CALIFORNIA LAWYERS ASSOCIATION

FAMILY LAW NEWS

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Issue 1, 2021 | Volume 43, No. 1

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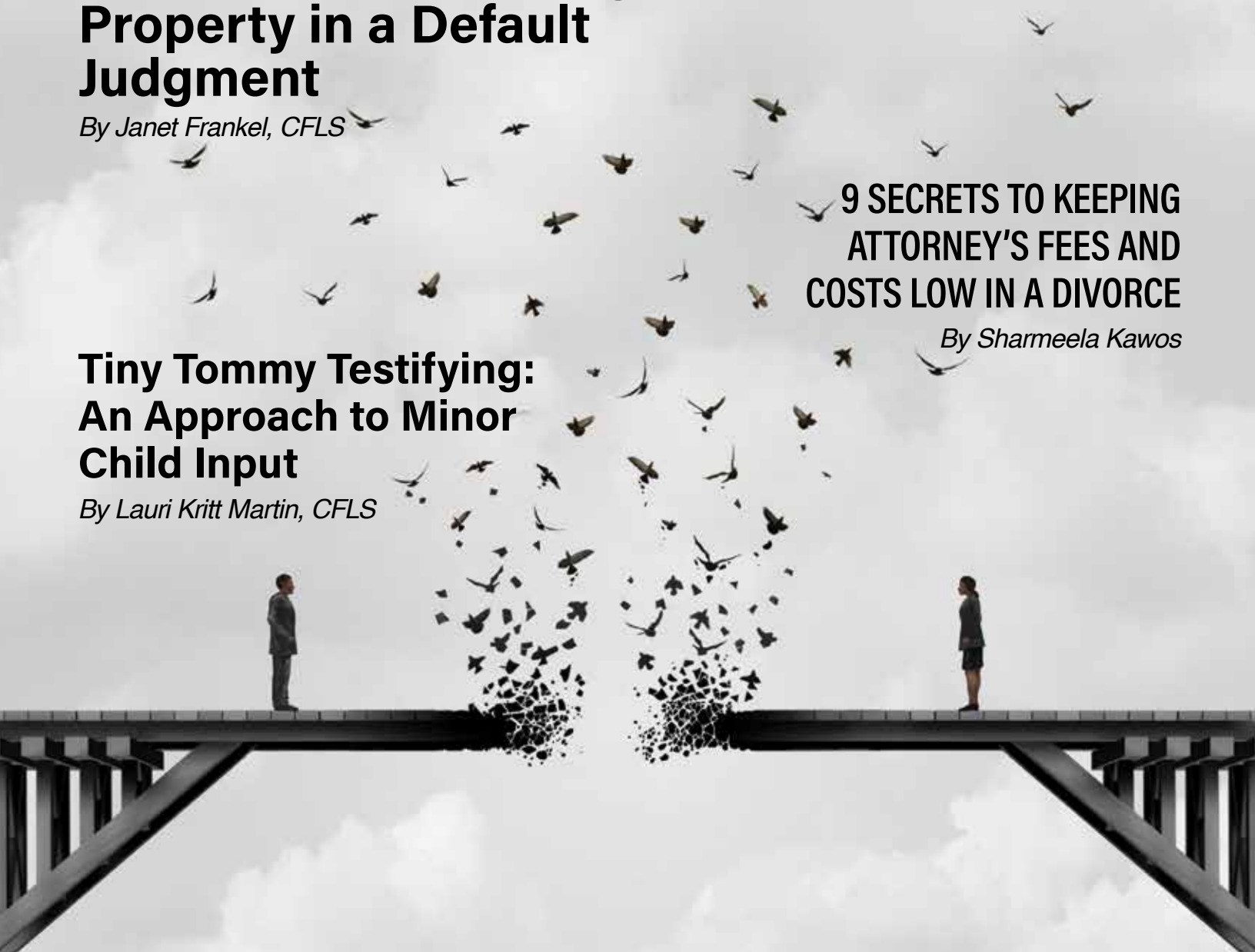

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Message from the Chair

Stephen A. Montagna, CFLS

Turn and Face the Strange – Changes.

We are indeed living in strange times with many changes. "Adapt, Improvise, Overcome" is no longer just a meme and social media cliché, but rather a mantra for which many family law practitioners and judicial officers have followed this past year. Navigating the pandemic and impact it has had on family law has required us to turn and face the strange, accepting many of the changes that have occurred over the course of this last year. Change is just a natural progression of the practice of law, be it good or bad. Over this last year we have witnessed many changes that, although may have initially been designed as a temporary solution, are now being considered as permanent fixtures in the practice of law. One important underlying theme associated with the changes is access to justice. As the court system continues to face potential closures, delays, and other logistical issues, the focus has been on how to ensure access to justice for those who are self-represented.

Recently, the State Bar published a study, (2019 *California Justice Gap Study: Measuring the Unmet Civil Legal Needs of Californians*),[1] in which it was determined that 55 percent of people in California experience at least one civil legal problem in their household each year. Of these cases, 85 percent of these litigants received inadequate or no legal assistance at all. The survey determined that that the two biggest culprits responsible for the justice gap were a lack of knowledge and lack of services. Unsurprisingly there was an economic component to this problem with direct correlation between access to legal assistance and household income levels.

Family law is not immune from the justice gap, as a majority of cases involve self-represented litigants. Although there are self-help centers and legal aid organizations, access to adequate legal assistance and representation continue to be an issue. So, what is the solution? Well, the State Bar believes that part of the solution may exist by expanding the pool of individuals who are authorized to provide legal services. Yes, you read that correctly.

Early last year, the State Bar's Board of Trustees directed the formation of a California Paraprofessionals Working Group, which was charged with developing recommendations for consideration by the Board of Trustees for the creation of a paraprofessional licensure/certification program. In making their recommendation, the working group is responsible for providing input on an array of issues: eligibility requirements to apply for the program, types of tasks that paraprofessionals will be permitted to perform depending on the area of law, financial responsibility requirements, rules of conduct, a way to measure effectiveness of the program, and other recommendations relating increasing self-help awareness. Again, the overall objective of the program is to increase access to legal services in California, which is an important and necessary goal. The final report and recommendations are expected to be provided to the Board of Trustees no later than September 30, 2021. Rest assured that both CLA and FLEXCOM will continue to provide the necessary feedback and education to assist the Board of Trustees as they move forward toward a final decision.

Change is on the horizon for the practice of law, especially the area of family law. Like the late great David Bowie once sang---"Ch-ch-ch-ch-changes. Turn and face the strange. Ch-ch-changes".

Stephen A. Montagna,
Chair of FLEXCOM

Endnotes

1 http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf

Message from the Editor

Nathan W. Gabbard, CFLS

Welcome, dear reader, to the first issue of the new year. This issue will not disappoint. Topics range from a review of issues that are less common in practice, to analysis of newly enacted legislation. We've got it all!

Convincing a client that a child support obligation does not always end when the child reaches the age of 18 can be uphill climb. Parents can be statutorily required to support their children beyond the age of majority. Elsa-Marie Madeiros discusses the less common issue of adult child support, the bases for determining whether it should be granted, and how to build a case for adult child support.

Without going to the extremes of the facts in the *Davenport* matter regarding attorney fees getting out of control, it is still helpful to stay cognizant of each client's fees incurred. Helping your client make reasonable decisions can save them thousands of dollars, and it can also save the practitioner from having high unpaid client bills in collections. Sharmeela Kawos provides several suggestions about how to keep fees and costs from skyrocketing during dissolutions of marriage.

What happens to community property when a respondent does not respond? Division of spouses' property has its own unique twists and turns when it arises in a default proceeding. Janet Frankel shares a detailed overview of how to handle the division of property in default judgments, including tips for best practices along the way.

Child input in a custody proceeding comes with many facets to assess. The court's decision to accept testimony from a child is determined on a case-by-case basis. Lauri Kritt Martin takes a deep dive into what the law requires regarding whether a child should provide input and, if so, how that input should be received, including practical applications for guiding clients through the process.

That establishing "abuse" under the Domestic Violence Prevention Act does not require any physical violence is well settled and understood. Survivors of abuse need protection, and the way to obtain this protection is constantly evolving. Emily Rubenstein summarizes and explains the newly enacted legislation that adds "coercive control" as another theory upon which abuse can be demonstrated in DVPA proceedings.

Thank you to all of our wonderful contributors. Although there was not a fourth issue of FLN in 2020, the entire editorial team is committed to providing only the best content for the coming year. Happy reading!

California Lawyers Association Website:
http//calawyers.org

Family Law Section Website:
http://calawyers.org/Family

We solicit original manuscripts, which should be e-mailed to the *Family Law News* editor. Authors should provide sufficient information to permit adequate identification in the publication. The editorial staff reserves the right to edit submitted manuscripts as necessary. Edited manuscripts will be sent to authors for approval only where extensive revision might affect the article's substance. Publication deadlines do not allow time to send proofs to authors.

