18801-06S; U.S. Tax Ct. 11/3/08) T.C. Summary Opinion 2008-139 By Gerber, Judge 31**Cabral v. Martins** (Civ. Nos. A120657, A121731; Ct. App., 1st Dist., Div. 4. filed 8/21/09; ord. pub. 9/4/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 1483 By Ruvolo, P.J. (Reardon, Sepulveda, JJ., concurring) 354**Charisma R. v. Kristina S.** (Civ. No. A122264; Ct. App., 1st Dist., Div. 5. 6/26/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 1047 By Simons, Acting P.J. (Needham, Bruiniers, JJ., concurring) 286**Charisma R. v. Kristina S.** (Civ. No. A122264; Ct. App., 1st Dist., Div. 5. 6/26/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 1047 By Simons, Acting P.J. (Needham, Bruiniers, JJ., concurring) 323**City and County of San Francisco v. Horton** (Civ. No. S168078; 11/05/08) 22**Cleland (Ulmer, III) v. Commissioner** (Civ. No. 22736-07S; U.S. Tax Ct. 4/30/09) T.C. Summary Opinion 2009 60 By Nims, Judge 215**Contreras (Rafael Alex) v. Commissioner** (Civ. No. 5743-08S; U.S. Tax Ct. 4/21/09) T.C. Summary Opinion 2009 55 By Armen, Special Trial Judge 214**County of Sacramento v. Llanes** (Civ. No. C056585; Ct. App., 3d Dist. 11/5/08) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2373 By Blease, Acting P.J. (Nicholson, Cantil Sakauye, JJ., concurring) 29**D. B. v. Superior Court** (Civ. No. A123439; Ct. App., 1st Dist., Div. 5. filed 2/18/09; mod. 2/26/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 180 By Needham, J. (Jones, P.J., Simons, J., concurring) 124**D. M. v. Superior Court** (Civ. No. G041370; Ct. App., 4th Dist., Div. 3. filed 4/13/09; ord. pub. 5/8/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 711 By Aronson, J. (O'Leary, Acting P.J., Ikola, J., concurring) 208**Enrique M. v. Angelina V.** (Civ. No. D053395; Ct. App., 4th Dist., Div. 1. 6/10/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 965 By Aaron, J. (McConnell, P.J., O'Rourke, J., concurring) 283**Estate of Chambers** (Civ. No. B210500; Ct. App., 2d Dist., Div. 8. 7/9/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 1118 By Rubin, Acting P.J. (Flier, Bendix, JJ., concurring) 283**Estate of Chambers** (Civ. No. B210500; Ct. App., 2d Dist., Div. 8. 7/9/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 1118 By Rubin, Acting P.J. (Flier, Bendix, JJ., concurring) 320**Estate of Pryor** (Civ. No. B207402; Ct. App., 2d Dist., Div. 4. 9/29/09) — Cal. App. 4th ___, — Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 1609 By Epstein, P.J. (Manella, Suzukawa, JJ., concurring) 403

Estate of Shellenbarger (Civ. No. B202854; Ct. App., 2d Dist., Div. 6. 12/29/08) 169 Cal. App. 4th 894, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2468 By Yegan, J. (Gilbert, P.J., Perren, J., concurring)	60
Estate of Will (Civ. No. B200639; Ct. App., 2d Dist., Div. 6. 1/27/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 90 By Gilbert, P.J. (Yegan, Perren, JJ., concurring)	90
Farb v. Superior Court (Civ. No. B209814; Ct. App., 2d Dist., Div. 4. 6/2/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 869 By Epstein, P.J. (Willhite, Manella, JJ., concurring)	255
Greer (Winnie L.) v. Commissioner (Civ. No. 24062-06; U.S. Tax Ct. 1/29/09) T.C. Memo. 2009-20 By Goeke, Judge ...	93
Gronbeck (Delysia B.) v. Commissioner (Civ. No. 10750-07; U.S. Tax Ct. 3/11/09) T.C. Memo. 2009-53 By Swift, Judge	178
Guardianship of Ann S. (Civ. No. S143723; Cal. Sup. Ct. 3/19/09) — Cal. 4th —, — Cal. Rptr. 3d —, — P.3d —, 2009 Cal. LEXIS 2933 By Corrigan, J. (George, C.J., Kennard, Baxter, Werdegar, Chin, Moreno, JJ., concurring)	163
