CALIFORNIA LAWYERS ASSOCIATION

FAMILY LAW NEWS

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Benefit Rights and Community Property: Is Marriage of Brown Still Good Law?

By James M. Crawford, Jr.

ARGUMENTS AND PROPOSED STANDARDS FOR VIRTUAL APPEARANCES, REDUX

By David M. Lederman, CFLS

Six Random Things That Are Good to Know Including the Distinction Between Impeachment and Rebuttal Evidence

By Judge Lawrence P. Riff

FAMILY LAW NEWS Issue 3, 2021 | Volume 43, No. 3

TABLE OF CONTENTS

Message from the Chair

Stephen A. Montagna, CFLS

"Taking on a challenge is a lot like riding a horse, isn't it? If you're comfortable while you're doing it, you're probably doing it wrong." - Ted Lasso

Looking back on the last couple years, being Chair of FLEXCOM has been anything but comfortable. I began this journey in September 2019, bright eyed and bushy tailed, eager to make my mark on a section that has historically contributed much to the community of family law. Like my new favorite visored/mustached protagonist, I could not wait to roll up my sleeves and get to work. Things didn't go as planned, as was the case for most things since COVID-19 came into the picture. The January 2020 meeting was the last in-person meeting the committee would have under my leadership. Educational programs which typically are held in person, were either forced to be held via online mediums, or cancelled altogether. Even our ability to personally hand out the family law section awards and celebrate the recipients accomplishments in person, became an afterthought. Basically everything that I had hoped and envisioned accomplishing as Chair of this section seemed to be going down the metaphorical drain.

Much like Ted Lasso, I believe in communism. Rom-communism that is. As Ted explains, it is a worldview that reminds us that if all of those characters in romantic comedies can go through some light hearted struggles and still end up happy, then so can we. Believing in "Rom-Communism" means believing that everything is going to work out in the end. Now it may not work out how you think it will, or how you hope it will, but it will all work out, exactly as it's supposed to. I realized probably later than I should have, that my job was to have zero expectations about my time as Chair and to just let go, knowing that in the end, it would all work out the way it needs to, which ultimately it has.

I have been blessed with an amazing team of committee members and advisors who made sure that we continued moving forward. Articles continued to be published, education continued to be delivered, and our legislative team provided the technical commentary and analysis for the bills which affected family law over the last two years. Our affirmative legislation team drafted and proposed Assembly Bill 429, legislation which affected the access and confidentiality of records in paternity actions. The bill has since been approved by the Governor and chaptered in the family code statutes for future use, an accomplishment I am extremely proud of.

I am also very excited about the future of FLEXCOM, especially when I look at the group of officers who are set to take over. Vice-Chair, Leena Hingnikar will be taking over as Chair after the annual meeting this year. I could not think of anyone better to take on the responsibility associated with this position, especially given her ability to inspire and motivate those around her. I have valued her input and constant reality checks throughout my term. Demetria Graves will be moving into the Vice-Chair position and will continue to provide the support and creative leadership she has exemplified in her role as Secretary and Marketing/Social Media Director. Kelly Robbins will be FLEXCOM's incoming treasurer and will no doubt ensure that our committee is headed in the right fiscal direction. Last but certainly not least, is Nathan Gabbard. Nathan will be transitioning out of his current role as editor of FLEXCOM's publication Family Law News (FLN) and will be the incoming Secretary.

Finally, I'd like to thank all of the aforementioned individuals, current committee members and advisors for their constant support and ability to adjust to a term that came with many unexpected challenges. I may not have accomplished everything that I intended to accomplish at the start of this journey, but am extremely proud of the work that has been done. The future is bright for FLEXCOM and I look forward to seeing what we can continue to accomplish for all our members and the world of California Family Law.

It has been an honor serving as Chair and an experience that I will not soon forget.

FLEXCOM is life.

Your's Truly, Stephen A. Montagna,

[Soon to be Past- Chair]

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Message from the Editor

Nathan W. Gabbard, CFLS

Dear Readers,

It has been my most sincere honor and privilege to serve in the capacity of editor for this journal, which continues to provide thoughtful perspectives and meaningful discussions of the family law practice. With the publishing of this issue, the baton will be passed to Mr. Craig Pedersen, who will serve as the editor for the next term. Mr. Pedersen has already been actively involved with the production of the *Family Law News*, and I am entirely confident that he will continue to carry forward the tradition of excellence that this body of work has established.

In this issue, there are several exciting topics to explore. David Lederman revisits the topic of remote appearances, proposes logistical solutions for unifying video conference technology across the state, and provides tips on how best to prepare clients for making remote appearances by video.

If you ever thought that obtaining discovery regarding a trust was off limits, you were not alone. Alphonse Provinziano unravels the idea that trusts are somehow impervious to discovery. In doing so, he provides an overview of what a trust is, how to obtain discovery about it, and how to protect the privacy interests of the trust beneficiary.

Is *Marriage of Brown* still operative when it comes to deferred compensation? James Crawford posits that it is, and he discusses the importance of distinguishing between benefit rights that are earned as deferred compensation for services and those that are acquired by purchasing service credit.

Holding onto evidence, not disclosing it to the other party, and banking on having it admitted into evidence at the last minute of trial as rebuttal evidence may be akin to carrying all of one's eggs in the same basket. Judge Lawrence Riff provides some observations about the presentation of evidence at trial, including discussion of the difference between rebuttal and impeachment evidence.

Additionally, Sherry Peterson describes that the 2021 Judicial Officer of the Year award was conferred to the Honorable Jerilyn Borack for her outstanding service to the practice of family law. The award is intended to recognize excellence on the Family Law bench, including outstanding service to the practice of Family Law, career achievements, or a distinguishing singular act or performance of the nominee.

Enjoy reading these illuminating perspectives. As always, we thank the authors who contributed their time and effort to make this content possible.

Six Random Things That Are Good to Know Including the Distinction Between Impeachment and Rebuttal Evidence

Judge Lawrence P. Riff

Judge Lawrence P. Riff was appointed to the Los Angeles Superior Court in 2015. His assignments have included criminal misdemeanors, civil trials, and family law "home court" and long cause trial departments. Before judicial service, Judge Riff was a partner of the international law firm Steptoe & Johnson LLP where he served as the firm's Managing Partner for its Los Angeles office for 17 years and Practice Group Leader for the firm's U.S. Toxic Tort and Environmental Litigation Practice Group. He is a member of the American Board of Trial Advocates (with 40+ Superior and U.S. District Court jury verdicts), and is currently on the Board of the Los Angeles Chapter of the Association of Business Trial Lawyers. In his practice, Judge Riff was a five-time recipient of the Daily Journal's Top Defense Verdicts and recognized as a "Top 100 Attorney" by Southern California SuperLawyers from 2009-2014 and a "Top 10" in 2015.

One day in trial, the following occurs:

Lawyer 1: Ms. Witness, let me show you now a document I pull from my briefcase and mark "next in order" and ask you, isn't it true that you wrote this to my client back on July 14, 2019?

Lawyer 2: Whoa! Not so fast. Your Honor, don't I get to see a copy?

Lawyer 1: Well, I don't have any copies. But I'll show you the original.

Lawyer 2 (after studying the document and causing a too-long delay in the proceeding): I object, your Honor. This is not on Petitioner's exhibit list that you ordered exchanged before trial.

Lawyer 1: Your Honor, I wish to use this document despite not including it on my exhibit list because I offer it for impeachment. I mean for rebuttal. I mean, well, one or the other or at least whatever will let me use it.

###

This exchange, or some variant, happens often. Having been invited by your editors, I will make six observations.

I. First Observation

If you wish to use a document at trial for any reason (including refreshing recollection), it must be "marked for identification" at the outset of any questioning about it. Technically, one asks the court *if* the document *may* be marked for identification, but usually that bit of Edwardian hyper-deference to the court is observed in the breach. This is what marking an exhibit for identification sounds like:

> "Your Honor, I am marking for identification as Petitioner's exhibit 19, a four-page text message string commencing on July 14, 2019 purportedly between the parties. I have handed a copy to counsel and, if I may, I would like to approach to hand a copy to the clerk and another copy to the witness."

Usually, the judge will then say something that is a signal to all concerned, including the clerk, that, yes, counsel may so proceed and as a direction to the clerk, yes, the exhibit may officially be so marked. That usually sounds like: "fine" or "OK" or "proceed, counsel" or "it may be so marked."

An exhibit is "marked" only after the clerk has placed an exhibit sticker on it—customarily, pink for "ID only." Counsel may *say* she is marking it but that is not so; it is only the clerk who can "mark" an exhibit. Later, if admitted into evidence, the clerk will place another sticker, this time yellow, for "admitted." By the way, the clerk has a duty to take custody at the end of the court day of all marked exhibits—whether for "ID only" or "admitted." You will make a clerk very nervous and

unhappy by sticking a marked exhibit in the pile of paper on counsel table. Often, experience shows, that paper is swept into a box or a briefcase at 4:35 p.m., never to be seen again. And now the clerk is in hot water because exhibit "P-19," identified on the record, is nowhere to be found. Therefore, get the exhibit in the hands of the clerk as soon as you can.

The best way to do this is to make sure you have provided the clerk with a copy of all your proposed exhibits in a tabbed binder with your exhibit list at the front. The clerk can then mark (i.e., place stickers on) the exhibit easily from that exhibit binder. This will also save counsel a great deal of walking around the courtroom and handing out pieces of paper during trial—which is both inelegant and wasteful of time.

But, for the exhibit not in the binder and not on the exhibit list—the one you are springing on opposing party and the court in trial in real time—it is courteous and professional to make sure the exhibit is placed in the custody of the clerk as soon as counsel is done examining a witness concerning the exhibit. This sounds like: "Your Honor, I am done examining on this exhibit. May I hand it to the clerk?" Your judge will be grateful for the question.

Last point relating to the exhibit not in your binder and not on the exhibit list: Once the judge has signaled that it is OK to proceed to use the document you have asked to be marked for identification, two options now exist. One is immediately to ask the judge if you may hand it to the clerk so that the pink "IDed only" sticker may be placed on the document. Then, you can examine the witness by placing the honest-to-goodness marked exhibit before the witness. This is belt and suspenders, A+ trial practice because there is no question as to which document the witness is looking at and testifying about. But option one takes time and is more walking around the courtroom. The second method is the one usually employed: counsel writes the exhibit number on the bottom right corner of the first page, e.g., "P-19." In that sense, counsel is marking the exhibit with information that will permit the exhibit truly to be marked (stickered) by the clerk later.

Counsel employing option two might consider saying something like this: "Your Honor, I'm writing 'P-19' in the bottom corner of this document to assist the clerk when this document is later formally marked." If you go this route, you probably only have to do it once to show the judge and clerk that you are sensitive to the issue. Then, when counsel hands the exhibit to the clerk fifteen minutes later, perhaps with other newly identified exhibits, the clerk can look at your notation and then can place the correct exhibit sticker on the document.

II. Second Observation

Having no copies of the original document pulled from your briefcase—not good. Always show up with enough copies. This means: for opposing counsel, for the witness, for the clerk, for the judge, and for you. Always hand the document to opposing counsel before asking any questions about it, and state that you did so it is reflected in the transcript. Don't wait to be asked by the judge: "Wait, have you shown counsel?" Or worse, don't give your opponent a chance to complain: "I haven't ever seen this document, your Honor, and counsel has not even given me a copy now!"

How about, "Your Honor, could your clerk make enough copies so everybody has one?" Really bad idea. That question will not be received with grace. You might get away with it—once.

III. Third Observation

Not knowing what exhibit number is your "next in order"—also not good. It is your job as a "master of the courtroom" to keep track of your exhibits. On a related subject, how about: "Your Honor, can we go over which exhibits have been admitted?" Your judge is thinking, "Really? You haven't kept notes of something that important?"