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A Big Success

Diane Wasznicky

Diane E. Wasznicky is a partner at Bartholomew & Wasznicky LLP in Sacramento, CA. She is co-founder and facilitator of the Sacramento Custody Discussion Group (1983 - 2008) and has served on the Senate Task Force on Family Relations Courts. She is active in a number of organizations, including serving as President of the Sacramento County Bar Association, President of Women Lawyers of Sacramento, President of the Association of Family Conciliation Courts (AFCC-CA), and President of the Association of Certified Family Law Specialists (ACFLS). She has served as an advisor to FlexCom since 2004. She also chairs the Legislation Committee of AFCC and currently serves as Treasurer of AFCC. She currently serves as a Coordinating Director for ACFLS.

Three and a half years ago a small number of family law attorneys and mental health professionals formed a group to try and recruit and train mental health professionals (MHPs) to join the family law community. The need was and is dire to replace and supplement the existing family law MHPs who serve as Private CCRCs and evaluators. Our group was named the Mediator Outreach Group, better known as MOG.

A great deal of time and effort were devoted by MOG to find and recruit interested mid-career MHPs. I have written prior articles about how we did this successfully in the Sacramento area, urging family law professionals to replicate these efforts in their communities. Very few counties have even considered taking on that challenge. Perhaps MOG's success will make them rethink that choice.

In past articles, I have outlined our task and our discovery that adequate training for this work was unavailable and had to be created/developed from the ground up. In 2019 MOG presented two forty-hour trainings, one on Custody Evaluations and another on Custody Mediation. We developed these to meet the requirements of statutory law and the California Rules of Court. We also recruited top notch presenters for each training. Both trainings were co-sponsored and supported by AFCC-CA, ACFLS and Flex Com.

Both trainings were very successful, the first one was nearly standing room only so we had to limit attendance for the second one. The attendees were committed and very interested in this work, some taking the high-quality in-person training (pre COVID restrictions!) as refreshers for courses taken previously on-line, etc.

A number of these committed MHPs actually took both courses so they could clearly qualify in the Sacramento region to do both private CCRC work (a regional hybrid of mediation and a Family Code section 3111 evaluation) as well as Family Code section 3111 evaluations. This was a huge financial and time commitment for all of them since nearly all had "regular" jobs as MHPs.

MOG is extraordinarily proud to report amazing success. As of January 1, 2021, we will have eight newly qualified CCRCs/Family Code section 3111 evaluators in the Sacramento area. In addition to all their training, they have each "materially assisted" on at least 4 cases to become fully qualified in the past year. We have more who are merely waiting to complete their requirement of "assisting" on four cases.

On December 16, 2020, the Sacramento County Bar Association's Family Law Section is co-sponsoring MOG's "Holiday Gift to the Family Law Community" webinar to introduce, virtually, all eight newly qualified family law professionals and colleagues.

We did it in Sacramento and you can in your community as well if you want to make the effort. It works! I wish you all a Happy Holiday Season on behalf of MOG and if you want more information, feel free to contact me.

Diane Wasznicky
Chair – Mediators Outreach Group

Annual Custody Seminar

I Dare You to Parent Me:

From Problem to Solution

in Refuse/Resist Cases

Reminder to Save This Date!

Friday, October 8, 2021

Arden Hills Spa and Club — Sacramento, California

This year's postponed Seminar will go forward on October 8, 2021, at the Arden Hills venue with the same program and presenters. We thank you all for your ongoing support of this event, and we look forward to seeing all of you in October.

Program Highlights and Presenters

Ending the Blame Game: Hon. Marjorie Slabach (retired); Leslie Drozd, PhD.

Attorneys as First Responders: Hon. Marjorie Slabach, Deborah Wald, CFLS; Michelle Hahn, JD

Problem and Solution Are In The Family: Leslie Drozd, PhD; Jessia Wharton, LMFT; Rhea Ann Dandeneau, LCSW

Exploring the Judge's Toolbox: Hon. Bunmi Awonyi; Hon Marjorie Slabach (retired); Leslie Drozd, PhD; Charlotte Keeley, CFLS

Co-Sponsored by the Association of Family and Conciliation Courts - California Chapter (AFCC -CA); Association of Certified Family Law Specialists (ACFLS); California Lawers Association, Family Law Section; and Bartholomew & Wasznicky LLP

Tiny Tommy Testifying: An Approach to Minor Child Input

Lauri Kritt Martin, CFLS

Lauri Kritt Martin is a certified family law specialist with Farzad & Ochoa Family Law Attorneys, LLP in the firm's downtown Los Angeles office. Lauri Kritt Martin may be one of the last attorneys left who enjoys litigation, while always striving to reach a negotiated resolution for her clients.

It is Monday morning following the Thanksgiving weekend. You are sitting in your office (now located in the bedroom of your nineteen-year-old away at college) gathering your thoughts and preparing to dive into this week's work. Your phone rings—it is a client, Sara, who is upset about news her fifteen-year-old son told her this morning upon his return to her residence after spending Thanksgiving weekend with his father, Sara's former husband, and his new wife. Sara had originally sought your assistance to help her negotiate the extension of time to refinance the former family home ("residence") so Sara can afford to complete the buyout of the father's interest.

This morning, Sara's focus in not on finances, but, as she phrases it, the "safety" of her son, who suffers from asthma, a condition that can cause respiratory illnesses such as COVID-19 to become possibly life threatening. The son reported to Sara that his father took him to a friend's home for Thanksgiving dinner where there were fifteen people for dinner, all inside and with no windows opened for ventilation. Sara is concerned about the father's disregard of COVID-19 protocol and wonders what she should do to protect her son. From within the privacy of her bathroom, Sara whispers to you what her son told her, because her son told her he does not want Sara to call or talk to his father about Thanksgiving.

You listen to Sara's concerns and, as a good counselor of law, ask her what does she want to accomplish? Does she want to educate and encourage the father to be more careful and only bring the son into well ventilated spaces, or does she want to punish the father for willfully ignoring the son's heightened risk of infection and possible ensuing complications?

You suggest that one alternative is to write a letter to opposing counsel raising the mother's concerns and suggest that the parties begin meeting with a co-parenting counselor on a regular basis who will help the parties listen to each other and work together. You advise Sara your letter will ask that the parties jointly agree on the co-parenting counselor and each pay one-half of all fees and costs so that both parties are invested in the process.

You and Sara discuss that there is a hearing in two months on Sara's request to extend the time for her to refinance the residence, where Sara lives with the son of whom she has 75% custody. Sara is concerned that the father will "make good" on his threats to seek more custodial time with the son in response to Sara's request for an extension of time and to counter her need to maintain the residence which is walking distance to the son's high school.

Sara is conflicted about involving the parties' son and wonders how she might present information about the father's Thanksgiving without placing her son in the middle of their disputes. You and Sara go through the list of adults who the son said were present at Thanksgiving to determine if Sara should ask one of them as to what occurred and if they would sign a declaration that would be submitted to the court and the father. Obtaining the same information from a willing adult could shield the son from providing this information to the court. Sara decides there is no one else who was present who will agree to sign a declaration for her or come to court to testify about what occurred.

You agree with Sara that the decision to present information from the son should not be undertaken lightly

and without consideration of the possible repercussions (anger from his father or guilt, to name a few). You explain to Sara that there are rules and protocols for presenting evidence from a child ("testimony"), but the first question is if she should offer such testimony.

Sara agonizes over whether to involve the son due to her concern that when the son becomes sick his asthma often complicates and exacerbates his illnesses. Sara asks you to explain what might occur if she submits the son's declaration, or if alternatively she lists the son as a possible witness.

You advise that one way for the court to become informed about what occurred at Thanksgiving and the son's preference concerning custody is to provide a declaration from the son. The son, rather than Sara, can draft a declaration describing the non-COVID-19 compliant Thanksgiving dinner, and you can submit it with Sara's opposition to the father's request for more custodial time to demonstrate that it is not in the son's best interest to have more time with his father. You explain that the father will see the son's declaration–there is no way to avoid this–and in your experience it is not uncommon for the other parent to ask the child to sign another declaration minimizing or explaining what did or did not occur which the father would then submit to counter Sara's submission. If the father takes that route the court will have two differing declarations from the son. If the court is presented with two declarations purportedly from the son, it may well disregard both or seek an independent assessment of what occurred on Thanksgiving. You counsel Sara that it is vital that the information about Thanksgiving be presented in a child centered manner–the need to protect the child from infection–as opposed to a desire to limit father's time with the son.