Halbin (Dolores Jean) v. Commissioner (Civ. No. 5799-06; U.S. Tax Ct. 1/28/09) T.C. Memo. 2009-18 By Marvel, Judge	93
Harris (Diane S.) v. Commissioner (Civ. No. 26684-06; U.S. Tax Ct. 2/5/09) T.C. Memo. 2009-26 By Wells, Judge	129
Haubrich (Gregory A.) v. Commissioner (Civ. No. 24079-06; U.S. Tax Ct. 12/30/08) T.C. Memo. 2008-299 By Marvel, Judge	62
Heydt (David and Jennifer) v. Commissioner (Civ. No. 13093-08S; U.S. Tax Ct. 9/24/09) T.C. Summary Opinion 2009-149 By Dean, Special Trial Judge	412
Horsley (Patricia Ann) v. Commissioner (Civ. No. 4853-07; U.S. Tax Ct. 3/2/09) T.C. Memo. 2009-47 By Chiechi, Judge	177
Humphries v. County of L.A. (Civ. No. 05-56467; U.S. Ct. App., 9th Cir. 11/5/08) 547 F. 3d 1117, 2008 U.S. App. LEXIS 23292 By Bybee, Cir. Judge (Smith, Mills, Cir. Judges, concurring)	52
In re A.C. (Civ. No. G040540; Ct. App., 4th Dist., Div. 3. 12/22/08) 169 Cal. App. 4th 636, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2448 By Ikola, J. (Bedsworth, Acting P.J., Aronson, J., concurring)	57
In re A. R. (Civ. No. D053125; Ct. App., 4th Dist., Div. 1. 1/26/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 81 By Aaron, J. (Haller, Acting P.J., O'Rourke, J., concurring)	87
In re A. S. (Civ. No. E045331; Ct. App., 4th Dist., Div. 2. 6/19/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 982 By McKinster, J. (Ramirez, P.J., Hollenhorst, J., concurring)	281
In re Aaron D. (Civ. No. E044453; Ct. App., 4th Dist., Div. 2. rev. den., ord. depub. 11/19/08) 165 Cal. App. 4th 1546, 82 Cal. Rptr. 3d 510, 2008 Cal. App. LEXIS 1324	46
In re Alexis E. (Civ. No. B207752; Ct. App., 2d Dist., Div. 3. filed 1/23/09; ord. pub. 2/23/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 199 By Croskey, Acting P.J. (Kitching, Aldrich, JJ., concurring)	123
In re Bledsoe (Civ. No. 07-35567; U.S. Ct. App., 9th Cir. 6/25/09) — F. 3d —, 2009 U.S. App. LEXIS 13677 By Graber, Cir. Judge (Bybee, Cir. Judge, concurring; O'Scannlain, Cir. Judge, concurring in part and dissenting in part)	277
In re Bledsoe (Civ. No. 07-35567; U.S. Ct. App., 9th Cir. 6/25/09) — F. 3d —, 2009 U.S. App. LEXIS 13677 By Graber, Cir. Judge (Bybee, Cir. Judge, concurring; O'Scannlain, Cir. Judge, concurring in part and dissenting in part)	315
In re B. del C. S. B. (Civ. No. 08-55067; U.S. Ct. App., 9th Cir. 3/18/09) — F. 3d —, 2009 U.S. App. LEXIS 5568 By Reinhardt, Cir. Judge (Miner, Berzon, Cir. Judges, concurring)	146
In re B. S. (Civ. No. E045748; Ct. App., 4th Dist., Div. 2. 3/17/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 370 By Richli, J. (Hollenhorst, Acting P.J., McKinster, J., concurring)	175
In re Carlos T. (Civ. No. B207604; Ct. App., 2d Dist., Div. 4. 6/3/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 888 By Willhite, J. (Epstein, P.J., Suzukawa, J., concurring)	248
In re Charlotte D. (Civ. No. S142028; Cal. Sup. Ct. 3/19/09) — Cal. 4th —, — Cal. Rptr. 3d —, — P.3d —, 2009 Cal. LEXIS 2932 By Corrigan, J. (George, C.J., Kennard, Baxter, Werdegar, Chin, Moreno, JJ., concurring)	163
In re Cole C. (Civ. No. D053845; Ct. App., 4th Dist., Div. 1. 6/4/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 897 By Huffman, Acting P.J. (Haller, Irion, JJ., concurring)	245
In re C. C. (Civ. No. B208675; Ct. App., 2d Dist., Div. 7. 4/13/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 539 By Perluss, P.J. (Woods, Zelon, JJ., concurring)	210
In re Damian C. (Civ. No. D054918; Ct. App., 4th Dist., Div. 1. filed 9/17/09; ord. pub. 10/8/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1655 By McConnell, P.J. (McDonald, Aaron, JJ., concurring)	397