Trial counsel should keep track in real time what has occurred with exhibits—both yours and the other side's—by having handy both sides' exhibit lists on which you have added columns for "date IDed" and "date admitted." Then when the other side appears befuddled, *you* can helpfully pipe up, channeling your inner Eddie Haskell, "Your Honor, if I may, my notes show that exhibit was admitted into evidence on March 14." Doing so is your way of signifying, "not my first rodeo" and that you are "master of the courtroom."

On the other hand, by not having enough copies, not knowing the next exhibit number, and not knowing what is and is not in evidence, a lawyer has effectively communicated to the court that he or she has never been to a rodeo, is not prepared and not skilled in trial practice. That is not fatal to the client's case, but it surely doesn't help.

IV. Fourth Observation

As to an exhibit not on the exhibit list, describe the exhibit at the time it is marked for identification for the benefit of the clerk. Recall, the clerk is charged with keeping track of marked and admitted exhibits. The clerk *also* has to identify in the minute order a brief description of the exhibit. In fact, even if you are referencing an exhibit in the binder you have provided to the clerk along with your exhibit list already containing a description, you should *briefly* describe the document at the time it is first referenced at trial because it will help the reader of the transcript later.

This sounds like: "I'm directing you, sir, to exhibit 8 in Respondent's exhibit binder which consists of two photographs of a small child with an adult." Don't load up the description with argument. For example, don't say: "I'm directing you, sir, to exhibit 8 in Respondent's exhibit binder which consists of two photographs of a small child looking up adoringly at a loving adult who obviously cares a great deal for the child."

It is useful to remember *how* one offers an exhibit into evidence. Many counsel become tongue-tied. The simplest way: "Your Honor, I offer Exhibit 19 into evidence". A shorthand version showing, too, that this is not your first rodeo sounds like: "I offer exhibit 19"—which everyone will know means "into evidence". The true cow hands may just go with a blurt-out: "Offer 19", but I think that is an affectation, albeit harmless.

By the way, once an exhibit is in evidence, when counsel later asks a witness about it, it is professional to state that it is in evidence. This avoids any concern that you are asking about the content of a document not yet in evidence. That sounds like: "Mr. Witness, I am directing you to Respondent's exhibit 4, *in evidence*, in the binder before you."

V. Fifth Observation

If the exhibit is not on your exhibit list and has not been exchanged before the very moment you plan to spring it, own up to that as you are asking that it be marked *before* drawing the objection. (Note well: if you are in a jury trial, do so at sidebar.) It can sound like this: "Your Honor, exhibit 19 is not on our exhibit list and we have not exchanged it before this moment. That is because this document, I contend, will impeach this witness's [or another witness's] testimony on a material point of testimony." Or: "Your Honor, exhibit 19 is not on our exhibit list and we have not exchanged it before this moment. That is because this document will be offered in rebuttal to the testimony of [witness X] and we contend it demonstrates that witness X's testimony was plainly incorrect."

VI. Sixth Observation

There is a difference between rebuttal and impeachment evidence, and trial counsel should know the difference before show time. Let's explore.

Impeach, in this context and not what happens in the U.S. House of Representatives, means to discredit a witness by showing that he or she is not telling the truth or that the witness does not have an adequate basis for his or her testimony. As to the latter, for example, when an expert is unaware of a key fact or a percipient witness who could not have perceived the event for some reason. Here are the two most important things to know about impeachment evidence.

First, a witness's credibility is always at issue, so impeachment evidence is theoretically always relevant, even when it has nothing to do with the subject matter of the dispute. That rule is constrained by Evidence Code section 352, the court's tool for limiting the admission of technically relevant evidence that tends to distract, prejudice, or take up too much court time.

Next, true impeachment evidence (documents and witness identities) generally do not need to be disclosed pre-trial or pre-hearing. Such evidence is the last vestige of trial by ambush. The reason is deterrence: to deter lying in court. Witnesses are less likely to lie if they know they can be blown out of the water by a truth bomb coming out of the blue.

So, then, what is the difference between impeachment and rebuttal evidence. I commend for your reading *U.S. v. Harris*, 557 F.3d 938, 942 (8th Cir. 2009), which provides a short but good discussion of this point. "Impeachment is an attack on the credibility of a witness, whereas rebuttal testimony is offered to explain, repel, counteract, or disprove evidence of the adverse party." Shorthand oversimplification: impeachment = witness is a liar or doesn't know what she's talking about; rebuttal = witness is wrong. Rebuttal evidence goes to the issues in controversy, whereas, in theory, impeachment evidence may stray into collateral matters.

Generally, *true rebuttal* witnesses and evidence do not need to be disclosed in advance of trial. Why? Because rebuttal evidence *answers* the other party's evidence.

The unstated premise is: "We didn't see this coming, your Honor, until the other side offered evidence on it, and now we need to respond". Thus, a rebuttal witness is someone called to testify only *after* the opposing party has testified or presented their case. How about: "Your Honor, I wish to call this unlisted witness in my case in chief 'in rebuttal' to what I believe the other side will later testify to." Sorry, generally not going to happen.

I suggest that rebuttal evidence had better go to something important. Otherwise, a judge may not permit it due to time constraints. By the time a party seeks to offer rebuttal evidence, everyone is pretty interested in the case being over. Rebuttal evidence is often an unwelcome prolongation of the trial. On the other hand, be aware that a judge may permit *sur*rebuttal evidence to answer the rebuttal evidence. Thus, one should be aware of opening Pandora's box by offering rebuttal evidence.

Here is the chief problem with rebuttal evidence: the opportunity for great mischief. Some litigants plan to lie in wait to offer evidence they could have and should have offered in their case in chief in order to make a big splash at the end of the case. It may have been entirely foreseeable that such evidence would be relevant and supportive of the party's case but for forensic reasons, that party held it back for "rebuttal." Keep in mind that the whole point of pretrial exchange of witness and exhibit lists is to eliminate unfair surprise and lying in wait.

Thus, many judges will be asking hard questions whether the proposed evidence is "true rebuttal" or really something else—like a strategic and unfair nondisclosure of information designed to, say, make a big splash at the end of the case and which could have been offered earlier. If the evidence has that faint odor, there is a high likelihood the court will not allow it.

VII. The Bottom Line

Relying upon a "rebuttal" exception to save you—when you neglected to timely disclose your witness or your document, or held such evidence back to make a big splash and the end—is a risky practice and a bad idea.

Obtaining Discovery of Trusts, Their Assets, & Income to Prove Cash Flow Available for Child and Spousal Support: The Black Letter Law & Practical Considerations

Alphonse F. Provinziano, CFLS

Alphonse Provinziano is a well known Beverly Hills Divorce and Family Law attorney. Mr. Provinziano is a Certified Family Law Specialist by the State Bar of California, Board of Legal Specialization. A graduate of UC Berkeley and Hastings Law School, he is the principal of Provinziano & Associates. For more information visit: http://www.Provinziano.com

Wealthy families often set up trust funds for children in order to benefit from tax savings, private transfers of wealth, and to allow parents to control the funds going to their children. Such trusts are intended to protect the beneficiary from scrutiny and can be a shield for publicly holding assets that are much more available to the public eye.[1] Trusts are often thought of as somewhat untouchable in family law cases, and that if someone has assets in a trust or is a beneficiary of trust, that they do not have to disclose the assets held in a trust and do not have to provide the information, often asserting confidentiality and privacy provisions for beneficiaries of a trust. Nevertheless, there often is a significant community property interest in trusts, as well as income bearing assets hidden inside of trusts that could be available as cash flow for support. The purpose of this article is to demystify the claims that trusts are somehow impervious to discovery, when, in fact, trusts are subject to discovery, both the assets in the trust and the information regarding the trust. If there are legitimate concerns regarding confidentiality and privacy, the court can impose appropriate protective orders and engage in an in camera review process.

What is a Trust?

In California, trusts are governed by the Probate Code Division 9 (sections 15000 et seq.). Chapter 1 begins at sections 15200 and addresses the Creation and Validity of Trusts. Chapter 2, beginning at sections 15300, addresses Restrictions on Voluntary and Involuntary Transfers, which is relevant to the use of trusts in family law cases. Probate Code section 15300 states:

> [e]xcept as provided in Sections 15304 to 15307, inclusive, if the trust instrument provides that a beneficiary's interest in income is not subject to voluntary or involuntary transfer, the beneficiary's interest in income under the trust may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

Probate Code section 15301 goes on to state that the beneficiary's interest in principle is also subject to the same limitations. This means that under a "spendthrift trust," the beneficiary cannot assign potential distributions as security and prevents third-party judgment creditors from satisfying debts with the trust's assets until they are paid to the beneficiary.

Regarding child support, this is only addressed in the Probate Code when it comes to enforcement of court orders under section 15305. There is nothing in the Probate Code to address establishing support orders against a beneficiary. Section 15305 authorizes a trial court to order a trustee to satisfy an existing support order even where there is a discretionary trustee or a spendthrift clause (section 15305(d)), but only (1) pursuant to section

15305(b), where the beneficiary has the right to compel distributions, or (2) pursuant to section 15305(c), where the trustee has exercised discretion to issue distributions, and all subject to the requirement that it is equitable and reasonable to do so.

A recent case interpreting this Probate Code section, *Pratt v. Ferguson*, found that the shutdown clause typically found in spendthrift trusts did not defeat the claims of a support creditor.[2] In this case, the court had discretion under section 15305 to order the trustee to make distributions to satisfy the judgment based on the circumstances and considering what was equitable and reasonable.

Are Assets in a Trust and Cash Flow Derived From Trusts Discoverable for Purposes of Child Support and Spousal Support?

Although trusts are governed by the Probate Code, the Family Code and the Code of Civil Procedure can also affect trusts.

Family Code section 4053 makes a parent's first and principal obligation the support of their minor children, as the parties cannot waive child support. Parents' respective support obligations are determined according to their financial circumstances, each to pay according to their ability, with a statutory mandate that children should share in the standard of living of both parents. Child support may, therefore, appropriately improve the standard of living of the custodial household to improve the lives of children.

In defining income, Family Code section 4058 includes "trust income." However, this does not completely open the door on discovery, as the general rule is that child support is paid from present earnings and a parent need not invade assets or liquidate preexisting assets to pay child support. As an example, in the decision *Pearlstein v. Pearlstein*, the court found that the unrealized value of stock was capital, and not gross income.[3] Even if those shares of stock were sold for reinvestment in income-producing assets, those gains would not be considered income and would just be the replacement of one capital investment for another. Likewise, the courts in *Marriage of Alter, Marriage of Scheppers*, and *County of Kern v. Castle*, held that a one-time, lump sum gift or inheritance is not income available for support, although the rents, interest, or dividends generated thereby are, and recurring gifts may likewise be so designated in the discretion of the trial court.[4] [5] [6] A trust can be similar in that the income, interest, or dividends derived from a trust should be considered income available for support.

A problem arises when the beneficiary of a trust maintains assets that could be income bearing, but does not take income from the trust or declines to receive a distribution from the trust. The question is, can you get information on the income bearing assets in a trust and use those to argue that there is cash flow for support, but it is not being distributed from a trust. Under Code of Civil Procedure section 2017.010:

> [u]nless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property.

This allows for inadmissible evidence to be discovered if it will lead to the discovery of admissible evidence, but also limits the information to be relevant to the current case. The right to discovery in these cases is limited by an individual's privacy rights, including in the case of trusts the rights of third-parties who may also be affected by the trust, such as other beneficiaries.