You explain the following possible scenarios to Sara that could result in the son communicating directly to the court:

If, for example, the son wants to tell the court directly about the environment of the Thanksgiving dinner he attended with father and that the son does not want his father to obtain more custodial time, this disclosure and stated preference will be governed by California Family Code section 3042[1] which provides in subsection (a) that if a child "is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation."

Section 3042 is applied and implemented in conjunction with California Rules of Court, rule 5.250,[2] which provides:

(a)…No statutory mandate, rule, or practice requires children to participate in court or prohibits them from doing so. When a child wishes to participate, the court should find a balance between protecting the child, the statutory duty to consider the wishes of and input from the child, and the probative value of the child's input while ensuring all parties' due process rights to challenge evidence relied upon by the court in making custody decisions.

You also tell Sara that you need to spend some time reviewing both Family Code section 3042 and rule 5.250 as you consider the options for Sara's son, as these statutes are both lengthy with significant detail focusing on balancing and weighing the need or merit for information from the son compared to the possible repercussions from testifying to the son.

The court's decision to accept testimony from a child is determined on a case-by-case basis, "after balancing the necessity of taking the child's testimony in the courtroom with parents and attorneys present with the need to create an environment in which the child can be open and honest."[3]

Testimony must be taken on the record or in the parties' presence. This requirement cannot be waived by stipulation.[4] This requirement is the due process right that cannot be dispensed with, even if a child who wishes to testify may need protection from a parent's response or reaction to the child's testimony.

The court is empowered to "control the examination of a child witness so as to protect the best interest of the child."[5] The court can, and will, control testimony so the child is protected from "undue harassment and embarrassment, with special care taken for a witness under the age of 14."[6]

If the court allows a child to testify, it will consider when, where, how and who should be present: chambers or court room; who should be present; how the child will be questioned (by the judge with questions submitted by the attorneys for the parties or solely based on the judge's inquiry to restrict unnecessary or harassing repetition of questions); and whether a court reporter is available.[7]

The court may decide that, even though the son in this scenario is over fourteen and wishes to address the court, it may not be in the child's best interest to have the son

testify.[8] One example of refusing a child's testimony is if there is a concern the other parent will punish the child, such as by forbidding something (e.g. hanging out with his friends in the backyard) or taking some away (e.g. the promised new Xbox). If the court decides the son should not testify, "the court shall state its reasons for that finding on the record."[9]

Some judges have openly expressed their preferences to never have a child testify in open court before their parents or on the record in chambers, as they believe the act alone is traumatic for a child and ultimately not in their best interests. Other judges believe that the 2012 revisions to section 3042 and rule 5.250 indicate that there are instances where a child who wants to, should be able to testify as to their wishes concerning custody and visitation, and especially once they reach the age of fourteen and above if they are mature enough to articulate their preference.

Our current age of COVID-19 and the normalizing use and emphasis on Zoom and other video platforms could enable a child to testify from the comfort and security of their bedroom, while still providing due process rights to the parents who are participating remotely as well (just as witnesses have been testifying on Zoom and other platforms at trials).

Age alone is not the determinative factor for allowing a child to testify. The court should look to the child's degree of maturity, sincerity, and ability to reason. The preference from children as young as ten may be considered and given some weight if the child were to appear as mature and capable of reason.[10] Older children's preferences may be disregarded if they are not supported by well thought-out reasons. The court is not bound to follow the child's preferences, no matter the child's age.[11]

If the court precludes the calling of the son as a witness it must provide alternative means of obtaining the son's input, which can take the form of "a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge" and other information regarding the child's preferences.[12]

You explain to Sara that Minor's Counsel provide a valuable service by shielding the son from direct involvement in the litigation, as Minor's Counsel's role is to gather and present admissible evidence that bears on the child's best interests. Minor's Counsel can interview the child and then report to the court – thereby shielding the child from any possible trauma related to testifying in open court or on the record before his/her parents.[13] The introduction of Minor's Counsel can come at a cost, since the parties often have to share the fees and costs of Minor's Counsel and now there is a third attorney involved in the action who may have an agenda/focus for the child that differs from the attorneys for the parents.

Mediators who can interview a child are available to most, but not all courts, and mediators provide the same level of inquiry. For example, in Los Angeles County the court could order a One-Day Parenting Plan Assessment (PPA1) which is used for one or two narrowly defined issues about which the court requires additional information and clinical judgment. Correspondingly, a Two-Day Parenting Plan Assessment (PPA2) is for when the court determines there are more than a simple narrowly defined issue or two. In both forms of assessment, the court staff will conduct interviews and then testify before the court about the interview. The costs are contained: $975 for a One Day PPA; $1,950 for a Two Day PPA. Many counties in California do not have the resources to provide the lower cost PPA, but will make a child custody mediator employed by the court available to interview the child and report to the judge–which may or may not be a sufficiently detailed enough inquiry in a particular case.

The court can appoint a private child custody evaluator to interview the child, the parents and any other relevant persons (which in the instance we are discussing would be fellow guests at the Thanksgiving dinner). This option can take time and be costly, but it will allow for the child's input without providing direct testimony in front of both parents in open court, or in chambers with the judge and a correct reporter (who prepares a transcript for later review of the parents), thus shielding the child from harassment or embarrassment at the time of testimony–which the court is directed to take special care to prevent from occurring. If the court orders a child custody evaluation it could be a limited scope private evaluation as specified in Form FL-327.[14]

There is no requirement that the son express any preference for custody or disclose information. The son can simply refuse to provide information if he prefers to remain uninvolved in his parents' dispute or does not want to express an opinion either way.[15]

After hearing the various options available to her son to present information to the court or not if the son chooses, Sara decides to think over the information you provided and look at section 3042 and rule 5.250 (as there is no substitute for going to the source). Sara closes the

conversation by agreeing that the best place to start is for you to draft a letter proposing co-parenting counseling for the parents so they can hopefully learn how to work together in their child's best interests.

Endnotes

1 Cal. Fam. Code § 3042:

(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.

(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interest of the child.

(c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interest, in which case, the court shall state its reasons for that finding on the record.

(d) This section does not prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interest.

(e) If the court precludes the calling of a child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences.

(f) To assist the court in determining whether the child wishes to express a preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

(g) This section does not require the child to express to the court a preference or to provide other input regarding custody or visitation.

(h) The Judicial Council shall, no later than January 1, 2012, promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody or visitation.

(i) The changes made to subdivisions (a) to (g), inclusive, by the act adding this subdivision shall become operative on January 1, 2012.

Amended by Stats. 2019, Ch. 115, Sec. 28. (AB 1817) Effective January 1, 2020.

2 Cal. Ct. R. 5.250: Children's participation and testimony in family court proceedings:

(a) Children's participation

This rule is intended to implement Family Code section 3042. Children's participation in family law matters must be considered on a case-by-case basis. No statutory mandate, rule, or practice requires children to participate in court or prohibits them from doing so. When a child wishes to participate, the court should find a balance between protecting the child, the statutory duty to consider the wishes of and input from the child, and the probative value of the child's input while ensuring all parties' due process rights to challenge evidence relied upon by the court in making custody decisions.

(b) Determining if the child wishes to address the court

(1) The following persons must inform the court if they have information indicating that a child in a custody or visitation (parenting time) matter wishes to address the court:

(A) A minor's counsel;

(B) An evaluator;

(C) An investigator; and

(D) A child custody recommending counselor who provides recommendations to the judge under Family Code section 3183.

(2) The following persons may inform the court if they have information indicating that a child wishes to address the court:

(A) A party; and

(B) A party's attorney.

(3) In the absence of information indicating a child wishes to address the court, the judicial officer may inquire whether the child wishes to do so.

(c) Guidelines for determining whether addressing the court is in the child's best interest

(1) When a child indicates that he or she wishes to address the court, the judicial officer must consider whether involving the child in the proceedings is in the child's best interest.

(2) If the child indicating an interest in addressing the court is 14 years old or older, the judicial officer must hear from that child unless the court makes a finding that addressing the court is not in the child's best interest and states the reasons on the record.

(3) In determining whether addressing the court is in a child's best interest, the judicial officer should consider the following:

(A) Whether the child is of sufficient age and capacity to reason to form an intelligent preference as to custody or visitation (parenting time);

(B) Whether the child is of sufficient age and capacity to understand the nature of testimony;

(C) Whether information has been presented indicating that the child may be at risk emotionally if he or she is permitted or denied the opportunity to address the court or that the child may benefit from addressing the court;

(D) Whether the subject areas about which the child is anticipated to address the court are relevant to the court's decisionmaking process; and

(E) Whether any other factors weigh in favor of or against having the child address the court, taking into consideration the child's desire to do so.