In re D. F. (Civ. Nos. C057250, C057753; Ct. App., 3d Dist. filed 2/20/09; ord. pub. 3/23/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 417 By Morrison, J. (Blease, Acting P.J., Cantil-Sakauye, J., concurring)	176
In re E. G. (Civ. No. C059277; Ct. App., 3d Dist. 2/10/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 161 By Scotland, P.J. (Sims, Nicholson, JJ., concurring) ...	84
In re E. S. (Civ. No. D052768; Ct. App., 4th Dist., Div. 1. 5/8/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 712 By Haller, J. (Benke, Acting P.J., Irion, J., concurring)	196
In re E. S. (Civ. No. D052768; Ct. App., 4th Dist., Div. 1. 5/8/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 712 By Haller, J. (Benke, Acting P.J., Irion, J., concurring)	234
In re E. W. (Civ. No. E045896; Ct. App., 4th Dist., Div. 2. 1/21/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 60 By Ramirez, P.J. (Gaut, Miller, JJ., concurring)	85
In re Gabriel L. (Civ. No. D053805; Ct. App., 4th Dist., Div. 1. filed 2/27/09; ord. pub. 3/24/09) — Cal. App. 4th —, — Cal.	

Rptr. 3d —, 2009 Cal. App. LEXIS 425 By Nares, Acting P.J. (Haller, Aaron, JJ., concurring)	176
In re G. W. (Civ. No. F056246; Ct. App., 5th Dist. 5/19/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 788 By Cornell, Acting P.J. (Dawson, Kane, JJ., concurring) .	249
In re H. E. (Civ. No. A120903; Ct. App., 1st Dist., Div. 2. 12/23/08) 169 Cal. App. 4th 710, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2455 By Lambden, J. (Kline, P.J., Haerle, J., concurring)	56
In re Holly B. (Civ. No. C058116; Ct. App., 3d Dist. 4/8/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 492 By Robie, J. (Scotland, P.J., Blease, J., concurring)	171
In re I. I. (Civ. No. E045763; Ct. App., 4th Dist., Div. 2. 11/25/08) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2008 Cal. App. LEXIS 2349 By Hollenhorst, Acting P.J. (Gaut, King, JJ., concurring)	21
In re Jaheim B. (Civ. No. D053121; Ct. App., 4th Dist., Div. 1. 12/22/08) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2495 By McConnell, P.J. (Nares, McIntyre, JJ., concurring)	47
In re Jaheim B. (Civ. No. D053121; Ct. App., 4th Dist., Div. 1. filed 12/22/08; ord. pub. 1/7/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2495 By McConnell, P.J. (Nares, McIntyre, JJ., concurring)	76
In re James R., Jr. (Civ. No. D054065; Ct. App., 4th Dist., Div. 1. 7/15/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1269 By McDonald, Acting P.J. (McIntyre, Irion, JJ., concurring)	318
In re Jason J. (Civ. No. D054188; Ct. App., 4th Dist., Div. 1. filed 7/9/09; reh. den., mod. 8/6/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1116 By McConnell, P.J. (Huffman, O'Rourke, JJ., concurring)	310
In re Jeremiah G. (Civ. No. C058223; Ct. App., 3d Dist. 4/14/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 541 By Scotland, P.J. (Sims, Nicholson, JJ., concurring)	207
In re J. K. (Civ. No. B210150; Ct. App., 2d Dist., Div. 7. filed 5/18/09; ord. pub. 6/17/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 966 By Woods, J. (Perluss, P.J., Zelon, J., concurring)	282
In re J. O. (Civ. No. B211535; Ct. App., 2d Dist., Div. 4. filed 9/9/09; ord. pub. 10/7/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1650 By Manella, J. (Epstein, P.J., Suzukawa, J., concurring)	396
In re Kenneth S., Jr. (Civ. No. D053130; Ct. App., 4th Dist., Div. 1. 12/10/08) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2493 By McDonald, J. (Benke, Acting P.J., Nares, J., concurring)	59