If representing the party seeking support from a payor-beneficiary, the question is how to propound discovery to ensure it is narrowly tailored to avoid protective orders and/or discovery sanctions. If representing the support payor, the question becomes how to respond with sufficient information to avoid motions to compel and attendant discovery sanctions.

Whichever party one represents, relevance of the information sought is key to the overall analysis. The key for trust accounts is to what trust assets or income does the beneficiary actually have access. This important distinction lies at the heart of the holding in *Marriage of Williamson*, which in the trial court on husband's

motion for protective order limited discovery to only the express language in the family trust specifically allocating income to husband and describing his interest in the trust, redacting the remainder to prevent disclosure of third-party beneficiaries and contingent beneficiaries, as well as, most significantly, of trust assets.[7] This was in spite of the facts of the case: the parties had a lengthy marriage and a high standard of living that was funded by tax-free trust distributions and parental gifts. However, the parental gifts were terminated and husband only had a low-paying job with which to pay spousal and child support. A similar holding was found in *Marriage of De Guigne*, a case in which the court found that because the assets were not under control of the husband-beneficiary, the total asset amounts were not relevant for the support calculus.[8] Based on these cases, it is clear that income generated from trusts are relevant to support and thus arguably, the information regarding the assets is available. A protective order or other confidentiality agreement should be utilized to protect privacy interests of other third-party beneficiaries.

Overcoming the Objection that the Trust is Not in the Hands of the Beneficiary

The best way to obtain the necessary information about the trust and any distributions received by the beneficiary would be to obtain a copy of the governing trust instrument. A Request for Production of Documents (RFPD) could compel the party that is the beneficiary to produce the document, subject to some limitations on the privacy of third-parties and contingent beneficiaries, as discussed in the section on Privacy and Confidentiality below.

Under California law, specifically Probate Code section 16060, a trustee has an affirmative duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration. Under Cal. Probate Code section 16061.5(a)(1), a trustee must provide a complete copy of the terms of an irrevocable trust to any beneficiary of the trust who requests it after a trust settlor passes away. Therefore, in the instance when the trust settlor has passed away, if the beneficiary requested a complete copy of the terms of the trust, the trustee was legally obligated to provide the beneficiary with a copy. This eliminates the argument of a beneficiary simply saying, "I don't have a copy of the trust," they are entitled to it by law, and arguably have possession or control over it based on the Probate Code.

If the beneficiary insists that they cannot receive the information, then through appropriate discovery (written interrogatories or deposition), then the person holding information in the trust can be identified, and third party discovery can ensure to get access to the trust, and with appropriate protective orders, the assets and income deriving capacity from the trust.

How to Bring a Motion to Compel to Secure Evidence of a Trust

If the party from whom discovery is sought refuses to comply with the RFPD, then the party seeking responses can file a Motion to Compel for Misuse of the Discovery Process. California Code of Civil Procedure section 2023.010 states:

> Misuses of the discovery process include, but not limited to, the following:
>
> (a) Persisting over objection and without substantial justification, in an attempt to obtain information of materials that are outside the scope of permissible discovery.
> (b) Using a discovery method in a manner that does not comply with its specified procedures.
> (c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
> (d) Failing to respond or to submit to an authorized method of discovery.
> (e) Making without substantial justification, an unmeritorious objection to discovery.
> (f) Making an evasive response to discovery.
> (g) Disobeying a Court order to provide discovery.
> (h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.
> (i) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made.

Under California Code of Civil Procedure section 2024.020 (a):

> [a]ny party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action.

In addition to the Motion to Compel, the party seeking discovery responses can move for sanctions under California Code of Civil Procedure sections 2023.040 and 2031.320 (c). California Code of Civil Procedure section 2023.040 states:

> [a] request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.

Further, California Code of Civil Procedure section 2031.320 (c) states:

> . . . if a party then fails to obey an order compelling inspection, copying, testing, or sampling, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter … In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 . . .

Ultimately, the reality is that a sanction will not be effective for a party seeking the information from the trust, unless it is of a sufficient amount that will ensure compliance with the documents requested to be produced. For example, a beneficiary that wants to block production of the income and assets in order to evade a support order will need to persuade the court that the sanction will need to be of the nature to persuade the party to produce the information, as often the sanction may be less than the support order that they are trying to prevent.

Possible Protections for Privacy or Confidentiality Claims

The California state Constitution expressly grants a right of privacy to its residents. The court must then balance the right to discover relevant facts with the right of nonparties to maintain reasonable privacy regarding their financial affairs. In evaluating claims for protection of confidentiality, courts are vested with discretion. They must consider and weigh, among other things, the purpose for which discovery is sought, the effect disclosure will have on the parties and trial, the nature of objections, and the ability of the court to make alternate orders for partial disclosure, disclosure in another form, or disclosure provided the requesting party meets specified burdens or conditions just under the circumstances.

In *Hill v. National Collegiate Athletic Assn.*, the court established the test to be applied when a party asserts a third-party right to privacy as an objection to discovery requests.[9] The Court in *Williams v. Superior Court* summarized the test in *Hill* as, "[t]he party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious."[10]

The court in *Schnabel* summed it up by finding that any discovery must be tailored to protect the interests of the requesting party in obtaining a fair resolution of the issues, while not unnecessarily invading the privacy of the nonparty, including, on request, by protective orders[11]. As mentioned in the discussion above for the *Marriage of Williamson* case, the court redacted information regarding third-party beneficiaries, contingent beneficiaries, and of trust assets.

It should be noted that the party seeking the support orders in *Williamson* did not obtain the entirety of the governing trust instrument. However, the issue of sharing the governing trust instrument does merit further attention by counsel for both parties, as it may be critical to determining the interest of the beneficiary in the trust. The history of distributions is clearly relevant to the money received by the beneficiary, but it is not necessarily indicative of future distributions. The trust instrument can identify the grantor, the grantor's intent, the purposes of the trust, the full extent of the trustees' powers and discretion, any future beneficiaries such as the parties' children, and how and when distributions may be made. This type of information may then be relevant to determining what income is or is not available to the beneficiary, and thus discoverable under *Williamson*. For the party representing the trust beneficiary, disclosure of the actual trust instrument subject to confidentiality protections may be helpful in showing the

unreasonableness and lack of relevance of further inquiry into trust income and assets.

Where possible, a court should impose partial limitations rather than denial. The court can accommodate both disclosure and confidentiality by deleting names, sealing the information except on further order of court, and holding in camera hearings.

Conclusion: Income bearing Trusts are Discoverable, but be prepared for a battle over Privacy and Protective Orders

In weighing the discoverability of assets, when there are questions about beneficiary control, trustee relatedness, or bad faith, discovery rights will arguably be greater. However, "good cause" needs to be based on more than speculation for discovery of the assets or income of a trust whose beneficiary is the payor or recipient of child or spousal support, but who cannot compel distributions and/or who has no history of receiving trust distributions. Likewise, under the present state of the law, it is unlikely that broad discovery inquiries akin to fishing expeditions concerning the trust or trustee will be permitted, no matter the disparity in income or seeming inequities between the parties themselves.

Endnotes

1 Emma Jacobs, *Wealthy parents face delicate balance when passing their money on to their children — especially the wayward ones: Giving children too much money too early risks indulging them and making them irresponsible,* Fin. Times (May 26, 2021), https://financialpost.com/personal-finance/high-net-worth/wealthy-parents-face-delicate-balance-when-passing-their-money-on-to-their-children-especially-the-wayward-ones.

2 Pratt v. Ferguson, 3 Cal. App. 5th 102 (2016).

3 Pearlstein v. Pearlstein, 137 Cal. App. 4th 1361 (2006).

4 *In re* Marriage of Alter, 171 Cal. App. 4th 718 (2009).

5 *In re* Marriage of Scheppers, 86 Cal. App. 4th 646 (2001).

6 Cnty. of Kern v. Castle, 75 Cal. App. 4th 1442 (2001).

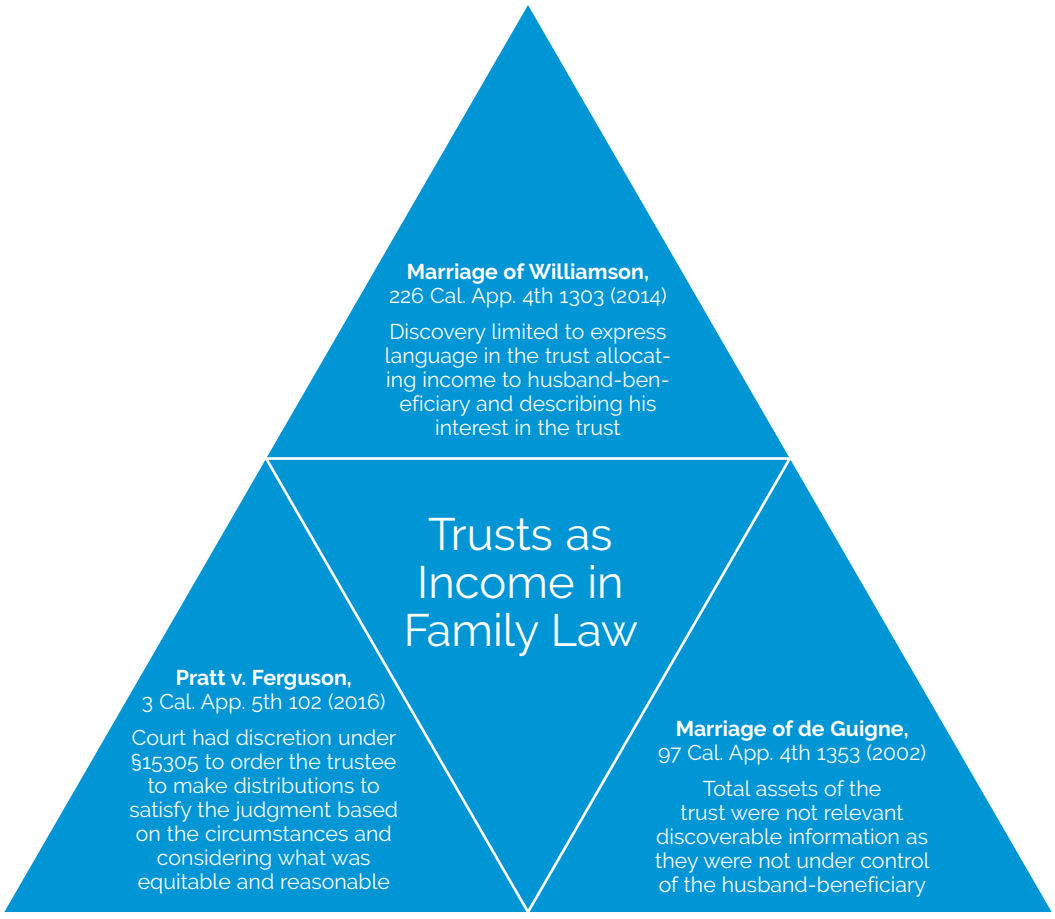
7 *In re* Marriage of Williamson, 226 Cal. App. 4th 1303 (2014).

8 *In re* Marriage of De Guigne, 97 Cal. App. 4th 1353 (2002).

9 Hill v. N.C.A.A., 7 Cal.4th 1 (1994).

10 Williams v. Superior Court, 3 Cal. 5th 531, 552 (2017), citing *Hill*, 7 Cal. 4th at 35-37.

11 Schnabel v. Super. Ct., 5 Cal. 4th 704, 714 (1993).



Arguments and Proposed Standards for Virtual Appearances, Redux[1]

David M. Lederman, CFLS[2]

David M. Lederman is a Past Chair of the State of California Bar Association, Family Law Section (FLEXCOM), Past Legislation Chair for FLEXCOM, and the Current Technology Director for the Association of Certified Family Law Specialists; current President Elect for the Contra Costa Family Law Section and is rated as a SuperLawyer by SuperLawyer.com. Mr. Lederman is a frequent lecturer on family law topics and speaks Mandarin Chinese.