(d) Guidelines for receiving testimony and other input

(1) If the court precludes the calling of a child as a witness, alternatives for the court to obtain information or other input from the child may include, but are not limited to:

(A) The child's participation in child custody mediation under Family Code section 3180;

(B) Appointment of a child custody evaluator or investigator under Family Code section 3110 or Evidence Code section 730;

(C) Admissible evidence provided by the parents, parties, or witnesses in the proceeding;

(D) Information provided by a child custody recommending counselor authorized to provide recommendations under Family Code section 3183(a); and

(E) Information provided from a child interview center or professional so as to avoid unnecessary multiple interviews.

(2) If the court precludes the calling of a child as a witness and specifies one of the other alternatives, the court must require that the information or evidence obtained by alternative means and provided by a professional or nonparty:

(A) Be in writing and fully document the child's views on the matters on which the child wished to express an opinion;

(B) Describe the child's input in sufficient detail to assist the court in its adjudication process;

(C) Be provided to the court and to the parties by an individual who will be available for testimony and cross-examination; and

(D) Be filed in the confidential portion of the family law file.

(3) On deciding to take the testimony of a child, the judicial officer should balance the necessity of taking the child's testimony in the courtroom with parents and attorneys present with the need to create an environment in which the child can be open and honest. In each case in which a child's testimony will be taken, courts should consider:

(A) Where the testimony will be taken, including the possibility of closing the courtroom to the public or hearing from the child on the record in chambers;

(B) Who should be present when the testimony is taken, such as: both parents and their attorneys, only attorneys in the case in which both parents are represented, the child's attorney and parents, or only a court reporter with the judicial officer;

(C) How the child will be questioned, such as whether only the judicial officer will pose questions that the parties have submitted, whether attorneys or parties will be permitted to cross-examine the child, or whether a child advocate or expert in child development will ask the questions in the presence of the judicial officer and parties or a court reporter; and

(D) Whether a court reporter is available in all instances, but especially when testimony may be taken outside the presence of the parties and their attorneys and, if not, whether it will be possible to provide a listening device so that testimony taken in chambers may be heard simultaneously by the parents and their attorneys in the courtroom or to otherwise make a record of the testimony.

(4) In taking testimony from a child, the court must take special care to protect the child from harassment or embarrassment and to restrict the unnecessary repetition of questions. The court must also take special care to ensure that questions are stated in a form that is appropriate to the witness's age or cognitive level. If the child is not represented by an attorney, the court must inform the child in an age-appropriate manner about the limitations on confidentiality and that the information provided to the court will be on the record and provided to the parties in the case. In the process of listening to and inviting the child's input, the court must allow but not require the child to state a preference regarding custody or visitation and should, in an age-appropriate manner, provide information about the process by which the court will make a decision.

(5) In any case in which a child will be called to testify, the court may consider the appointment of minor's counsel for that child. The court may consider whether such appointment will cause unnecessary delay or otherwise interfere with the child's ability to participate in the process. In addition to adhering to the requirements for minor's counsel under Family Code section 3151 and rules 5.240, 5.241, and 5.242, minor's counsel must:

(A) Provide information to the child in an age-appropriate manner about the limitations on confidentiality and indicate to the child the possibility that information provided to the court will be on the record and provided to the parties in the case;

(B) Allow but not require the child to state a preference regarding custody or visitation (parenting time) and, in an age-appropriate manner, provide information about the process by which the court will make a decision;

(C) Provide procedures relevant to the child's participation and, if appropriate, provide an orientation to the courtroom where the child will be testifying; and

(D) Inform the parties and then the court about the client's desire to provide input.

(6) No testimony of a child may be received without such testimony being heard on the record or in the presence of the parties. This requirement may not be waived by stipulation.

(e) Responsibilities of court-connected or appointed professionals

A child custody evaluator, a child custody recommending counselor, an investigator, or a mediator appointed or assigned to meet with a child in a family court proceeding must:

(1) Provide information to the child in an age-appropriate manner about the limitations on confidentiality and the possibility that information provided to the professional may be shared with the court on the record and provided to the parties in the case;

(2) Allow but not require the child to state a preference regarding custody and visitation (parenting time), and, in an age-appropriate manner, provide information about the process by which the court will make a decision; and

(3) Provide to the parents of the child participating in the court process information about local court procedures relevant to the child's participation and information about how to best support the child in an age-appropriate manner during the court process.

(f) Methods of providing information to parents and supporting children

Courts should provide information to parties and parents and support for children when children want to participate or testify or are otherwise involved in family law proceedings. Such methods may include but are not limited to:

(1) Having court-connected professionals meet jointly or separately with the parents or parties to discuss alternatives to having a child provide direct testimony;

(2) Providing an orientation for a child about the court process and the role of the judicial officer in making decisions, how the courtroom or chambers will be set up, and what participating or testifying will entail;

(3) Providing information to parents or parties before and after a child participates or testifies so that they can consider the possible effect on their child of participating or not participating in a given case;

(4) Including information in child custody mediation orientation presentations and publications about a child's participation in family law proceedings;

(5) Providing a children's waiting room; and

(6) Providing an interpreter for the child, if needed.

(g) Education and training

Education and training content for court staff and judicial officers should include information on children's participation in family court processes, methods other than direct testimony for receiving input from children, and procedures for taking children's testimony.

Rule 5.250 adopted effective January 1, 2012.

3 CAL. CT. R. 5.250(d)(3).

4 CAL. CT. R. 5.250(d)(6).

5 CAL. FAM. CODE § 3042(b).

6 CAL. CT. R. 5.250(c)(4).

7 CAL. CT. R. 5.250(d)(3).

8 CAL. FAM. CODE § 3042(c).

9 CAL. FAM. CODE § 3042(c).

10 *In re* Marriage of Rossom, 179 Cal. App. 3d 1094, 1103 (1986).

11 *In re* Marriage of Mehlmauer, 60 Cal. App. 3d 104, 110-111 (1976).

12 CAL. FAM. CODE § 3042(e).

13 CAL. FAM. CODE §§ 3151 & 3152; CAL. CT. R. 5.242.

14 CAL. CT. R. 5.250(d)(1)(B).

15 CAL. FAM. CODE § 3042(g).

Division of Community Property in a Default Judgment

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What happens to community property when a respondent fails to respond? Will a default judgment simply grant petitioner all of the relief requested? Are there restrictions regarding the division of community property in a default judgment?

Unless the parties agree in writing or on the record in open court, the court must divide all community property equally, or substantially equally.[1] If mathematical equality is not possible, the division should at least be "substantially equal."[2] In-kind division is preferred, but not required. "Where economic circumstances warrant, the court may award an [entire] asset of the community estate to one party ... to effect a substantially equal division of the community estate."[3] Upon good cause shown that "the interests of justice require an unequal division," the court has the discretion to make an unequal division.[4]

Does the Family Code equal division requirement conflict with the Code of Civil Procedure in a default? The Family Code does not specifically address default proceedings or whether the equal division requirement applies to defaults; the Civil Procedure Code (CCP), however, does. The CCP provides that the "relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint…."[5] The complaint must put the defendant on notice of each asset and debt to be awarded and assigned, and a default judgment that exceeds what is requested in the complaint is void. This is basic due process and certainly applies in dissolution matters.

The CCP further provides that, in a default, the court "shall hear the evidence" and then "shall render judgment in ... plaintiff's favor ... as appears by the evidence to be just."[6] The CCP does not mention an equal division of community property. It does not mention community property at all.

Statutory construction requires that if multiple statutes apply to a situation, they should be construed in a way that gives full effect to all.[7] This general rule of construction applies in family law proceedings where there is no direct conflict between the Family Code / Family Court Rules and the CCP.[8] Here, there is no direct conflict because the CCP does not mention community property and the Family Code does not address default judgments.

This construction of the CCP in family law defaults appears in numerous cases. It reflects a clear understanding that the equal division requirement applies.

Unequal division of the community estate in a default proceeding would be error.[9] In *Badillo*, the judgment was nonetheless upheld because husband was "10 years late in his appeal."[10] Wife's petition listed the only community asset, the family residence, and requested it be divided "as provided by law."[11] Husband defaulted and the trial court awarded the entire residence to wife, with a payment due to husband that husband claimed was unequal.[12]

The court must divide equally upon notice. In *Andresen,* wife completed a standard form petition and property declaration. Wife listed the community property without values or a proposed division.[13] Husband defaulted. *Andresen* affirmed the resulting default judgment and held that "due process is satisfied and sufficient notice is given for [CCP] section 580 purposes in marital dissolution actions by the petitioner's act of checking the boxes and inserting the information called for on the standard form dissolution petition ...."[14]

Only the type of relief demanded by the form need be included.[15]

Andresen stated that "the trial court, in its judgment ..., *must* value and divide the community estate ... equally" as a "nondelegable judicial function."[16] Husband was properly put on notice when wife listed the property to be divided in the petition. It was husband's choice to either (1) "file a response to preserve the right to appear before the court and present evidence and argument," or (2) "rely upon the trial court's independent obligation to accurately value and fairly allocate the community estate as a protection against any attempt by the petitioner to overreach."[17]

When using form pleadings, the importance of checking the appropriate boxes cannot be overstated. In *Lippel*, wife neglected to check the box seeking child support on her form petition.[18] The California Supreme Court voided the child support portion of the default judgment because it was in excess of the relief requested. The standard form petition has changed since *Lippel,* but the lesson remains.