In re K. B. (Civ. No. E046005; Ct. App., 4th Dist., Div. 2. 5/13/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 743 By McKinster, J. (Ramirez, P.J., King, J., concurring)	246
In re K. M. (Civ. No. B206435; Ct. App., 2d Dist., Div. 6. 3/16/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 356 By Perren, J. (Gilbert, P.J., Yegan, J., concurring)	173
In re K. P. (Civ. No. C060327; Ct. App., 3d Dist. 6/22/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 992 By Sims, Acting P.J. (Raye, Cantil Sakauye, JJ., concurring)	281
In re L. B. (Civ. No. B210574; Ct. App., 2d Dist., Div. 5. 4/28/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 622 By Armstrong, J. (Turner, P.J., Krieglner, J., concurring)	202
In re Marriage of Alter (Civ. No. H032390; Ct. App., 6th Dist. 2/26/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 218	97
In re Marriage of Berger (Civ. No. G039234; Ct. App., 4th Dist., Div. 3. 1/29/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 106 By Bedsworth, Acting P.J. (Aronson, Ikola, JJ., concurring)	78
In re Marriage of Blazer (Civ. No. H031574, Ct. App., 6th Dist. 8/25/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1409	337
In re Marriage of Brooks & Robinson (Civ. No. E043770, Ct. App., 4th Dist., Div. 2. 12/16/08) 169 Cal. App. 4th 176, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2421	33, 179
In re Marriage of Corona (Civ. No. D052502; Ct. App., 4th Dist., Div. 1. 4/7/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 488 By O'Rourke, J. (Benke, Acting P.J., McDonald, J., concurring)	154
In re Marriage of Corona (Civ. No. D052502, Ct. App., 4th Dist., Div. 1. 4/7/09) 172 Cal. App. 4th 1205, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 488	187
In re Marriage of Dellaria & Blickman-Dellaria (Civ. No. A122162; Ct. App., 1st Dist., Div. 4. filed 3/17/09; mod., reh. den. 4/2/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 369 By Ruvolo, P.J. (Reardon, Sepulveda, JJ., concurring)	155
In re Marriage of Dietz (Civ. No. G040640; Ct. App., 4th Dist., Div. 3. 8/3/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1282 By Fybel, J. (O'Leary, Acting P.J., Aronson, J., concurring)	328
In re Marriage of Dietz (Civ. No. G040640; Ct. App., 4th Dist., Div. 3. 8/3/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1282 By Fybel, J. (O'Leary, Acting P.J., Aronson, J., concurring)	364
In re Marriage of Herr (Civ. No. C058019; Ct. App., 3d Dist. 6/17/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 960 By Sims, J. (Blease, Acting P.J., Robie, J., concurring)	287
In re Marriage of Hopkins (Civ. No. F055130; Ct. App., 5th Dist. 4/23/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 613 By Cornell, J. (Ardaiz, P.J., Vartabedian, J., concurring)	199
In re Marriage of Knowles (Civ. No. C057851; Ct. App., 3d Dist. 10/6/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1634 By Nicholson, Acting P.J. (Robie, Butz, JJ., concurring)	396
In re Marriage of Lund (Civ. No. G040863, Ct. App., 4th Dist., Div. 3. 5/21/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 809	221

- In re Marriage of Lyustiger** (Civ. No. C057861; Ct. App., 3d Dist. 9/29/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1594 By Nicholson, J. (Sims, Acting P.J., Butz, J., concurring) 386
- In re Marriage of Nadkarni** (Civ. No. H032868; Ct. App., 6th Dist. filed 4/24/09; ord. pub. 5/19/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 775 By Bamattre Manoukian, Acting P.J. (Mihara, McAdams, JJ., concurring) 238
- In re Marriage of Nurie** (Civ. No. A121719; Ct. App., 1st Dist., Div. 2. 8/7/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1303 By Richman, J. (Kline, P.J., Lambden, J., concurring) 313