Virtual trials are efficient, cost effective, and allow for significantly better access to justice than "in person" trials. When the COVID-19 Pandemic caused courts to shut down across California and beyond, each of the 58 counties in California hobbled together their respective plans for reopening, both virtually and physically. Many counties began using some form of a remote hearing/trial platform, such as Zoom, BlueJeans, WebEx, Teams, and others. There are people on both sides of the well still longing for a physical reopening. They should not.

The Judicial Council of California issued its first Interim Report on Remote Access to Courts on August 16, 2021.[3] The report was prepared by the Workgroup on Post-Pandemic Initiatives convened by Chief Justice Tani G. Cantil-Sakauye. The first interim report focused on remote access to courts, which, unsurprisingly, has emerged as a central issue with strong support for maintaining extensive remote access to court proceedings. The report was informed by input from forty-six different groups—including civil and criminal attorneys, law enforcement, legal aid attorneys, dependency counsel, and court staff. The Workgroup made the following recommendations:

- California courts should expand and maximize remote access on a permanent basis for most proceedings and should not default to pre-pandemic levels of in-person operations.
- The Judicial Council should encourage and support courts to substantially expand remote access through all available technology and should work to promote consistency in remote access throughout the state to ensure that Californians have equal access to the courts while providing flexibility to meet local needs.[4]

The interim report also described that "remote proceedings allow individuals who face barriers in accessing the courts (such as having to travel long distances to court or take time off work) to efficiently resolve their court matters, and that providing access to the courts through the use of remote technology is an access to justice issue."[5]

In **2006** the Administrative Office of the Courts in conjunction with the California Department of Health Services published a report titled Epidemics and the California Courts.[6] That report urged:

> In an effort to reduce face-to-face interaction and adapt to employee absenteeism, alternative means of work performance and communication should be explored, which could include:

- Allow staff to telecommute. If a telecommuting policy is implemented, the court should determine the hardware and software requirements for staff working off site as well as the telecommunications protocols and associated security to establish connectivity to the mission-critical applications.
- Use videoconference or teleconference technologies or both. For planning purposes, assume that most court proceedings included within the mission-critical functions and

other tactical objectives can be held by videoconference or teleconference under the emergency conditions described in this document.

- Increased use of video arraignments.

That report was written in 2006. By 2020 very little of those recommendations were adopted before the COVID-19 Pandemic. *After* the pandemic started, "we" started to use video conferencing for court appearances and trials. We learned that virtual appearances were a practical solution to in person appearances.

Prior to the pandemic, a hearing required attorneys to spend a significant number of hours traveling to court, parking, and printing physical exhibits. In the physical court days, a proceeding could proceed as follows:

> Lawyer: "Let me draw your attention to page 98 of binder 2, bates stamped page 3035."
>
> Litigant: "Is it the March 2017 Wells Fargo statement?"
>
> Lawyer: "No it's in the other binder?"
>
> Litigant: Hold on, I'll find it.
>
> Judge: "Let's take a 15 minute break for the court reporter."

Same exchange during a video trial:

> Lawyer: "Let me draw you attention to my PDF binder at page 63."
>
> Witness: "I am not seeing it."
>
> Lawyer: "Your honor, may I have screen controls."
>
> Judge: "Granted."
>
> Lawyer: "Thank you Your Honor. Can everyone see my screen? Let me direct your attention to the document on the screen…." "Let me highlight the relevant passage."

Documents are exchanged by PDF, there is no need to exchange physical binders or paper. With a little organization, which I discuss below, trials and hearings can be managed much more efficiently than physical trials.

There is some movement by the Judicial Council to mainstream virtual hearings. In its Strategic Plan for Technology 2019-2020, the Strategic Plan Update Workstream and the Judicial Council Technology Committee stated:

> Digital transformation is required for the judicial branch to meet the needs of the people of California. Innovative solutions will help automate the courts' manual processes, provide tools for judicial officers and staff, and expand digital services to the public. In addition to funding, creative approaches are required to deliver these solutions in an efficient and cost-effective manner across 58 counties with varying degrees of technological maturity, staff, and financial resources.[7]

A step forward in this process is Senate Bill 241 (2021-2022 Reg. Sess.), a bill proposed by Senator Umberg. The bill would authorize a witness in a proceeding (including trials), to appear by live remote audiovisual connection to the court.[8] Without getting into the details of the bill, the effect will be to create a hybrid court system in which some litigants appear in person and some appear virtually. The hybrid model will require each of the fifty-eight courts to invest in the infrastructure to allow each department to hold hybrid hearings and trials. While the author considers this a step forward from "live court" only, it does not allow for a continuation of the COVID rules which allow for entire virtual trials and hearings.

Virtual appearances are easy! All you need is a virtual platform, a computer with a camera, microphone and a speaker and Adobe Acrobat DC pro. If presenting larger, more document intensive hearings or trials, two monitors are helpful as you have more desktop space to work. The following is a proposed system for video presentation.

Proposed System for Video Presentation

Note: These rules and concepts are predicated on the following principles:

1. Reviewing and tracking of exhibits must be easy for witnesses and the judicial officer.
2. The remote process should mimic or improve on rules of practice and procedure in the physical, in person environment.
3. The system needs to be simple and teachable based on readily available technology.
4. These procedures should be Secure, Stable, and Scalable.

Trial Binders:

Trial binders shall be prepared using the same format as in the physical world. Exhibits must be marked using numbers for the Petitioner and letters for the Respondent. Binders shall be created using a Portable Document Format (PDF). It is highly recommended that users subscribe to Adobe Acrobat Pro DC, which costs approximately $15 per month per user.

All exhibits must be combined into a single PDF binder. The file name of the binder shall be as follows:

Date of trial (YY/MM/DD), followed by party designation, followed by binder number, then case number. For example:

200701.Petitioners.Trialbinder.1.D20-24689

Page Breaks:

Trial binders must have page breaks between the Exhibits. The page break shall have at the bottom of the page in 24 pt font the identification letter or number for the exhibits. For example, Petitioner's Exhibit 1 would appear as follows, center justified 2" from the bottom of the page:

Petitioner's Exhibit 1

Exhibit Bookmarks:

Each exhibit must be bookmarked with the exhibit number, and a brief description of the exhibit, for example:

Exhibit 1: Wells Fargo statements 1/1/20- 6/30/20

(Note: Descriptions of each exhibit in the bookmark should not exceed 3 lines).

Exhibit Lists:

Each party must submit an exhibit list with the exhibit binder. The exhibit list must have five columns. One column for the exhibit number/letter designation; one column for the description of the exhibit; one column for the PDF page number; and two empty columns for the parties to use at trial to mark during trial as "marked" and "admitted." (Excel or word is fine for this).

Rebuttal Exhibits:

Where practical, rebuttal exhibits should be created in a PDF binder similar to the process described above. Rebuttal exhibits, to the extent possible, should have a second rebuttal exhibit list. Rebuttal binders shall be designated in the same manner as the trial binder with the exception that the file name shall have added to it ".rebuttal." For example:

200701.Petitioner.Trialbinder.rebuttal.1.D20-24689

Cross Examination Exhibits:

Cross examination exhibits not shared before trial shall be exchanged prior to cross examination, where practical or used during examination by sending a copy to the opposing party during trial and sharing the virtual screen. Remember, the court controls his or her court room. Always ask the court for permission to share the screen. If you are sharing a screen, make sure that the only document on the screen is the exhibit intended to be shared, and used for examination. Note: Zoom lets you share a *specific* document; BlueJeans only lets you share the *whole* screen. Both allow for audio sharing, but each has its own quirks. Be aware of the limitations of the platform being used.

When appearing for a virtual hearing or trial, remember you are in a virtual courtroom. Dress appropriately for court, be in a quiet location, preferably your office, with the door closed and no ambient noise. Use a computer with a microphone and video camera. Attorneys should not use their cellular phones.

Redundancy:

Murphy's Law: If something can go wrong, it will. Internet connections can fail, and urgent software program can update at the wrong time (such as just before a hearing). Beyond the base computer and internet system, all documents intended to be used should be a) saved to the desktop; 2) saved to a virtual folder; and 3) saved to your firm database. If you have the redundancy system set up and there is a failure of something, you can switch to a tablet or, as a last alternative your mobile phone. For internet redundancy, make sure your computer can switch from your basic ISP to the 4G (or 5G) connection on mobile phone.

Creating Exhibit Binders in Adobe – a simple approach:

Each exhibit should be created individually by exhibit number, for example:

1. email dated…
2. text message dated…
3. photo of *xyz*

After the exhibits files are created, highlight all of the files, right click and then click on the option to combine PDF. If the files are organized appropriately, they will self-bookmark with the appropriate exhibit numbers on the left column of the PDF.

Pro Tip: The F4 key will open the bookmarks. You can drag and drop the bookmarks and change the designations as needed in the bookmark column.

Policy Recommendations:

Exchange and lodging of submission of Exhibits:

Exhibit binders and list are to be exchanged five days prior to trial and lodged with the court using the following process:

1. Exhibit binders and lists are to be served on the opposing party by Dropbox link, or any other agreed upon method of electronic document exchange.
2. Exhibit binders and lists shall be lodged with the court by sending the clerk of the department a Dropbox link to the binder file (or any other form of electronic transfer allowed by the department clerk). Attorneys may subscribe to a free Dropbox account at www.dropbox.com.

Advisements to Clients and Witnesses

It may come as a surprise to some witnesses, perhaps even a client or two, that a video court appearance is indeed an *actual court appearance*. By now, we have all heard anecdotally about remote appearance mishaps, like the attorney with the kitten face filter, or parties eating a meal on screen, or even witnesses lighting up a cigarette of one form or another. For individuals who are not routinely participating in court proceedings via video conference, some basic ground rules must be plainly spelled out.

When providing instructions on how to sign up for remote appearances, best practices include advisements that other persons, especially children of the parties, should not be in the same room; recording or broadcasting of the proceeding is prohibited by rules of court; the same or similar laws apply as if physically inside the courtroom; and persons who violate such rules may be held in contempt of court.

The State Bar of California Standing Committee on Professional Responsibility and Conduct issued in 2015, Formal Opinion No. 2015-193. That opinion, related to e-discovery, advises "An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law." That evolution is happening now. We must adapt and avoid being slammed into the rocks by *Schumpeter's gale*.

Endnotes

1 An earlier version of this article appeared in the ACFLS publication *The Specialist.*

2 David Lederman is a past Chair of the State Bar of California, Family Law Section; current Technology Director for the Association of Certified Family Law Specialists; President Elect for the Contra Costa County Family Law Section; and a content editor for the CEB Guide Practice under the California Family Code.

3 Interim Report: Remote Access to Courts, Workgroup on Post-Pandemic Initiatives, Judicial Council of California (August 2021), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-08/P3%20Workgroup%20Remote%20Access%20Interim%20Report%2008162021.pdf.

4 *Id.*

5 *Id.*

6 Epidemics and the California Courts, Administrative office of the Courts, Judicial Council of California (October 2006), https://www.cdph.ca.gov/Programs/CCLHO/CDPH%20Document%20Library/EpidemicsInTheCourts.pdf.

7 *See* Strategic Plan for Technology, Strategic Plan Update Workstream and the Judicial Council Technology Committee, Judicial Council of California (May 2019), https://www.courts.ca.gov/documents/jctc-Court-Technology-Strategic-Plan.pdf.