It is possible to seek relief outside of the issues listed on the standard form petition, but in that case the petitioner must be even more specific. In *Marriage of Kahn*, wife's petition sought relief for breach of fiduciary duty but "did not specify any factual grounds, or ... an amount sought."[19] In *Kahn*, husband's responsive pleadings were struck as a discovery sanction and his default was entered.[20] After a prove-up hearing, the judgment included an award of $275,000 for breach of fiduciary duty.[21] *Kahn* held that this award "exceeded the scope of the petition" and, therefore, the entire default judgment was void.[22]

Notably, in *Kahn*, husband's contention that the award was "not supported by substantial evidence" was not reached because the judgment was void. *Kahn* noted that if the petition had specified factual grounds and an amount sought, it then would have considered whether the award was supported by substantial evidence. In other words, whether was the division was equal.[23]

PRACTICE TIPS:

How can petitioner ensure that substantial evidence will support the division of property proposed by petitioner? Petitioner's petition and testimony will be the *only* evidence before the court when it considers whether petitioner's proposed judgment is equal. Petitioner gets to define the marital estate as well as define which "half" will be awarded to each party. Where there is the possibility of default, a family law practitioner should consider:

Equitable Division

The property division can be "equitable" rather than in-kind. In other words, whole assets can be awarded to petitioner so long as assets of substantially equal value are also awarded to respondent.[24] For some examples of equitable division are: *Marriage of Connolly* (1979) 23 Cal. 3d 590 (stock awarded to spouse better able to afford to retain high risk asset), *Marriage of Burlini* (1983) 143 Cal. App. 3d 65 (coin-laundry business), *Marriage of Rives* (1982) 130 Cal. App.3d 138 (queen bee breeding business), *Marriage of House* (1980) 106 Cal. App. 3d 434 (tool and die business), and *Marriage of Winn* (1979) 98 Cal. App. 3d 363 (horse slaughter and auction business).

Child support and spousal support

Ongoing support cannot be used to equalize the division of community property. However, if the judgment establishes that there are child or spousal support arrears, those arrears can be used to offset the value of the estate awarded to petitioner. The standard form petition now automatically includes a request for child support. For spousal support, the box must be checked, and a Spousal or Partner Support Declaration Attachment (FL-157) can be attached to either the petition or to the request for entry of default. This puts respondent on notice and satisfies due process.

Attorneys' fees

Attorneys' fees also can be used to offset assets awarded to petitioner, where appropriate. Be as specific as possible, as soon as possible, and include the request in the petition or in the request for entry of default.

Reimbursements / *Epstein* credits

There is no requirement that petitioner's reimbursement claims be included in the petition once the underlying asset is listed as community or separate property. However, whether to include specifics in the petition is a strategy decision.

Breach of Fiduciary Duty

Heed the holding in *Kahn*, and if petitioner has a breach of fiduciary duty claim, make sure to specify the factual grounds and the amount sought in the petition.

Misappropriations of Community Property

Family Code section 2602 allows for an additional award or offset for deliberate misappropriation of community property. If respondent misappropriated community property, petitioner should include that in the petition with as much specificity as possible, because the claim may be treated similarly to a claim for breach of fiduciary duty.

Small marital estate

Where the marital estate is less than $5000, the court does not have to make an equal division.[25]

Equalization payment

Equalization payments from petitioner to respondent may be used.

Notice of Entry of Judgment

Petitioner should serve a notice of entry of judgment on respondent as an extra dose of due process. This will also start the clock running on, for example, respondent's ability to set aside the judgment.

Prove-Up Hearing

If a prove-up hearing is necessary, be prepared to provide evidence that the proposed division is equal, or substantially equal, or otherwise equitable.

Default judgments require creativity and foresight. Which, of course, is just another day at the office.

Endnotes

1 Cal. Fam. Code §§ 2550, 2601.

2 Droeger v. Friedman, Sloan & Ross, 54 Cal. 3d 26 (1991).

3 Cal. Fam. Code § 2601.

4 Cal. Fam. Code § 2126.

5 Cal. Civ. Proc. Code § 580 (a).

6 Cal. Civ. Proc. Code § 585(b) and (c).

7 Cal. Civ. Proc. Code § 1858.

8 Cal. Fam. Code § 210; Cal. Ct. R. 5.2(c); Cal. Civ. Proc. Code § 1859.

9 Badillo v. Badillo, 123 Cal. App. 3d 1009 (1981).

10 *Id*. at 1012.

11 *Id*. at 1009.

12 *Id.* at 1010.

13 *In re* Marriage of Andresen, 28 Cal. App. 4th 873, 876 (1994).

14 *Id*. at 879.

15 *Id*.

16 *Id*. at 880.

17 *Id*.

18 *In re* Marriage of Lippel, 51 Cal. 3d 1160 (1990).

19 *In re* Marriage of Kahn, 215 Cal. App. 4th 1113, 1116 (2013).

20 *Id*. at 1115.

21 *Id.*

22 *Id*. at 1116.

23 *Id.*

24 Cal. Fam. Code § 2601.

25 Cal. Fam. Code § 2604.

9 Secrets to Keeping Attorney's Fees and Costs Low in a Divorce

Sharmeela Kawos

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I can't stress enough the importance of being cognizant of your client's attorney's fees and costs. As we all know, there is no winning in a divorce. Both parties suffer a loss. What's worse is knowing you are burning through children's college funds because the parties are unable (or unwilling) to agree about even the most basic issues. As an attorney, you must be heavily involved in management and communications regarding your client's attorney's fees. Staying involved and helping your client make reasonable decisions can help save them thousands of dollars and prevent high unpaid client bills in collections. Below are ten tips for keeping attorney's fees and costs low in a divorce.

1. Set Standards and Guidelines.

The secret starts with the initial conversation. Once you agree to take on the case, you need to set your standards and guidelines on billing. Reserving five to ten minutes at the end of your consult to review your legal services agreement with the client will go a long way. Set your expectations on what information or documents you want and the manner you want them organized. Do more than just listening to their stories and giving them legal advice. Explain to them your firm's policies and procedures. Share what method of communication with you is most efficient and productive. Explain how and when they can get a hold of you if they have questions. Explain your timelines and inform your clients during the initial consultation how often they can expect updates. Tell them how they may connect with your staff if you are unavailable. To take it one step forward, create a brief policies and procedures guideline for your new clients that they can use as a reference later. This will help set expectations.

At the end of every consult, I share with my clients how we work as a firm. I detail our billing rate and standards. I explain the billing program we use and the manner in which they are billed. I suggest to them how they can help keep their attorney's fees and costs low. I am frank and straight forward with clients and they appreciate that. This is how you build a trust relationship from the inception. Setting these standards and expectations at the beginning will also help future billing-related discussions with clients and help save them money.

2. Pick Your Battles.

You can't win every battle in a divorce. Pick the battles that are worth fighting. Individuals going through a divorce are experiencing an emotional rollercoaster as their family—the most valuable part of their life—is shattering. Their ability to rationally cognize information and make practical decisions can become clouded by emotional entanglements. As their attorney, you must be the reasonable voice to help them understand what is in their best interest and do a cost benefit analysis for them. It is one thing to keep your clients happy; it is another when you go into client-pleasing mode. Client-pleasing may temporarily make your clients happy. However, fighting these worthless battles will leave your client with a fat bill and unsatisfied with your services. Pick the reasonable battles as the places to spend time and money. Encourage settlement and compromise on the issues that are not worth spending thousands of dollars to resolve.

3. Give them Homework.

A very efficient way to help keep your client's attorney's fees low is to give them *homework*. For example,

provide them a checklist to work on after your initial meeting with a list of documents needed to prepare their financial disclosures, send them a bullet point list of information and documents you need to respond to discovery, send them questions to prepare for drafting motions, etc. Assigning them with homework will help avoid inefficient and unproductive back and forth communications that cost a lot of money. Homework can also serve as a guide to keep them on track when they look for their documents and provide answers to your questions. It helps them stay involved in their case and know what is being requested. Once they provide you with the requested information, then scheduling a meeting with them to discuss the documents and their answers becomes much more efficient and saves time and money. Some clients are very sophisticated and technology savvy. Sophisticated clients can follow specific format instructions that can accelerate our time to synthesize their data into work product. Their completed homework will help move the case forward efficiently. This level of organization is critical in every divorce matter.