- In re Marriage of Nurie** (Civ. No. A121719; Ct. App., 1st Dist., Div. 2. 8/7/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1303 By Richman, J. (Kline, P.J., Lambden, J., concurring) 348
- In re Marriage of Padgett** (Civ. No. A120644; Ct. App., 1st Dist., Div. 2. 3/25/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 420 By Kline, P.J. (Haerle, Richman, JJ., concurring) 159
- In re Marriage of Rossin** (Civ. No. H032258, Ct. App., 6th Dist. 3/24/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 426 135
- In re Melissa R.** (Civ. No. A121951; Ct. App., 1st Dist., Div. 3. 8/27/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1430 By Siggins, J. (McGuinness, P.J., Jenkins, J., concurring) 363
- In re B. R.** (Civ. No. A122581; Ct. App., 1st Dist., Div. 1. 8/13/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1331 By Margulies, J. (Marchiano, P.J., Graham, J., concurring) 360
- In re G. L.** (Civ. No. D054257; Ct. App., 4th Dist., Div. 1. 9/9/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1498 By Irion, J. (Benke, Acting P.J., Huffman, J., concurring) 362
- In re N. M.** (Civ. No. C056832; Ct. App., 3d Dist. 5/27/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 854 By Raye, J. (Scotland, P.J., Cantil Sakauye, J., concurring) 246
- In re Nolan W.** (Civ. No. S159524; Cal. Sup. Ct. 3/30/09) — Cal. 4th —, — Cal. Rptr. 3d —, — P.3d —, 2009 Cal. LEXIS 3185 By Corrigan, J. (George, C.J., Kennard, Werdegar, Chin, Moreno, JJ., concurring; Baxter, J., concurring and dissenting) 172
- In re Nolan W.** (Civ. No. S159524; Cal. Sup. Ct. 3/30/09) 45 Cal. 4th 1217, 91 Cal. Rptr. 3d 140, — P.3d —, 2009 Cal. LEXIS 3185 By Corrigan, J. (George, C.J., Kennard, Werdegar, Chin, Moreno, JJ., concurring; Baxter, J., concurring and dissenting) 203
- In re R.C.** (Civ. No. D052698; Ct. App., 4th Dist., Div. 1. 12/19/08) 169 Cal. App. 4th 486, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2435 By Irion, J. (Nares, Acting P.J., Aaron, J., concurring) 58
- In re R. H.** (Civ. No. F055047; Ct. App., 5th Dist. 1/26/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 88 By Vartabedian, Acting P.J. (Cornell, Kane, JJ., concurring) 84
- In re R. M. & S. M.** (Civ. No. B210077; Ct. App., 2d Dist., Div. 1. 5/5/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 716 By Rothschild, J. (Mallano, P.J., Weisberg, J., concurring) 209
- In re S. B.** (Civ. No. S162156; Cal. Sup. Ct. 5/28/09) — Cal. 4th —, — Cal. Rptr. 3d —, — P.3d —, 2009 Cal. LEXIS 4629 By Corrigan, J. (George, C.J., Kennard, Baxter, Werdegar, Chin, Moreno, JJ., concurring) 244
- In re R. W.** (Civ. No. G040791; Ct. App., 4th Dist., Div. 3. filed 3/26/09; ord. pub. 4/8/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 493 By Fybel, J. (Rylaarsdam, Acting P.J., Aronson, J., concurring) 174
- In re Samuel G.** (Civ. No. D054066; Ct. App., 4th Dist., Div. 1. 5/28/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 840 By McDonald, J. (McConnell, P.J., Benke, J., concurring) 244
- In re Scott** (Civ. No. ND-08-10564-RR; U.S. Bankr. Ct., Cent. Dist. Cal. 3/4/09) 400 Bankr. 257, 2009 Bankr. LEXIS 883 By Riblet, Bankr. Judge 347
- In re S. B.** (Civ. No. B210101; Ct. App., 2d Dist., Div. 4. 6/3/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 891 By Epstein, P.J. (Willhite, Suzukawa, JJ., concurring) 247
- In re S. R.** (Civ. No. C060404; Ct. App., 3d Dist. 5/1/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 668 By Nicholson, Acting P.J. (Hull, Robie, JJ., concurring) 209