8 S.B. 241, 2021-2022 Reg. Sess. (Cal. 2021).

2021 Judicial Officer of the Year Honorable Jerilyn Borack, Sacramento County

By Sherry Peterson, CFLS

Honorable Jerilyn Borack

The Family Law Executive Committee of the California Lawyers Association is honored to confer the 2021 Judicial Officer of the Year award to the Honorable Jerilyn Borack for her outstanding service to the practice of family law. The award is intended to recognize excellence on the Family Law bench. Focus is paid to outstanding service to the practice of Family Law, career achievements, or a distinguishing singular act or performance of the nominee.

Judge Borack's commitment to improving access to and quality of justice for families and children in California's court has been tireless and decades long. Family law practitioners are somewhat rare on the bench, as compared to those who practiced in criminal law or general civil litigation, and Judge Borack has been aware that many of her colleagues insufficiently appreciated the professional, legal, and intellectual challenges and joys of serving in a family law assignment. She has also been acutely aware that increasing numbers of self-represented litigants seeking remedies for family law matters required a new orientation for the court system and the bench to ensure due process and continued access to the family courts. As a result, every time the Judicial Council was seeking bench officers to serve on statewide committees and task forces aimed at improving the practices and procedures in family courts, she stepped up and has been willing to serve.

She has served on the Judicial Council's standing Family and Juvenile Law Advisory Committee since 2003, and was the Family Law co-chair from 2005 to 2012, when she moved to become the Juvenile Law co-chair. In her sixteen years as a Chair of the committee, she has overseen the committee's substantial work in developing and refining forms for all areas of family law that are more easily accessible to self-represented litigants, while safeguarding integrity of the legal process. Likewise, on behalf of the bench, she guided the committee in reviewing legislation with an impact on family and juvenile courts to ensure that bench officers can fulfill their statutory obligations and protect families and children.

After a significant time as a bench officer in family law, Judge Borack sought out a juvenile dependency assignment to take to further be of service to families and children from a different vantage point. She brought to the table her significant experience in family court. She helped lead educational efforts and form changes to ensure that when dependency courts issue custody judgments (exit orders) that are to be enforced in family court, they are drafted with sufficient specificity that the family court can preserve the objectives of the juvenile court should a conflict arise.

In addition to the tremendous work product that she has overseen as Chair of the Family and Juvenile Law Advisory Committee, Judge Borack has also served on other initiatives to improve practices and procedures in the family courts. As a member of the Judicial Council Domestic Violence Practices and Procedures Task Force, Judge Borack worked with her colleagues on the bench to comprehensively evaluate the ways in which the courts were fulfilling their statutory obligations in domestic violence cases and to make numerous recommendations to improve those practices and procedures. These included a rule of court to ensure that the court was doing all it could to implement mandatory firearms relinquishment

provisions for parties subject to domestic violence restraining orders.

Judge Borack also was an active member of the Elkins Family Law Task Force that worked to ensure litigants in family law matters were provided the same due process protections when seeking to have their day in court as other types of civil litigants. Many of the key recommendations of the task force were taken up in legislation to ensure that litigants can present testimonial evidence in family law matters, and that courts can manage the flow of these cases in a way that protects the rights of all.

Judge Borack was also instrumental in ensuring that the funding model used to cover the costs of court appointed counsel in dependency matters was equitable across California, taking into account caseloads and regional differences in costs and labor markets. In her spare time, Judge Borack has also remained an active member of California Judges Association's Juvenile Court Judge's of California Committee.

Through all of this, Judge Borack has also been a constant presence in judicial education. She has served as a faculty member on countless occasions for judicial trainings on domestic violence, family law, guardianship, and juvenile dependency. Bench officers across California have been trained by Judge Borack, and she is recognized by her peers as a subject matter expert. For over thirty-eight years, Judge Borack has dedicated herself to the improvement of family law across the state for all litigants, both young and old. Appropriately, FLEXCOM is honored to recognize such distinguished excellence and outstanding service by presenting the 2021 Judicial Officer of the Year award to Judge Jerilyn Borack.

Benefit Rights and Community Property: Is Marriage of Brown Still Good Law?

James M. Crawford, Jr.

James M. Crawford, Jr. is an employee benefits attorney who for over 36 years has been assisting family law attorneys with the characterization, apportionment, and division of qualified and non-qualified retirement benefits and other forms deferred compensation. He has presented on the subject for various organizations, including the ACFLS, CEB, AAML, the CPA Society, California and Texas State Bars Advanced Courses, McGeroge School of Law, and the Judicial Institute of California. He is a co-author of the chapters on the characterization and division of employee benefits for CEB's Marital Settlement and Other Family Law Agreements, and for a similar publication of Matthew Bender; and has served as CEB's Sr. Editorial Consultant for Dividing Pensions and Other Employee Benefits in California Divorces. Mr. Crawford is also a co-author of "Crossover Issues in Estate Planning and Family Law," published in 2011 by CEB, and updated annually. Mr. Crawford has written a number of articles for the California and Texas bar associations regarding selected issues frequently encountered in QDRO practice.

Introduction

For over 40 years, the leading case on dividing retirement and other forms of deferred compensation in divorce has been *In re Marriage of Brown*, 15 Cal. 3d 838 (1976). The purpose of this article is to explore whether *In re Marriage of Green*, 56 Cal. 4th 1130 (2013) has altered *Brown's* basic principles. Examining *Green* in light of the subsequent case of *Cal Fire Local 2881 v. California Public Employees' Retirement System*, 6 Cal.5th 965 (2019), I argue that *Brown* remains the controlling authority in this area, and that the difficulty encountered by the *Green* court in stating and applying its principles was due to a failure to distinguish between benefit rights that are earned as deferred compensation for services and those acquired by purchasing service credit, both in terms of when the rights accrue as "property," and in determining the extent to which that property is community property.

This distinction is critical to resolving any benefit case involving the purchase or award of credit for service during which no benefit rights are accrued, including, for example, service for a prior employer (e.g., the military service at issue in *Green*), pre-plan service for the same employer, and even deemed or "fictive" service. This issue can arise in retirement plans—both private and governmental—which are allowed by the Internal Revenue Code to utilize a limited amount of such service in determining the amount of benefits to be paid.[1] The issue can also arise in other types of benefit plans that are not subject to the qualified plan rules, such as severance benefit or stock option plans.

Brown

The topic in *Brown* was the question of when an unvested or otherwise contingent[2] right to retirement benefits becomes "property." The result was a game changer. Overruling more than thirty-five years of jurisprudence under *French v. French*,[3] *Brown* finally recognized that, because retirement rights are a form of deferred compensation for services rendered, they are earned as "property" at the time the service on which they are based is performed, even when the rights are accrued subject to a contingency, such as vesting.[4] By virtue of this holding, two fundamental principles became firmly established.

First, as a form of deferred compensation, retirement rights are community property to the extent they are earned or accrued during marriage and before separation. As a consequence, the character of such rights is always determined by the marital status of the employee spouse at the time of the service from which they are derived was rendered—what the high court later described in *In re Marriage of Lehman*[5] as "a single concrete fact."[6] Accordingly, if the rights are accrued subject to a contingency such as vesting, then any post-accrual service that may be required to remove that contingency (such as vesting service) will *not* change their character. As *Lehman* explained:

> As stated, various events and conditions after separation and even after dissolution may affect the amount of …benefits that an employee spouse receives. But not their character. Once he or she has accrued a right to … benefits, at least in part, during marriage before separation, the … benefits themselves are stamped a community asset from then on.[7]

The second basic principle established in *Brown* is that when married spouses accrue unvested or otherwise contingent rights as community property, the risk that those rights will fail to vest or otherwise become non-contingent is shared equally between them, as co-owners.[8] Where employee benefits are concerned "[w]hat the nonemployee spouse possesses, in short, is the right to share in the [benefit attributable to the community's service] as it is ultimately determined.'"[9] Consequently, the employee spouse does *not* have to answer to the non-employee spouse if, as a result of post-separation events, the community's rights should fail to vest or mature as was hoped;[10] but the employee spouse also cannot acquire a separate interest in those rights by providing the post-separation employment necessary to vest or mature them.

> Brown's message is very simple. An employment benefit, whether or not vested, is community property to the extent a right to it accrues during marriage.[11]

An important corollary to these basic principles is that the character of any period of service during which the right to a benefit was not accrued in any part (sometimes referred to herein as "non-accruing service") has no relevance to the characterization of that benefit *even if that non-accruing service is used to calculate the amount of the benefit that is to be paid*. For example, there was no community interest for severance benefits the amount of which was partly based upon service during marriage, where the plan under which the benefits were accrued was not established until after separation.[12] Similarly, the non-accruing "fictive" service credited for purposes of calculating husband's benefit under a post-separation amendment to his plan did not give him a separate interest in the resulting additional benefits.[13] [14] Hence, whether actually performed (as in *Frahm*) or totally fictive (as in *Lehman),* non-accruing service may affect the value of benefit rights accrued but not their character.

Over the years, *Brown* has mostly been followed, but due to a misapplication of its simple message, not always.

Brown's rule for determining the character of benefit rights accrued as deferred compensation is a bright line test. Such rights are community property to the extent they were earned in community employment. For this reason, when applied to stock options and other types of benefit plans in which the rights all accrue on a single date rather than over time as service is provided (such as the usual case for the award of stock options and severance benefit plans), *Brown* dictates that the employee's marital status on the date the rights are accrued determines their character, regardless of whether the benefits are intended to reward past service, incentivize future service, or some combination thereof. When confronted with this type of benefit in the past, some courts have decided that equity requires the benefits to be characterized based on the employer's perceived purpose in providing them, making the determinative factor *why* the rights were accrued, rather than *when*.[15,16]

Despite these aberrations, or perhaps in response thereto, in *Lehman* the high court decided to clarify what *Brown* requires. It explained that because the character of benefit rights is determined *solely* by the extent to which they are contractually earned or accrued during marriage and before separation, the employer's motive in providing them has no part to play in determining the extent to which they are property of the community:

> [T]he Frahm court recognized that the issue of characterization of property, including the right to retirement benefits and retirement benefits themselves, as the community property of the employee spouse and the nonemployee spouse or the separate property of the employee spouse alone, does not turn on the motive of the employer. In any context, motive is, at best, hard to discern. In this context, it is also "irrelevant." That is because the employer acts for its own business reasons, and not for reasons bearing on the characterization of property for employee spouses and nonemployee spouses.[17]
>
> * * *
>
> [*Frahm's* reasoning is sound] because it cleaves closely to *Brow*n…. As we held in *Brown*, what is determinative is the single concrete fact of time. To the extent-and only to the extent-that

> an employee spouse accrues a right to property during marriage before separation, the property in question is a community asset.[18]

Lehman also removed the confusion that was evident in such cases as *Hug* and *Nelson*[19] over how characterization (in which courts have no discretion), relates to apportionment (where discretion is allowed).