4. There is an Awesome Invention Called a "Telephone." Use It.

In today's age, electronic communication such as emailing is becoming the main form of communication. Almost everyone has an email address. Now more than ever, we rely on email and other electronic methods to communicate with each other. Don't get me wrong, email is a great tool for communication. It is great for record keeping and to have something in writing to refer to later. However, drafting an email requires specificity and clarity with detailed explanations. Not doing so causes lots of confusion, resulting in multiple back and forth emails until the request is met. There is the risk your recipient doesn't receive your email, or your email gets lost in the large pool of other emails or goes into your recipient's spam folder. To cure this problem, you end up sending multiple follow-up emails wondering why your client hasn't responded. You also risk missing deadlines and completing work last minute which is time consuming. This problem results in your client incurring lots of unnecessary attorney's fees. The better practice is to pick up the phone and call your client, followed by an email summarizing your conversation. If your client is not responding to your initial email, call them and follow up via telephone. If your client does not understand what you request in an email, call them instead of sending ten emails back and forth. A one-minute call may be all that is required to get what you need.

5. Combine Your Communications.

You can help save your clients attorney's fees by combining your requests into one email or one phone call. Don't send your client multiple emails requesting information when you can combine all requests in one email. Similarly, limit your phone calls and set a call to discuss all issues together. It is even more important to instruct your client to limit and combine their communications into one method of communication. Each email sent has its own transaction cost. It gets read and indexed into the client file. If you ask for documents or if they have questions, they should consolidate their responses and questions together into one email or one phone call. If you don't set this expectation from the inception, you open the door to allow your client to send you an email or call you for every item, no matter how important or minor. Help your client understand the importance of combining their communications as it will help save them thousands.

6. Cut the Therapy.

Let's face it. As a divorce attorney you catch yourself providing your client with something akin to therapeutic counseling. It is unavoidable because our clients are possibly going through the worst time of their life. They are stressed, emotional, and many are also going through some form of depression. We must sympathize with them and build a relationship of trust. Regardless of how great a therapist you may think you are, you are not. You are an attorney. They hired an attorney to help them navigate their legal situation. So, cut the therapy and help them resolve their family law issues. If your client needs a therapist, refer them to one. Therapists are usually cheaper than attorneys. Your job is to help finalize their divorce and resolve their family law disputes. If you continue to allow long conversations with your client about how horrible their ex-spouse is and how they ruined their life, then your client will end up with a substantial bill and an unresolved and convoluted family law matter.

7. Embrace Technology and Teach Your Clients.

Law firms that implemented technology into their systems before the COVID-19 pandemic had an easier time shifting to work from home after the stay-at-home orders were put in place. Those who maintained paper files and rarely used digital platforms struggled and suffered financially as they were forced to digitalize their firm practices and procedures. The reality is, whether we have a pandemic or not, technology is booming and eventually

paper will become extinct. Familiarize yourself with top recommended technology platforms for your client file retention and learn the ease of data transfer electronically. There are various case management software programs and document retention platforms that are user friendly and much more affordable than maintaining paper files. There is client relationship management software that can help you streamline your client intake process and help you automate your follow-up communications with your clients during your representation. An efficient, technology driven firm, can manage their client cases productively and help keep their attorney's fees low by not spending time on unnecessary, outdated administrative work.

It is also as important to teach your clients how to better use technology to their advantage to help keep their attorney's fees low. Your clients should know how to convert files such as images and jpeg files into PDF and also know how to consolidate multiple files into one document. This will prevent unnecessary administrative work on your end that would otherwise be costly to them. For example, if you send your client a list of twenty documents, teach them to organize the records into different categorical folders, separate by year and category. Sure, your client may not do exactly what you ask of them, but any level of organization helps.

8. Negotiate a Settlement.

Hearings and trial proceedings are expensive. It is imperative you encourage your client to make every effort possible to resolve all issues privately without the court's intervention. By the time you prepare for and complete trial, your client's bill will grow by thousands of dollars. This is where advising your clients to pick their battles is important. They must understand the value of their objective against the costs of possibly attaining that objective. Do a cost benefit analysis with them again and discuss other alternative options to trial. If the parties go to court for a decision, they are asking a judge (whose scope of knowledge about their lives is limited to the evidence admitted) to make their important life decisions. If they negotiate a private settlement, then they have more control and can possibly come to a better outcome and save on costs. It is critical to discuss and explore all alternative options before sprinting to the courthouse.

9. Don't Create Issues. Discourage Fights.

At times, the things parties fight about are so worthless that it makes me cringe. Is it worth fighting over a $500 couch and spend over $1,000 each to argue who keeps it? It makes no sense. It is probably less expensive and more productive to buy a brand-new couch than pay your attorney to fight over the old one. Sure, the personal item may have some sentimental value to your client, or they may be emotional and sad because of the divorce—but spending thousands over it is simply not financially prudent. Adding another $1,000 to their child's college fund and building savings for their future is a far more worthy cause than a $500 couch. This is the time you need to help do a cost benefit analysis for them and be the logical person to help them make better decisions as they are going through their emotional turmoil. Discourage fights over every issue and don't create new issues simply not worth the cost.

Work with your clients and have regular weekly or biweekly quick follow-up calls with them. Your follow-up conversation need not be long but give them a quick update on where they stand with their attorney's fees during every follow-up call. Setting realistic expectations about their case and revisiting their goals help control their attorney's fees. Keep these nine tips in mind as it will help save your clients thousands of dollars and it will help you manage your financial business efficiently and productively.

Building the Case for Adult Child Support

Elsa-Marie Medeiros

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It is common knowledge that when parents divorce or separate with minor children there is a financial obligation to support the children until they attain eighteen years of age. However, parents can be statutorily required to support their children beyond the age of majority.[1] This occurs in two situations: (1) the adult child is eighteen years old in high school and is not self-supporting[2] *or* (2) the adult child is incapacitated from earning a living and without sufficient means.[3]

Adult child support is an area of family law that does not garner much attention because the issue seems to be uncommon. It is still important though to be aware of the issue because it can potentially pose a financial burden or legal liability on clients—payments can last the lifetime of the children and a parent can be sued for unpaid support. A basic understanding of the statutes and case law on adult child support is crucial to advise clients on the extent of child support obligations and to protect the welfare of adult children.

High School Adult Child

Pursuant to Family Code section 3901(a)(1) (former Civil Code section 196.5), the duty of support continues for (1) "an unmarried child," (2) "who has attained 18 years of age," (3) "is a full-time high school student," *and* (4) "is not self-supporting." This duty continues "until the time the child completes the twelfth grade or attains nineteen years of age, whichever occurs first."[4]

According to Family Code section 3901(a)(2), a child does not have to be a "full-time" high school student *if* "the child has a medical condition documented by a physician that prevents full-time school attendance." Further, the payee parent is not required to provide "monthly proof" that the adult child satisfied the conditions for continued child support after age eighteen to enforce the order.[5] Rather, the payee parent is only required to notify the payor parent of any condition that would terminate the duty of support, and if the payee parent does not, any overpayments are refunded.[6]

There is only one published case that analyzes the elements of Family Code section 3901(a)(1). In *Marriage of Hubner*, the payor parent argued he did not have a duty of continued support for his unmarried eighteen-year-old son because he was not a "full-time high school student."[7] He participated in a full-time American Field Service academic foreign exchange program at a high-school in Japan that did not count towards his high school diploma in the United States[8] The trial court agreed and suspended the adult child support obligation.[9]

The Second District Court of Appeal, however, reversed the decision and held "[t]here is no requirement that the supported child must demonstrate a good faith effort to graduate from high school as soon as possible, around the date the payor spouse reasonably could have expected that obligation to cease."[10] In addition, the duty of support is not conditioned "on the child's participation only in those classes that propel her or him toward graduation at the earliest possible date."[11] The son was enrolled in a full-time high school foreign exchange program, therefore, the payor parent had a duty of continued support.[12]

The court in *Marriage of Hubner* reveals that the "full-time high school student" requirement is self-explanatory. If the child is enrolled full-time in a high school regardless of whether the class credits count towards the diploma, the requirement is met. Further, while there are no published cases that specifically discusses the "self-supporting" element, the court in

Marriage of Hubner, did briefly mention "emancipation" as proof of a self-supporting adult child.[13]

Incapacitated Adult Child

Pursuant to Family Code section 3910(a), parents must support "a child of whatever age" who is (1) "incapacitated from earning a living" *and* (2) "without sufficient means." Substantial evidence must support the finding.[14] The cases that fall under this code section are sometimes heartbreaking because parents may not agree their child is incapacitated or unable to earn a living. These are difficult realities some parents must face. Therefore, it is crucial for family law attorneys to be aware of this code section to ensure the well-being of children are protected.