- In re T. M.** (Civ. No. C059898; Ct. App., 3d Dist. 7/17/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1160 By Cantil-Sakauye, J. (Blease, Acting P.J., Robie, J., concurring) 319
- In re T. S.** (Civ. No. C059718; Ct. App., 3d Dist. 7/14/09) 175 Cal. App. 4th 1031, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1141 By Sims, Acting P.J. (Raye, Cantil-Sakauye, JJ., concurring) 306
- In re Y. G.** (Civ. No. B210847; Ct. App., 2d Dist., Div. 4. 6/23/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 997 By Willhite, J. (Epstein, P.J., Manella, J., concurring) 282
- Insys, Ltd. v. Applied Materials, Inc.** (Civ. No. H033058; Ct. App., 6th Dist. 1/30/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 132 By Rushing, P.J. (Premo, Elia, JJ., concurring) 85
- Irons (Melvin J.) v. Commissioner** (Civ. No. 12511 07; U.S. Tax Ct. 5/13/09) T.C. Memo. 2009 96 By Wells, Judge .. 256
- I.R.S. Office of Chief Counsel Memorandum** (C.C.A. No. 200925041. 5/11/09) 329
- Jose O. v. Superior Court** (Civ. No. D053669; Ct. App., 4th Dist., Div. 1. 12/3/08) 169 Cal. App. 4th 703, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2453 By Nares, Acting P. J. (McDonald, McIntyre, JJ., concurring) 57
- Karp (Alina) v. Commissioner** (Civ. No. 26617-06; U.S. Tax Ct. 2/18/09) T.C. Memo. 2009-40 By Vasquez, Judge 130
- Karton v. Dougherty** (Civ. No. B201663; Ct. App., 2d Dist., Div. 1. filed 2/17/09; mod., reh. den. 3/18/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 175 By Rothschild, J. (Mallano, P.J., Weisberg, J., concurring) ... 113
- Keith R. v. Superior Court** (Civ. No. G041642; Ct. App., 4th Dist., Div. 3. filed 5/19/09; ord. pub. 6/5/09) — Cal. App. 4th —,

— Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 902 By the Court (Rylaarsdam, Acting P.J., Fybel, Ikola, JJ.)	272
Kennedy v. Plan Administrator for DuPont Savings and Investment Plan (No. 07-636, U.S. Sup. Ct. 1/26/09) ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___, 2009 U.S. LEXIS 869	65
Kevin Q. v. Lauren W. (Civ. No. G040343, Ct. App., 4th Dist., Div. 3. filed 6/19/09; mod., reh'g. den. 7/16/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 984	263
Kollar (Mary Ann) v. Commissioner (Civ. No. 15928-05, U.S. Tax Ct. 11/25/08) 131 T.C. No 12 By Marvel, Judge	30
Krug v. Maschmeier (Civ. No. A121940; Ct. App., 1st Dist., Div. 4. 3/25/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 432 By Ruvolo, P.J. (Sepulveda, Rivera, JJ., concurring)	142
Loeffler v. Medina (Civ. No. D053096; Ct. App., 4th Dist., Div. 1. 6/18/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 974 By Irion, J. (Huffman, Acting P.J., McIntyre, J., concurring)	277
Manela v. Superior Court (Civ. No. B214447; Ct. App., 2d Dist., Div. 3. 9/22/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1561 By Kitching, J. (Klein, P.J., Aldrich, J., concurring)	405
Matusow v. Trans-County Title Agency (Civ. No. 07-2148; U.S. Ct. App., 3d Cir. 10/16/08) — F. 3d —, 2008 U.S. App. LEXIS 21584 By Tashima, Cir. Judge (McKee, Rendell, Cir. Judges, concurring)	22
McDaniel (Steven M.) v. Commissioner (Civ. No. 24702-06; U.S. Tax Ct. 6/15/09) T.C. Memo. 2009 137 By Goldberg, Special Trial Judge	290
Merrill (Charles) v. Commissioner (Civ. No. 22608-07; U.S. Tax Ct. 7/13/09) T.C. Memo. 2009-166 By Kroupa, Judge	330
Morales Garcia v. Holder (Civ. No. 07 70400; U.S. Ct. App., 9th Cir. 6/3/09) — F. 3d —, 2009 U.S. App. LEXIS 11934 By Tashima, Cir. Judge (McKeown, Gould, Cir. Judges, concurring)	238
Musaelian v. Adams (Civ. No. S156045; Cal. Sup. Ct. 1/15/09) ___ Cal. 4th ___, ___ Cal. Rptr. 3d ___, ___ P.3d ___, 2009 Cal. LEXIS 115 By Werdegard, J. (George, C.J., Kennard, Baxter, Chin, Moreno, Corrigan, JJ., concurring)	87