Characterization and Apportionment

As *Lehman* explained it, "characterization" is the process of determining whether a right to benefits was accrued to *any* extent during marriage, in which case the rights are a community "asset." Since this is a "single concrete fact," courts do not have discretion to characterize such rights in any other way. However, when a community asset is only partly accrued during marital service, it must then be subject to an "apportionment" in order to determine the portion that was accrued during marriage and before separation, which makes it community property to that extent.[20] Unlike characterization, apportionment requires a determination made in the sound discretion of the court of the relative contributions made by the community and separate estates to the accrual of the benefit rights.[21]

Since both concepts are grounded in the *Brownian* maxim that "'[a]n employment benefit ...is community *property* to the extent a right to it accrues during marriage' before separation",[22] apportionment and characterization are in many respects two sides of the same coin.[23] But not in all. For whenever the benefit rights in issue are accrued only during community employment (as they were in the *Hug* and *Nelson* cases, for example), the asset is community property in its entirety, and therefore cannot be apportioned without impermissibly invading the community interest. By the same token, apportionment is also unavailable whenever the benefit rights in issue are all accrued by the separate estate before marriage or after separation, which was the situation encountered in *Frahm*. Per *Lehman*:

> In *Frahm*, the non-employee spouse had argued that because the benefits in question were based on husband's total service, much of which was performed during the marriage, they should be apportioned under "time rule" even though the right to receive them did not accrue to any extent until after the parties separated. *Frahm* rightly rejected this argument, because a nonemployee spouse cannot have a community property interest in a benefit to which a right was not accrued in any part prior to separation, even if that benefit is partly based on and thus rewards the employee spouse's service rendered during the marriage. Since the time rule is a tool of apportionment not characterization, its use is confined to those instances in which the right to benefits was derived from service during both the community and separate periods of employment.[24]

As stated earlier, in their effort to achieve a result they considered to be in keeping with the purpose for which the benefits were granted, and therefore a more equitable outcome, not only did cases such as *Hug* and *Nelson* wind up apportioning contingent benefit rights (i.e., unvested stock options) entirely granted during the marriage as community property; but lacking any period of benefit accrual service to use for the apportionment, each based its "time rule" fraction upon how much of the non-accruing service (e.g., vesting service or past service) had been provided by the community—service that does not and cannot matter when determining the community interest under *Brown*.

While adherence to *Brown* may at times seem to lead to results that are inequitable, the opposite is always true.

What *Hug* and the other pre-*Lehman* cases that deviated from *Brown* had in common was the notion that apportionment of rights accrued during marriage is required because such rights were in effect "earned" as and when the service the employer *intended* to compensate with the rights is performed, even though no benefit rights are accrued at that time. This notion of course ignores the fact rights become property only when they are accrued, not before or after, and regardless of why the employer chooses to undertake the corresponding legal obligation, and it violates basic community property law as it applies to deferred compensation. But, it is also fundamentally inequitable because, with respect to any benefit rights accrued during marriage that remain contingent at separation, it will always put the non-employee spouse in a no-win situation. If that contingency (e.g., vesting) is later satisfied by rendering post-separation service, the non-employee spouse's community interest is forfeited to the employee spouse as his or her separate property, and if it is not satisfied, the rights are forfeited back to the employer. Similarly, and for the same reason, the notion could be used to unfairly transmute separate property

rights acquired before marriage into community property, to the extent they became vested during marriage—again, a decidedly non-*Brown* implication that even the *Hug* court seemed concerned about.[25]

An Example of The Correct Application of *Brown*: *Sonne*

Some twelve years after *Lehman* came down, the court had another opportunity to provide further insight into how *Brown's* simple test is to be applied. The case was *In re Marriage of Sonne*, 48 Cal. 4th 118 (2010), and the issue there was the character of service credit, member contributions and the associated benefit rights under California Public Employees Retirement System (CalPERS). The rights in question had been awarded to husband in a prior divorce and subsequently transferred to his former spouse to satisfy a separate obligation to her. She had then withdrawn the member contributions in cash, which triggered husband's statutory right to restore the service credit and associated benefit rights that he had previously earned by redepositing the withdrawn contributions, with interest.

Husband elected to make this deposit during his second marriage using community funds. In the subsequent dissolution of that union, his new spouse claimed this contribution by the community entitled her to a *pro tanto* share of the restored service credit and benefits based thereon as community property.

Citing *Lehman's* statement that '[t]hroughout our decisions we have always recognized that the community owns all [such] rights attributable to employment during marriage' before separation,"[26] the Court rejected the new spouse's bid because "[t]he service credit at issue … was not attributable to employment during the [second] marriage."[27] It reasoned that the credit and associated benefits could not be the property of the second marriage because the right to them was not accrued to any extent during that union. Said another way, because husband's service credit was accrued and then forfeited subject to the statutory right of restoration before the marriage,[28] the rights restored were the same rights that had been earned as deferred compensation for husband's prior service, making them his separate property under *Brown*.

Marriage of *Green* Muddies the Water

About three years after *Sonne* came down, the court again addressed the character of CalPERS service credit in *Marriage of Green*.[29] But, this time the credit at issue was not earned in CalPERS service, it was purchased during the marriage under Government Code section 21024, which gave members with prior (non-accruing) military service the opportunity to buy credit for that service in the benefit formula. Husband paid the purchase price for this credit using a combination of community and separate funds.

By statute, the price of this additional service credit was equal to the actuarial present value of the extra benefits husband would receive at retirement on account of the additional credit, calculated based on his payrate in effect when he was first employed in CalPERS-covered service. Given that his actual retirement benefit attributable to the purchased credit would be based on husband's payrate in effect at retirement, the probability that he would earn a significantly increase in that rate by the time he retired made this investment a "great bargain."[30]

The trial court had awarded all the purchased credit and associated pension increase to husband as his separate property, and ordered that, for its participation in this investment, the community was entitled only to its money back plus interest. The court of appeal reversed, holding that the credit was community property because it was purchased during the marriage, and should be so treated in apportioning husband's pension.[31]

Because the case involved a benefit based on military service during which no CalPERS benefit rights were accrued, it was conceptually on all fours with *Frahm*. While the facts were reversed as to husband's marital status both at the time this non-accruing service was performed, and at the time the right to receive an additional benefit based on that service was accrued,[32] in both cases the service on which the benefits were based did *not* accrue a right to the benefits in any part, i.e., it was non-accruing service.

Given that the court in *Lehman* had previously lauded *Frahm* for "cleaving" to *Brown* in concluding that the community did not have any interest in benefit rights that were based on service rendered during marriage but had not been accrued during that service,[33] one would have expected the court in *Green* to easily conclude (a) that the character of husband's credit for his non-accruing military service was irrelevant to the character of the benefits based thereon, and (b) that since husband did not accrue an enforceable right to receive the additional benefits until the credit for that service was a purchased

during the marriage, the benefits should be characterized as community property.

But that is not what *Green* held. In fact, although the court initially identified the issue as the characterization of the additional retirement benefits that were based on the purchased credit, it ended up deciding only the character of the service credit itself, as the "property" involved:

> What matters in determining whether retirement benefits are community or separate property is the person's marital status when the services on which the benefits are based were rendered. Here the husband rendered the military service before the marriage. Accordingly, we conclude that, except for the community's contribution to the cost of obtaining the credit, the four years of additional credit are the husband's separate property.[34]

The court's obvious but unstated assumption behind this conclusion was that the character of the service credit will determine the character of any benefits based thereon, which is what was really at stake. But while under *Brown* that is certainly true with respect to benefit rights that are earned as deferred compensation for the credit service (as was the case in *Sonne)*, as *Frahm* and *Lehman* both made clear, there is no such nexus in the case of benefits that are based on service during which no benefit rights were accrued, whether that service is actually performed or not.

It is therefore fortunate that *Green* ended up ruling only on the character of the purchased service credit. This is a judicial "punt" left for the court below to resolve on remand how, if at all, the separate character of credit for service during which no benefit rights were accrued relates to the character of the benefits based thereon under *Lehman* and *Frahm,*[35] and rendered the above-quoted statement about "what matters" pure dicta of no precedental value.

Moreover, the limited scope of the court's analysis had another benefit, since in that context, once the court determined that the right to the additional service credit arose as a contingent right before marriage, it was not inconsistent with *Brown* to hold that this was separate property:

> The four years of military service should be treated the same the way the years at issue in *Sonne* and *Lehman* were treated — basing the characterization of the credit on the marital status at the time of the service.[36]

In addition, the limited scope of the issue allowed the court to dismiss *Lehman's* views on the characterization of benefits (as opposed to service credit) as "not similar",[37] and even to admonish the court of appeal for not giving any "weight to husband's premarital service to his country."[38]

Hence as it relates to the issue of whether *Green* has altered *Brown's* simple message, it seems that *Green* gets a pass.

If *Green* had addressed the character of the benefit rights acquired through the purchase of service credit, how should it have been decided?

Had *Green* addressed the issue of the character of the additional benefits that would be received as a result of the purchased military service credit, rather than that of the credit itself, the analysis would likely have been informed by a number of factors. For one thing, the principle that benefit rights accrue only after the condition(s) precedent to accrual set forth in the plan have been satisfied is basic to all qualified plans, public or private,[39] and that is equally true whether the condition precedent is the rendering of additional benefit accrual service, earning of an increase in pensionable compensation, or as in *Green*, purchasing credit for non-accruing (military) service. Thus, regardless of whether husband accrued a contingent right to purchase the additional credit before marriage, because that purchase was a condition precedent to accruing a right to the additional benefits under the plan, there is no getting around the fact that he did not accrue a right to additional benefits based on that credit until it was purchased.

For another, notwithstanding the court's suggestion to the contrary,[40] Mr. Green did not accrue a right to additional credit as consideration for his military service before marriage, he accrued it in consideration of his having paid the purchase price. Consideration for the additional benefits resulting from the purchase of service credit is the satisfaction of the condition precedent for accruing the credit, which was the payment of the purchase price.[41] While it is certainly correct that Mr. Green's military service was necessary for him to be eligible to make this purchase, that service did not entitle him to additional compensation any more than did his current service in CalPERS employment (which was also

an eligibility requirement).[42] Mr. Green received a right to additional benefits only because (and when) he paid for his additional service credit.

Moreover, even though the community did not yet exist when husband was in the military, the notion that the community was not involved in producing the additional benefits based on the credit he purchased for that service (beyond contributing to the purchase price), ignores the fact that this investment would not have been nearly the bargain it was had husband not earned subsequent increases in his payrate over the rate used to calculate the cost of the credit—increases that were attributable to some extent to his post-purchase employment during the marriage.[43]

With the character of the purchased credit itself being irrelevant to the character of the associated benefit increase, given just these facts alone, it seems clear the Court would have to have found there was a community interest of some sort in the benefits that were at stake in the case. But as to the issue of the extent of that interest, the probable result is not all that clear, for it seems there are three possible approaches the court might have taken.

The first, suggested earlier, would be to reason that since the right to the additional benefits was accrued when the right to the credit was purchased during marriage, under *Brown* the benefits were all community, subject to any reimbursement rights that might be applicable for the separate estate's contribution to that investment.

A second possibility would be to treat as separate components the portion of the additional benefits representing a return of the funds used to make the purchase (i.e., the cost) and the portion representing the bargain element of the investment. Since the latter was entirely attributable to the increases in that pay rate earned over time, apportion only that portion under *Brown* under the time rule;[44] and award the investment portion as community property subject to a right of reimbursement for any separate property used to pay the cost.

The third choice would be not to apply *Brown* at all. Benefits based on the purchase of service credit are not deferred compensation earned in that service, which arguably makes *Brown's* rule regarding the characterization of benefits accrued as deferred compensation[45] inapposite. With *Brown* out of the way, the case would be analyzed and resolved according to the general principles applicable to assets that are purchased for investment during marriage.[46]

While it likely came too late to assist the appellate court in resolving this issue for the Greens, a subsequent case has provided valuable insight into how increases in retirement benefits that result from the purchase of service credit should be characterized, and it is not under *Brown*.

Cal Fire Clears It All Up

Cal Fire involved a constitutional challenge to the 2013 repeal by PEPRA[47] of Government Code section 20909, which had been enacted in 2003 to give all eligible CalPERS members an opportunity to purchase additional service credit, known as "ARS credit," on the same terms as the members with prior military service had for years been able to purchase additional service credit under Government Code section 21024 (the section that husband in *Green* utilized for his purchase in 2002).[48] [49] The issue was "whether the opportunity to purchase this credit was a 'vested right'—that is, a right protected by the constitutional contract clause"[50] That is, whether it was a contingent contractual right, i.e., "property."