(1) Incapacitated from Earning a Living

To determine whether a child is "incapacitated from earning a living," courts will assess whether the child (1) was unable to be "self-supporting because of a mental or physical disability" *or* (2) was unable to "find work because of factors beyond the child's control."[15]

The mental or physical disability of a child must be a condition that imposes significant limitations on the child's ability to live independently of the care of others. Courts have found children suffering with acute conditions like chronic schizophrenia,[16] cerebral palsy,[17] and poliomyelitis[18] to be incapacitated under section 3910. Other courts have found children to be incapacitated under section 3910 for manageable, but debilitating, conditions. For instance, the Fourth District Court of Appeal in *Marriage of Drake* found the parties' nineteen-year-old son to be incapacitated because he was diagnosed with attention deficit hyperactivity disorder, a psychotic disorder, oppositional defiant disorder, and cannabis abuse, and was living in a residential treatment center.[19] The Third District Court of Appeal in *Chun v. Chun* also found the parties twenty-year-old daughter to be incapacitated because she had the emotional maturity of a twelve-year-old and attended school at the fifth to seventh grade level.[20]

In contrast, courts do not find a child to be incapacitated under section 3910 if the child is able to independently handle aspects of adult life. For instance, the Fourth District Court of Appeal in *Marriage of Cecilia and David W.* determined that while the parties' twenty-four-year-old son had Tourette's syndrome and attention deficit hyperactivity disorder, he earned two Associates degrees, attended University of California, San Diego with accommodations, lived in the dormitories, drove his own car, and planned to seek employment after graduation.[21] Therefore, there was no substantial evidence indicating his conditions imposed major challenges on his ability to be self-supporting or find work.[22] The court indicated that the outcome could have been different if there was a vocational evaluation.[23]

An independent medical examination and vocational evaluation could help establish this prong, however, such evidence is not conclusive unless supported. For instance, the Second District Court of Appeal in *Lederer v. Gursey Schneider LLP* held that while the parties' twenty-nine-year-old son suffered catastrophic injuries from a motorcycle accident and vocational evidence indicated he was "not employable in the open labor market," he was able to be self-supporting and find work.[24] He performed computer work at both his father's law office and at home for third parties, and received income for his drone photography work.[25] The evidence did not support that his condition rendered him incapable of performing job tasks.

(2) Without Sufficient Means

Last, to determine whether the child is "without sufficient means," courts will assess whether the child will likely become a "public charge," requiring government benefits or assistance.[26] The statutory purpose is to protect the public from the burden of supporting a child whose parents are able to do so.[27]

There are few published cases that analyze this prong. The Fourth District Court of Appeal found in *Marriage of Drake* that the adult child living in the residential treatment facility for various disorders was "without sufficient means" because he lacked the means to pay for expenses that were not publicly reimbursed.[28] Although he had some expenses covered such as his "[school] tuition, room, board, and IEP assessments," he had many other "necessary" expenses that were not covered.[29] Evidenced by receipts, these expenses included "medical expenses (including deductibles and co-pays), clothing, books, toiletries, and snacks," which were at least $800 per month.[30] Therefore, the court determined that he was without sufficient means to cover those costs which placed him at risk of becoming a public charge if adult child support was not ordered.[31]

On the other hand, the Fourth District Court of Appeal in *Marriage of Cecilia & David W.* found that the adult child attending UCSD, who suffered Tourette's

syndrome and ADHD, was not "without sufficient means."[32] The evidence reflected that he potentially could hold a minimum wage job.[33] The court indicated there would need to be additional evidence regarding the likelihood of the adult child becoming a public charge.[34] Perhaps if the parties provided a vocational evaluation or other evidence like the parties in *Marriage of Drake* did, this prong may have been met. Nevertheless, these two cases demonstrate the importance of providing ample evidence in court to make your case.

Furthermore, adult children who receive financial assistance from sources like trusts or government benefits will not discharge a parent's support obligation. For instance, the Second District Court of Appeal in a case also called *Marriage of Drake* found that the income from a trust established by the mother to support her son, who suffered chronic schizophrenia, did not discharge the father's statutory duty of adult child support.[35] There was substantial evidence that their son was "without sufficient means" because the trust would run dry long before the death of their son.[36] This raised the "prospect" that he would become a public charge.[37]

Conclusion

Making a case for adult child support is relatively straightforward. However, these cases can get highly contentious, necessitating the use of medical and vocational experts. Litigating a child's disability may be emotional for the parents and the child. Encouraging parents to come to a stipulated agreement[38] to provide or continue support for their child can be the better option to preserve relationships and save costs. Knowing the statutes and case law on adult child support is crucial to advise clients on the best course of action and to protect the welfare of adult children.

Endnotes

1 Cal. Fam. Code §§ 3901 & 3910; 6500-6502.

2 Cal. Fam. Code § 3901.

3 Cal. Fam. Code § 3910.

4 Cal. Fam. Code § 3901(a)(1).

5 *In re* Marriage of Hubner, 124 Cal. App. 4th 1082, 1092 (2004) (holding that requiring the payee spouse to provide monthly proof of the conditions satisfied for continued child support "would place a needlessly heavy burden on payee parents and prove impractical and unworkable.")

6 *Id*.

7 *Id.* at 1089.

8 *Id*.

9 *Id*.

10 *Id*. at 1090.

11 *Id*.

12 *Id*.

13 *Id.* at 1092.

14 *In re* Marriage of Cecilia & David W., 241 Cal. App. 4th 1277 (2015).

15 *Id*. at 1285.

16 *In re* Marriage of Drake, 53 Cal. App. 4th 1139, 1148-49 & 1154 (1997).

17 *In re* Marriage of Cohen, 3 Cal. App. 5th 1014, 1026 n.5 (2016).

18 Woolams v. Woolams, 115 Cal. App. 2d 1, 2 (1952).

19 *Drake,* 241 Cal. App. 4th at 937.

20 Chun v. Chun, 190 Cal. App. 3d 589, 597 (1987).

21 *In re* Marriage of Cecilia & David W., 241 Cal. App. 4th 1277, 1287-88 (2015)..

22 *Id*.

23 *Id*. at 1288.

24 Lederer v. Gursey Schneider LLP, 22 Cal. App. 5th 508, 532 (2018).

25 *Id*. at 520.

26 *In re* Marriage of Drake, 53 Cal. App. 4th 1139, 1154 (1997).; *see also Cecilia & David W*., 241 Cal. App. 4th at 1286.

27 *Drake*, 53 Cal. App. 4th at 1154.

28 *Id.* at 941.

29 *Id*.

30 *Id*.

31 *Id*.

32 *In re* Marriage of Cecilia & David W., 241 Cal. App. 4th 1277, 1288 (2015).

33 *Id*.

34 *Id*.

35 *In re* Marriage of Drake, 53 Cal. App. 4th 1139, 1154 (1997).

36 *Id*.

37 *Id*.

38 *See* Cal. Fam. Code §§ 3587, 3901(b); *see also In re* Marriage of Rosenfeld & Gross, 225 Cal. App. 4th 478 (2014).

Defining "Coercive Control" in the Domestic Violence Prevention Act

Emily E. Rubenstein

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The Basics of the Domestic Violence Prevention Act

California's Domestic Violence Prevention Act (DVPA) was passed in 1993. It provides domestic violence victims with immediate legal protection in the form of restraining orders and other injunctions against abusers.[1] Under the DVPA, the court may issue a domestic violence restraining order upon reasonable proof of one past act or multiple past acts of abuse.[2] While people of goodwill can certainly agree that domestic violence is a pervasive societal issue and that victims need protection, the exact way to effectuate this protection is always evolving.

On September 29, 2020 Governor Gavin Newsom signed California Senate Bill No. 1141 (SB 1141) into law. This new legislation added a definition of "coercive control" as a theory for relief under the DVPA.[3] Whether SB 1141 is a positive or negative development for California family law and the DVPA is the subject of some debate.

Domestic violence is not "violence" in the traditional sense

California law has long recognized that "domestic violence" is not limited to physical injury or assault. The DVPA is broad. Litigants can obtain domestic violence restraining orders based on non-physical conduct, including threats, harassment, stalking, surveillance, or disturbing the peace of the other party.[4]

Thus, despite the plain meaning of the phrase, California law appreciates that "domestic violence" is not always domestic, nor is it necessarily "violence" in the traditional sense. The crux of domestic violence, no matter its form, is power and control.

Adding a definition of coercive control in the DVPA in the form of SB 1141

SB 1141 adds a specific definition of "coercive control" to the DVPA.[5] While this form of abuse was already illegal in some countries, including England and Wales, California and Hawaii are the first U.S. states to expressly define coercive control in the law.[6] In England and Wales, coercive control is punishable by up to five years in jail.[7]

SB 1141 defines coercive control as "a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty."[8] Examples cited in SB 1141 include unreasonably engaging in any of the following:

1. Isolating the other party from friends, relatives, or other sources of support.
2. Depriving the other party of basic necessities.
3. Controlling or monitoring the other party's movements, communications, daily behavior, finances, economic resources, or access to services.
4. Forbidding or compelling conduct that the other party has a right to engage in or abstain from.[9]

Purpose of SB 1141

The purpose of SB 1141 is simple: to provide more protection for victims.