M. L. v. Superior Court (Civ. No. B212274; Ct. App., 2d Dist., Div. 6. 3/23/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 410 By Gilbert, P.J. (Coffee, Perren, JJ., concurring)	174
M. S. v. O. S. (Civ. No. D053996; Ct. App., 4th Dist., Div. 1. 8/7/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1297 By McConnell, P.J. (O'Rourke, Aaron, JJ., concurring)	314
M. S. v. O. S. (Civ. No. D053996; Ct. App., 4th Dist., Div. 1. 8/7/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1297 By McConnell, P.J. (O'Rourke, Aaron, JJ., concurring)	354
Newkirk (Frankie D.) v. Commissioner (Civ. No. 28518-07S; U.S. Tax Ct. 8/13/09) T.C. Summary Opinion 2009-128 By Marvel, Judge	369
Owens v. Automotive Machinists Pension Trust (Civ. No. 07-35253; U.S. Ct. App., 9th Cir. 1/12/09) ___ F. 3d ___, 2009 U.S. App. LEXIS 582 By Pregerson, Cir. Judge (Canby, Jr., Cir. Judge, concurring; Noonan, Cir. Judge, dissenting)	83
Owens v. Automotive Machinists Pension Trust (Civ. No. 07-35253; U.S. Ct. App., 9th Cir. 1/12/09) 551 F.3d 1138, 2009 U.S. App. LEXIS 582 By Pregerson, Cir. Judge (Canby, Jr., Cir. Judge, concurring; Noonan, Cir. Judge, dissenting)	119
Patrick v. Alacer Corp. (Civ. No. G037261; Ct. App., 4th Dist., Div. 3. filed 10/22/08; reh'g. den., mod. 11/22/08) 167 Cal. App. 4th 995, 84 Cal. Rptr. 3d 642, 2008 Cal. App. LEXIS 1669 By Ikola, J. (Sills, P.J., O'Leary, J., concurring)	48
Pavia (Oralia) v. Commissioner (Civ. No. 640-07; U.S. Tax Ct. 12/4/08) T.C. Memo. 2008-270 By Vasquez, Judge	62
People v. Belton (Crim. No. C055046; Ct. App., 3d Dist. 11/18/08) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2008 Cal. App. LEXIS 2216 By Davis, Acting P.J. (Nicholson, Hull, JJ., concurring)	17
Pryor v. Pryor (Civ. No. B207398; Ct. App., 2d Dist., Div. 4. 9/29/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1608 By Epstein, P.J. (Manella, Suzukawa, JJ., concurring)	398
Riverside County Sheriff's Dept. v. Zigman (Civ. No. E043187; Ct. App., 4th Dist., Div. 2. 12/23/08) 169 Cal. App. 4th 763, ___ Cal. Rptr. 3d ___, 2008 Cal. App. LEXIS 2459 By Ramirez, P.J. (Richli, King, JJ., concurring)	59
Robert J. v. Catherine D. (Civ. No. D051552; Ct. App., 4th Dist., Div. 1. 3/11/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 322 By Benke, Acting P.J. (Huffman, Nares, JJ., concurring)	131
Robert J. v. Catherine D. (Civ. No. D051552; Ct. App., 4th Dist., Div. 1. 3/11/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 322 By Benke, Acting P.J. (Huffman, Nares, JJ., concurring)	151
R. S. v. Superior Court (Civ. No. G040473; Ct. App., 4th Dist., Div. 3. filed 3/3/09; ord. pub. 3/30/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 468 By O'Leary, J. (Sills, P.J., Rylaarsdam, J., concurring)	172
Sakaguchi v. Sakaguchi (Civ. No. B208353; Ct. App., 2d Dist., Div. 4. 4/27/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 621 By Epstein, P.J. (Willhite, Manella, JJ., concurring)	211
San Mateo County Department of Child Support Services v. Clark (Civ. No. A120494; Ct. App., 1st Dist., Div. 4. 11/25/08) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2008 Cal. App. LEXIS 2356 By Reardon, J. (Ruvolo, P.J., Sepulveda, J., concurring)	25
Schatz v. Allen, Matkins, Leck, Gamble & Mallory, LLP (Civ. No. S150371; Cal. Sup. Ct. 1/26/09) ___ Cal. 4th ___, ___ Cal. Rptr. 3d ___, ___ P.3d ___, 2009 Cal. LEXIS 125 By Moreno, J. (George, C.J., Kennard, Baxter, Werdegard, Chin, Corrigan, JJ., concurring)	72