The plaintiffs contended that because the statute said this option could be exercised "at any time," it was a vested term of their employment contract. Without mentioning what had been said in *Green* about the ability of members to purchase military service credit "any time [the member] chose"[51] under Government Code section 21024 being a contingent right of CalPERS-covered employment, *Cal Fire* ruled that the ability to purchase ARS credit was not a property right. It was merely an opportunity that could be taken away at any time before it was exercised.

Although *Cal Fire* dealt only with the issue of whether section 20909 created a property right, its analysis is equally applicable to the option to acquire additional service credit under section 21024, for the two options are conceptually identical. Under this analysis, *Green* clearly "got it wrong" both in concluding that husband's ability to purchase military service credit was a contingent property right, and in assuming such "property" could be characterized under *Brown* as a form of deferred compensation for services rendered.

Cal Fire began its analysis by making clear that the question before it was not whether service credit that had been purchased under section 20909 was a vested right, but whether the option to make that purchase was such a right:

State employees and other members of CalPERS were granted the opportunity to purchase ARS credit in 2003 by the enactment of section 20909; teachers had been granted the opportunity in 1997. The concept of purchasing service credit did not originate with ARS credit. Members who had performed military service or other "public service," as defined by statute, had long been able to obtain pension service credit for that time by making appropriate payments to CalPERS [under GC § 21024]. Section 20909, however, was the first opportunity for state employees to acquire "nonqualified" service credit, or service credit that did not reflect any type of service. (See 26 U.S.C. § 415(n)(3)(C) [defining "nonqualified service credit"]; § 7522.46, subd. (a).) Because ARS credit is untethered to actual service, it acquired the nickname "`air time.'"[52]

"[I]t is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law. It is also "well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority." As we explained in *Retired Employees Assn. of Orange County v. County of Orange* (2011) 52 Cal.4th 1171 (*Retired Employees*), "`the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the [governmental body]. Policies, unlike contracts, are inherently subject to revision and repeal.'"[53]

The only change made by PEPRA relating to ARS credit was to eliminate the opportunity to purchase ARS credit after the end of 2012. PEPRA does not purport to affect the rights of employees who took advantage of the opportunity to purchase ARS credit while it was still available. Persons who actually purchased ARS credit therefore remain in precisely the same position as they were prior to PEPRA, and we need not consider their circumstances further.

> **What is claimed here to be a vested right is the *opportunity to purchase* ARS credit, rather than any of the rights conferred by its purchase.**[54]

Cal Fire then proceeded to distinguish between a right to service credit that is accrued as service is provided by an employee, and a right to service credit that is acquired by purchasing it. Drawing heavily upon *Kern v. City of Long Beach*,[55] a case on which it had relied in fashioning *Brown* years earlier,[56] the court explained that, unlike a right to "core" pension rights that accrues as a form of deferred compensation as services are rendered, the performance of which is the condition precedent to such accrual,[57] pension rights that are purchased do not accrue until they are purchased:

> As *Kern* explained, a public employee "is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due." Given their character as deferred compensation, the receipt of legislatively established pension benefits is protected by the contract clause, even in the absence of a manifest legislative intent to create contractual rights.[58]
>
> * * *
>
> Pension benefits, the classic example of deferred compensation, flow directly from a public employee's service, and their magnitude is roughly proportional to the time of that service. Just as each month of public service earns an employee a month's cash compensation, it also earns him or her a slightly greater benefit upon retirement. In this way, pension benefits are, literally, earned by an employee's work. Upon retirement, this additional component of his or

her compensation is paid to the employee in the form of pension benefits.

In contrast, the opportunity to purchase ARS credit, when it existed, was made available at the option of each individual employee. If not taken advantage of, the opportunity expired upon an employee's retirement or termination of employment.[59]

* * *

[A] term and condition of public employment that is otherwise not entitled to protection under the contract clause does not become entitled to such protection merely because it affects the amount of an employee's pension benefit. In any event, **although the purchase of ARS credit does increase the amount of a pension benefit, as plaintiffs argue, it does not affect the amount of the pension benefit that represents deferred compensation. That portion of the pension benefit is the same for employees who elect to purchase ARS credit and those with the identical employment experience who decline to purchase it. Acquiring ARS credit merely adds an amount attributable to the purchased service credit to the monthly benefit payable as deferred compensation. Rather than compensation for public employment, the increase in pension benefits from the purchase of ARS credit is a return of, and perhaps a return on, the funds used to make the purchase.**[60]

Again, this same analysis applies equally to the purchase of credit for military service. No deferred compensation benefits payable by CalPERS are earned when rendering military service. As *Cal Fire* noted, the mere fact that a period of service may be required in order for a member to have the opportunity to purchase additional service credit (which is equally true both for ARS credit and military service credit) does not mean the resulting pension rights are deferred compensation.[61] Were it otherwise, then all former service members would be entitled to the credit for their service as deferred compensation earned as a matter of right, whether they purchased credit for that service or not.

Green's analysis unfortunately failed to take into account this distinction. Which is no doubt why the court concluded that purchased service credits should be treated just like the service credit that was earned as deferred compensation in *Sonne* and *Lehman:*

> The four years of military service should be treated the same the way the years at issue in Sonne and Lehman were treated — basing the characterization of the credit on the marital status at the time of the service.[62]

The logical flaw behind this approach is that if the character of benefits is determined by when the service on which they were based was rendered regardless of when the right to those benefits was accrued, then the character of the benefits does not turn on the extent to which the right thereto was accrued during marriage, which is what *Brown* requires. That is why *Frahm* was indeed staying faithful to *Brown* when it found that a right to benefits based on service performed during marriage that was not accrued until long after separation was separate property.

It is also why *Green's* prodigious effort to analyze the character of a right to purchased service credit as the "property," entirely missed the mark. To reiterate, when the right to service credit is purchased rather than earned in service, its character is necessarily irrelevant to the character of the additional benefits received as a result of that purchase.

Should *Cal Fire's* conclusion be distinguished from *Green's* opposite conclusion?

It would seem unlikely.

According to *Cal Fire*, the issue boils down to whether the statute involved created either an express or implied right of employment.[63] Working from the "legal presumption against the creation of a vested right," and finding no evidence of legislative intent, express or implied, to make the section 20909 option available indefinitely, *Cal Fire* concluded that even though the statute said the election could be made "at any time," it did not create a vested right.[64] Citing to the fact that there was no relationship between the purchase price and the length of the employment required for eligibility to purchase the credit, it concluded that the statute's requirement that a member have certain service to be eligible did not signal that the option was earned when that service was rendered.[65] In the court's view, the consideration for the acquisition of ARS credit was not service, it was "the filing of a written election and payment of the necessary sums."[66] [67] Moreover, the fact that the additional benefits

resulting from exercising the option were not deferred compensation that flowed from the performance of service also precluded a finding that the option was an implied right.[68]

Although the nature of the option to purchase military service credit under section 21024, which could also be exercised at any time for the same consideration as the section 20909 option[69] was not before the court in *Cal Fire*, substantially all the factors that were there found determinative with respect to section 20909 are equally applicable to section 21024. For example, just as with section 20909, no benefit rights were earned by the performance of the service that is credited, nor is there any relationship between the cost of acquiring the credit and the total length of the member's military service necessary to be eligible to purchase the credit.

That said, there are differences in the wording between section 21024 and section 20909 from which it might be argued that *Green's* determination that the ability to purchase military service credit under section 21024 was a property right whereas its conceptual sister option under section 20909 was not.[70] However, there is also a significant indication in *Green* that, were this issue to again come before the court, section 21024 would likely not fare any better than section 20909. That indication is found in the that among the "contingencies" listed in *Green* to which the husband's employment "right" to purchase the credit was subject was whether "section 21024 remained in effect."[71] If *Cal Fire* teaches us anything, it is that if the ability to purchase service credit is subject to repeal before it is exercised, it is NOT a contingent property right regardless of how long it may have been in effect:

> We have never held that statutory terms and conditions of public employment gain constitutional protection merely from the fact of their existence, even if they have persisted for a decade. Such a rationale would directly contradict the general principle that such terms and conditions are not a matter of contract and are generally subject to legislative change.[72]

As *Cal Fire* recognized, it is "well settled that public employees have no vested right in any particular measure of … benefits, and that these [measures] may be modified or reduced by the proper statutory authority."[73] Such modifications or reductions are possible because there is a difference between the *ability* to accrue a right to benefits by meeting the statutory conditions precedent to that accrual, and contingent contractual rights that accrue as property once those conditions have been met. As *Cal Fire* made clear, an accrued right to additional benefits is "property" even if contingent; but a contingent right to accrue a right to such benefits is not.

Green's mistake in conflating the two concepts is easily seen by taking its reasoning to its logical conclusion. For if husband's ability to accrue a right to benefits by purchasing service credit is as a contingent property right he accrued as separate property upon entering CalPERS-covered employment, then the same must be said of his ability to accrue a right to benefits by earning service credit by remaining employed. If the benefits derived from the exercise during marriage of the right to acquire service credit by purchase are his separate property, then the benefits derived from the exercise during marriage of his right to acquire service credit by working must also be separate property—a result that would stand *Brown* on its head.

Conclusion

Green opened its analysis by broadly stating that what matters when characterizing retirement benefits is the character of the service on which they are based, without clarifying that this is true only for benefits to which a right is earned by providing that service. As *Lehman* explained, because the character of retirement benefits that are a form of deferred compensation is determined solely by when the right to them is accrued, service during which no such rights are accrued is irrelevant to their character.

Fortunately, the analysis that followed this imprecise explanation of "what matters" effectively took it out of play, as the court chose to deal only with the issue of whether husband's ability to purchase credit for his (non-accruing) military service was separate or community property. On that score, once the court had satisfied itself that this opportunity was actually a contingent contractual right that accrued before marriage,[74] its finding that this service credit was separate property was consistent with *Brown's* simple message that the time of accrual alone dictates character.

However, as *Cal Fire* was to later opine, service credit that is purchased rather than earned in CalPERS-covered employment is *not* deferred compensation for service, and accordingly any benefits based thereon represent "a return of, or perhaps a return on" that investment. In this

circumstance, *Green's* application of *Brown's* rule for the characterization of deferred compensation[75] to determine the character of the purchased credit amounted to trying to put a square peg in a round hold. Even worse, it focused its attack upon a straw man, given that what was at stake in that case was not the service credit, but the additional benefits that resulted from its purchase, and under *Frahm* and *Lehman*, the character of non-accruing service has nothing to do with the character any benefits that may be based thereon.

Overall, it thus appears that QDRO practitioners may rest easy in the knowledge that *Green* did nothing to undercut *Brown's* simple message; but not too easy. Thanks to *Cal Fire*, a "new" issue has come to light that really has been there all along, to wit: should benefit rights that are not earned as deferred compensation for services rendered be characterized as if they were?

Endnotes

1 *See, e.g.*, 26 U.S.C. § 415(n) and Treas. Reg § 1.401(a)(4)-11(d).

2 "The law has long recognized that a contingent future interest is property [citation] no matter how improbable the contingency ..." *In re* Marriage of Brown, 15 Cal. 3d 838, 846 (1976), fn. 8.

3 French v. French, 17 Cal. 2d 775 (1941).

4 "Although, as we have pointed out, supra, courts have previously refused to allocate this right in a nonvested pension between the spouses as community property on the ground that such pension is contingent upon continued employment, we reject this theory." *Brown*, 15 Cal. 3d 838 at 846 (citations omitted).

5 *In re* Marriage of Lehman, 18 Cal. 4th 169, 177 (1998).