Authored by California state senator Susan Rubio (D-Baldwin Park), herself a survivor of domestic violence, the goal is to draw attention to "subtler" forms of abuse that are not always easy to identify.[10]

Senator Rubio has a strong history of domestic violence advocacy, having introduced the Phoenix Act in 2019, legislation that extends the statute of limitations for domestic violence felony crimes from three to five years in certain

cases. The Phoenix Act also expands training requirements for police officers relating to domestic violence.[11]

In its text, SB 1141 expressly references the nationwide increase in domestic violence during the COVID-19 pandemic, and the way in which "increased isolation of victims has created an environment where abuse, including coercive control, is more likely to go undetected and therefore unreported."[12]

It is easier to recognize domestic violence in the forms of things like:

- Evidence of physical violence,
- Home security or public surveillance videos showing stalking,
- Phone records and text messages showing hundreds, or even thousands, of calls or messages after being told the other party no longer wants contact.

It can be harder to recognize, and to prove, domestic violence in the form of psychological control and micromanagement:

- Monitoring the victim's phone or device,
- Withholding car keys, wallet, or access to funds,
- Sabotaging birth control methods,
- Making the victim quit his/her job,
- Monitoring the victim's weight, exercise, dress, and speech,
- Degrading the victim's parenting, turning children against a parent,
- Threatening self-harm to manipulate the victim,
- Sexual manipulation,
- Convincing the victim that his/her family or friends have turned against them.

This type of manipulation and psychological control "trains" a victim to feel worthless and to behave in the specific way that the abuser wants. It is a sort of psychological hijacking.

Identifying and defining this specific type of abuse creates awareness and provides judicial officers and family law attorneys with a succinct, workable definition to apply.

Criticisms of SB 1141

Suffice to say, there is immense value in creating awareness and providing relief for this insidious type of abuse. The debate lies in whether SB 1141 is the best way, or even a good way, to handle this issue in the DVPA.

One potential criticism is that defining coercive control in the Family Code has the actual effect of muddying the waters, or even narrowing the victim's practical ability to obtain relief in court.[13]

Prior to the passage of SB 1141, the DVPA already authorized (and still authorizes) the family court to issue restraining orders based on the broad basis of "disturbing the peace of the other party." This is defined as conduct that destroys the mental or emotional calm of the other party.[14] Surely, this broad definition should already include coercive control.

For example, disturbing the peace of the other party already included conduct like:

- Accessing, reading, and publicly disclosing a spouse's confidential texts and e-mails. Marriage of Evilsizor & Sweeney [15] (texts); Marriage of Nadkarni (e-mails).[16]
- Engaging in an e-mail campaign against a spouse directed to the spouse's employer and friends. Altafulla v. Ervin .[17]
- Consensual sex as part of the pattern of violence followed by attempted reconciliation. Marriage of Fregoso and Hernandez.[18]
- *See also*, *McCord v. Smith*[19]; *Rodriguez v. Menjivar*. [20]

In my own cases, the family court has granted domestic violence restraining orders for conduct like:

- Threatening to claim that a marriage was fraudulent in order to instill fear about immigration status,
- Using slurs and degrading language about one's religion,
- Repeatedly setting off the home security alarm (remotely) for no other reason than to disturb,
- Making a spouse regularly weigh herself, micromanaging her weight, and degrading her.

This begs the question, to what extent does SB 1141 make a practical difference for victims of domestic violence? If disturbing the peace of the other party already functionally includes coercive control, then what does providing a more narrow definition in the Family Code actually achieve?

Interestingly, though SB 1141 does not remove nor limit previously existing legal grounds for issuance of a restraining order, it defines coercive control as part of a pattern of behavior, whereas none of the other grounds (including disturbing the peace) require a showing of a pattern. Will this specific definition of coercive control have the practical effect of confusing family law practitioners, judicial officers, and self-represented litigants? Will it inadvertently add new hurdles for victims?

While these good faith concerns are important to consider, it is more likely that clearly defining coercive control in the code will help victims.

Consider the case of *Rodriguez*.[21] In that case, the trial court did not consider coercive control to be disturbing the peace. When the victim sought to testify about mental abuse, the trial court stated;

> There's a whole movement who believes mental abuse ought to be considered domestic violence. For whatever reason, the state has not adopted that in its domestic violence statute. So being unpleasant, generally not saying nice things, excluding you from friends and stuff, probably not, under all facts and circumstances, generally is not domestic violence.

Likewise, the court stated, "If you happen to be controlling, I don't think that's a good thing to do. It's unpleasant. But it's not something that this court is going to sanction." Accordingly, in *Rodriguez*, the trial court sustained the respondent's objection to presentation of evidence relating to controlling behavior. In denying the request for DVRO, the court discussed only evidence relating to physical violence.

Though the appellate court reversed, expressly finding that, "Mental abuse is relevant evidence in a DVPA proceeding," and "the testimony that the trial court did permit revealed significant acts of emotional abuse…The acts of isolation, control, and threats were sufficient to demonstrate the destruction of Rodriguez's mental and emotional calm… this evidence demonstrated abuse," the practical reality is that few litigants will pursue an appeal in the context of a DVRO if the trial court does not get it right. It is clearest, most efficient, and most practical to be able to point to the plain language of the code. This clarity will help domestic violence victims.

Another potential criticism is that the inclusion of coercive control in the DVPA broadens an already-too-broad statutory system. Critics may be concerned that SB 1141, coupled with an already-low burden of proof, encourages "creative" divorce attorneys to infuse divorces with domestic violence theories for wrongful tactical purposes.

Protecting victims of domestic violence must be the top priority; there will always be divorce litigants who try to misuse the system to gain an edge. A finding of domestic violence can have wide-ranging effects on child custody, spousal support, and property control, and rightfully so. A litigant can obtain a temporary restraining order—without notice—which can suspend child visitation, require a person to vacate his or her home, and more. Again, rightfully so, but it is easy to see how a disgruntled ex-spouse may be tempted to misuse this system.

Potential misuse of the DVPA is an important consideration generally but it is misguided and shortsighted in this context. Though SB 1141 adds a definition to the code, it does not add a new legal basis for the issuance of a restraining order, it does not expand legal bases that were not already there. In my practice, it has been extremely rare for a client to suggest pursuit of a DVRO simply for a strategic edge, while it is quite common for a client to be a legitimate survivor of abuse, whether by coercive control or other methods. It is up to family law attorneys to do their due diligence before taking cases and to refuse to take part in any misuse of the DVPA. Aside from our ethical responsibilities as lawyers, it is the least we can do to help preserve the credibility of survivors of abuse.

Endnotes

1 Cal. Fam. Code §§ 6300 *et seq*.

2 Cal. Fam. Code § 6300.

3 Sen. Bill No. 1141, 2019-2020 Reg. Sess. (Cal. 2020).

4 Cal. Fam. Code § 6320.

5 Cal. Fam. Code § 6320.

6 Carrie N. Baker, *A New Frontier in Domestic Violence Prevention: Coercive Control Bans*, Ms. Magazine, Nov. 11, 2020.

7 Ciara Nugent, *"Abuse Is a Pattern." Why These Nations Took the Lead in Criminalizing Controlling Behavior in Relationships*, Time, June 21, 2019.

8 Cal. Fam. Code § 6320.

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10 Daniela Pardo, *California Bill Aims to Change How Domestic Violence is Defined*, Spectrum News 1, Sept. 26, 2020.

11 Susan Rubio, Wikipedia, en.wikipedia.org/wiki/Susan_Rubio (last visited Dec. 9, 2020).

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13 Lemon, Nancy K.D., Hernandez, Cory, *"Coercive Control" Domestic Violence Bill: Well- Intentioned, But Needs to be Reworked*, Daily Journal, June 11, 2020.

14 Burquet v. Brumbaugh, 223 Cal. App. 4th 1140, 1142 (2014).

15 *In re* Marriage of Evilsizor & Sweeney, 237 Cal. App. 4th 1416, 1424 (2015).

16 *In re* Marriage of Nadkarni, 173 Cal. App. 4th 1483, 1498 (2009).

17 Altafulla v. Ervin, 238 Cal. App. 4th 571 (2015).

18 *In re* Marriage of Fregoso & Hernandez, 5 Cal. App. 5th 698, 703 (2016).

19 McCord v. Smith, 51 Cal. App. 5th 358 (2020).

20 Rodriguez v. Menjivar, 243 Cal. App. 4th 816 (2015).

21 *Id.* at 821.

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