Scott v. Superior Court (Civ. No. C059686; Ct. App., 3d Dist. 2/25/09) ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2009 Cal. App. LEXIS 210 By Scotland, P.J. (Nicholson, Cantil Sakauye, JJ., concurring)	114
Shulkin Hutton, Inc. v. Treiger (In re Owens) (Civ. No. 07-35634; U.S. Ct. App., 9th Cir. 12/31/08) ___ F. 3d ___, 2008 U.S. App. LEXIS 26947 By Gould, Cir. Judge (Tallman, Callahan, Cir. Judges, concurring)	51

Sperling (Andrew Martin) v. Commissioner (Civ. No. 2475-08, U.S. Tax Ct. 6/16/09) T.C. Memo 2009 141 By Gustavson, Judge	292	Milan D. Smith, Jr., Cir. Judge (Fletcher, Clifton, Cir. Judges, concurring)	358
Sternberg v. Johnston (Civ. Nos. 07-16870, 08-15721; U.S. Ct. App., 9th Cir. 10/1/09) — F. 3d —, 2009 U.S. App. LEXIS 21532 By Clifton, Cir. Judge (Hawkins, Berzon, Cir. Judges, concurring)	410	United States v. Banks (Civ. No. 07-30130; U.S. Ct. App., 9th Cir. 2/25/09) ___ F.3d ___, 2009 U.S. App. LEXIS 3696 By Rawlinson, Cir. Judge (Graber, Cir. Judge, concurring; Alarcon, Cir. Judge, concurring in part and dissenting in part)	125
Strauss v. Horton (Civ. No. S168047; 11/05/08)	22	Villela Wilcox (Lillian Doreen) v. Commissioner (Civ. No. 11479 07S; U.S. Tax Ct. 5/13/09) T.C. Summary Opinion 2009 75 By Carluzzo, Special Trial Judge	257
Strauss v. Horton (Civ. Nos. S168047, S168066, S168078; Cal. Sup. Ct. 5/26/09) — Cal. 4th —, — Cal. Rptr. 3d —, — P.3d —, 2009 Cal. LEXIS 4626 By George, C.J. (Kennard, Baxter, Chin, Corrigan, JJ., concurring; Kennard, J., separately concurring; Werdegar, J. separately concurring; Moreno, J., concurring and dissenting)	250	Terry v. Slico (Civ. No. A123310; Ct. App., 1st Dist., Div. 3. 6/25/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1022 By Pollak, J. (McGuinness, P.J., Jenkins, J., concurring)	287
Suarez v. Barrett (In re Suarez) (Civ. No. SC 07-1401 MoJuKw; U.S. Bankr. App. Pan., 9th Cir. 1/16/09) ___ Bankr. ___, 2009 Bankr. LEXIS 235 By Montali, Bankr. Judge (Jury, Kwan, Bankr. Judges, concurring)	113	Tyler v. State of California (Civ. No. S168066; 11/05/08)	22
Szewajs v. U.S. Bancorp Amended and Restated Supplemental Benefits Plan (Civ. No. 07-16489, U.S. Ct. App., 9th Cir. 7/13/09) — F. 3d —, 2009 U.S. App. LEXIS 15392	299	Wells Fargo Financial Leasing, Inc. v. D & M Cabinets (Civ. No. C058486; Ct. App., 3d Dist. 8/28/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1433 By Sims, J. (Scotland, P.J., Raye, J., concurring)	359
S. T. v. Superior Court (Civ. No. B216686; Ct. App., 2d Dist., Div. 1. filed 8/28/09; ord. pub. 9/18/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1552 By Rothschild, J. (Mallano, P.J., Miller, J., concurring)	397	Wynn v. Superior Court (Civ. No. F056975; Ct. App., 5th Dist. 8/4/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1286 By Dawson, J. (Wiseman, Acting P.J., Kane, J., concurring)	309
S.W. v. Superior Court (Civ. No. G041674; Ct. App., 4th Dist., Div. 3. 5/15/09; ord. pub. 5/26/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 833 By Ikola, J. (Rylaarsdam, Acting P.J., Moore, J., concurring)	248	Wynn v. Superior Court (Civ. No. F056975; Ct. App., 5th Dist. 8/4/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1286 By Dawson, J. (Wiseman, Acting P.J., Kane, J., concurring)	345
United States v. Berger (Civ. No. 08-50415; U.S. Ct. App., 9th Cir. 7/31/09) 574 F.3d 1202, 2009 U.S. App. LEXIS 16998 By		Yolo County Department of Child Support Services v. Lowery (Civ. No. C059892; Ct. App., 3d Dist. 8/21/09) — Cal. App. 4th —, — Cal. Rptr. 3d —, 2009 Cal. App. LEXIS 1398 By Cantil-Sakauye, J. (Sims, Acting P.J., Hull, J., concurring)	363