6 *Id.* at 177.

7 *Id.* at 183.

8 *See Lehman*, 18 Cal. 4th at 179 ("Because the nonemployee spouse is compelled to share the bad with the employee spouse, he or she must be allowed to share the good as well.") As *Brown* put it in the context of pension benefits:

> In dividing nonvested pension rights as community property the court must take account of the possibility that death or termination of employment may destroy those rights before they mature. In some cases the trial court may be able to evaluate this risk in determining the present value of those rights. But if the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid. This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to vest. *Brown*, 15 Cal. 3d at 848 (citations omitted for clarity).

9 *Lehman*, 18 Cal. 4th at 184.

10 *Id.*

11 *Id.* at 191 (quoting *In re* Marriage of Frahm, 4 Cal. App. 4th 536, 544 (1996)).

12 *See Id.*

13 *See also Lehman*, 18 Cal. 4th at 187-188

14 As the court pointed out, granting additional service credit is just one of several avenues that an employer may use to increase the value of benefit rights already accrued:

> The employer can achieve exactly the same outcome, for example, by crediting a putative sum to the employee spouse's final compensation…. Or by increasing the per-service-year multiplier in the retirement-benefit formula that operates on the basis provided by the employee spouse…. *Lehman*, 18 Cal. 4th at 188.

15 *See, e.g.*, *In re* Marriage of Hug, 154 Cal. App. 3d 780 (1984); *In re* Marriage of Nelson, 177 Cal. App. 3d 150 (1986).

16 Similar decisions, also pre-*Lehman*, in cases dealing with severance plans. *See generally Frahm*, 4 Cal. App. 4th 536 at 540-544, and cases cited therein.

17 *Lehman*, 18 Cal. 4th at 180 (citations omitted).

18 *Id*. at. 183.

19 Both having concluded that unvested rights that were accrued entirely during marriage were partly separate property.

20 "What was in contest was solely characterization, i.e., whether the enhancement was a community asset in any part, and not apportionment, i.e., to what extent the enhancement, if a community asset at least in some part, belonged to the community and separate estates…." *Lehman*, 18 Cal. 4th at 187.

21 *Lehman*, 18 Cal. 4th at 187.

22 *Id*. at 182 (emphasis added).

23 Hence, "arguments about characterization may be deemed to reach apportionment by implication." *Lehman*, 18 Cal. 4th at 187.

24 *See generally Lehman*, 18 Cal. 4th at 182-183.

25 *See In re* Marriage of Hug, 154 Cal. App. 3d 780, 793 (1984).

26 *In re* Marriage of Sonne, 48 Cal. 4th 118, 123 (2010).

27 *Id.* at 126.

28 While in one sense, the redeposit was an investment, in reality it was an exercise of a contractual right of restoration that was accrued at the time the credit was conditionally forfeited, and therefore part of the terms of husband's right to deferred compensation. *See In re* Marriage of Green, 56 Cal. 4th 1130, 1137-1141 (2013). Unfortunately, as discussed hereinafter, *Green* failed to recognize the key difference between property of this sort, which is a form of deferred compensation, and service credit that is not earned as deferred compensation, but purchased.

29 *Green*, 56 Cal. 4th 1130.

30 *Id*. at 1139.

31 *See Id.* at 121-122.

32 Mr. Frahm was married when his non-accruing was performed, and single when he accrued a right under a new plan to receive a benefit based on that service; whereas Mr. Green was single when his non-accruing (military) service was performed, and married at the time he acquired (by purchase) a right to receive an additional benefit based on that service.

33 *Lehman*, 18 Cal.4th at 183.

34 *Green*, 56 Cal.4th at 1132-1133.

35 *See Lehman*, 18 Cal.4th at 182-183.

36 *Green*, 56 Cal.4th at 1138.

37 *Id.*

38 *Id.*

39 Were it not so, then the opportunity to accrue such rights would itself constitute a contingent right—property—that could not be taken away by plan amendment or termination as the Internal Revenue Code allows. *See, e.g.*, 29 U.S.C. § 1054(g); and I.R.C. § 411(d)(6), which permit plans to modified or terminated a right to accrue benefits at any time before such benefits are accrued, and expressly prohibits the cutback of any benefit rights that have been accrued by meeting the conditions for that accrual.

40 Although in *Green* the court said that the purchase of the additional service credit was "possible only as consideration for [his military]service", it clearly was not using the term "consideration", as something "earned" in the legal sense, since Mr. Green did not own a right to any CalPERS retirement benefits when he was discharged from the military. The court appears instead to have been referencing the fact that the legislature had decided in its beneficence to consider prior public service as a basis for offering CalPERS members the opportunity to invest in a way that could increase their retirement pay over that earned as deferred compensation—an offer it later decided to open to all members with the enactment of Cal. Gov. Code § 20909 (under which service credit could be purchased for putative service) as discussed in *Cal Fire, infra*.

41 *See* Cal Fire Local 2881 v. CalPERS, 6 Cal. 5th 965, 992 (2019)**.**

42 Cal. Gov. Code § 21024 (option is available to "members," defined in Cal. Gov. Code § 20340 to exclude retirees).

43 In fact, were it not for a quirk in the statutes that allowed husband's purchase price to be calculated using his initial payrate from three years before the marriage (*see Green*, 56 Cal. 4th at 1138-1139), his cost would have been calculated under Cal. Gov. Code §§§ 21050, 21052 based on the payrate in effect at the time of purchase, in which case 100% of the bargain element of that investment as of the date of separation would have been due to the payrate increase earned by the community.

44 Of course, since the increase in value from pay rate increases that are not related in any identifiable way to the length of service, apportioning the latter component would have to be done without benefit of the time rule.

45 A treatise has aptly distilled the rule derived from these cases: "Pension and retirement benefits are a form of employment compensation and thus tantamount to 'earnings.' As such, regardless of when the benefits 'vest' or are received, they are characterized in accordance with the employee's marital status at the time the services were rendered; i.e., the benefits are community property to the extent attributable to employment during marriage." *Green*, 56 Cal. 4th at 1137, citation omitted.

46 See, e.g., *In re* Marriage of Lucas, 27 Cal. 3d 808 (1980), and cases cited therein.

47 Public Employee's Pension Reform Act.

48 *See* Cal Fire Local 2881 v. CalPERS, 6 Cal. 5th 965 (2019).

49 Query what would have been the outcome in *Green* if Cal. Gov. Code § 20909 had been available at the time he purchased his credit with community funds?

50 *Cal. Fire*, 6 Cal. 5th at 970.

51 As the court phrased it when explaining why husband's ability to purchase military service credit was a property right and not an expectancy:

> [In *Brown*, we] contrasted such nonenforceable expectancies with retirement benefits, which are property rights. We explained "that an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract. (*Cal. Fire*, 6 Cal. 5th at 845.)

52 *Cal. Fire*, 6 Cal. 5th at 973 (some citations omitted for clarity).

53 *Id.* at 981 (some citations omitted for clarity).

54 *Id.* at p. 981 (emphasis added, some citations omitted for clarity).

55 Kern v. City of Long Beach*,* 29 Cal. 2d 848 (1947).

56 *See In re* Marriage of Brown, 15 Cal. 3d 838, 845-46 (1976).

57 This of course is the basis upon which *Brown* held that the character of such rights is determined at the time they are earned/accrued. *Brown*, 15 Cal. 3d 838 at 845. *See also Lehman*, 18 Cal. 4th at 183.

58 *Cal. Fire*, 6 Cal. 5th at 970.

59 *Id*. at 987, emphasis added.

60 *Id*. at 992, emphasis added.

61 *Id*. at 987.

62 *In re* Marriage of Green, 56 Cal. 4th 1130, 1138 (2013).

63 *Cal. Fire*, 6 Cal. 5th at 970.

> Constitutional protection can arise, however, (1) when the statute or ordinance establishing a benefit of employment and the circumstances of its enactment clearly evince an intent by the relevant legislative body to create contractual rights or, (2) when, even in the absence of a manifest legislative intent to create such rights, contractual rights are implied as a result of the nature of the employment benefit, as is the case with pension rights.

64 *Cal. Fire*, 6 Cal. 5th at 983.

65 *Id*. at 987.

66 *Id.* at 989.

67 In contrast, when the court said in *Green* that the bargain element of the purchase of military service credit "was possible only as consideration for husband's service" in the United States military — service that predated the marriage." It was clearly t talking about something other than legal consideration earned. *Green*, 56 Cal. 4th at 1139.

68 *Cal. Fire*, 6 Cal. 5th at 986.

69 Specifically, the filing of a written election and payment of the sums specified in Cal. Gov. Code §§§ 21050 & 21052.

70 The most notable difference being that the Cal. Gov. Code § 21024(g) makes a reference to new employees being notified by their employer of their "rights under this section," which could either refer to rights conferred by an employer contract that were incorporated the section, or to the fact that the section itself reflected legislative intent to confer a vested contractual right.

71 *Green*, 56 Cal. 4th at 1141.

72 *Cal. Fire*, 6 Cal. 5th at 989 (citations and footnote omitted).

73 *Id.* at 982.

74 Note that although the court did not pin down exactly when husband acquired what the court found to be a contingent purchase right as between when he served in the military, or when he first became a member of CalPERS, both events predated the marriage. *Compare*: "The four years of military service should be treated the same way the years at issue in *Sonne* and *Lehman* were treated — basing the characterization of the credit on the marital status **at the time of the service**;" (*Green*, 56 Cal. 4th at 1138, emphasis added) with "[As an employee in CalPERS-covered service] [h]usband here could enforce his right to receive the military credit **any time he chose**. This right was a property interest.") (*Green*, 56 Cal. 4th at 1141 (emphasis added).).

75 "Since pension benefits represent a form of deferred compensation for services rendered, the employee's right to such benefits is a contractual right, derived from the terms of thein employment contract." *In re* Marriage of Brown, 15 Cal. 3d 838, 845 (1976)845 (citations omitted). As *Green* explained:

> A treatise has aptly distilled the rule derived from these cases: "Pension and retirement benefits are a form of employment compensation and thus tantamount to `earnings.' As such, regardless of when the benefits `vest' or are received, they are characterized in accordance with the employee's marital status at the time the services were rendered; i.e., the benefits are community property to the extent attributable to employment during marriage." *Green*, 56 Cal. 4th at 1138 (citation omitted).

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CALIFORNIA LAWYERS ASSOCIATION

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Family Law News Editorial Team

Executive Editor
Nathan W. Gabbard
nathan@tlfamlaw.com

Assistant Editor
Louise Fightmaster
louise@fightmastermediation.com

BJ Lee
bjlee@bjleefamilylaw.com

Craig Pedersen
csp@molfamlaw.com

Production Coordinator
Megan Lynch
Sublime Designs Media
megan@sublimedesignsmedia.com
www.sublimedesignsmedia.com

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Diane Elizabeth Wasznicky, CFLS

Section Coordinator
Erin Ravenscraft
Phone: (916) 516-1710

Legislative Liaisons and Designated Recipients of Legislation

Adoption/Art Liaison
Co-Chair: Robert Walmsley
Jarrette & Walmsley
2901 Grand Ave Ste E,
Los Olivos, CA 93441
Phone: (805) 697-7390
Fax: (805) 697-7410
Email: Robert@jarrettewalmsley.com

Regional Liaison — Los Angeles
Chair Roger Rombro, Rombro & Associates,
3405 N Sepulveda Blvd Ste 200,
Manhattan Beach, CA 90266-3650
Phone Number: (310) 545-1900
Fax Number: (310) 802-8849
Email: roger.rombro@rombrolaw.com

Regional Liaison — Inland Empire
Chair: Chandra L. Moss
Holstrom, Block and Parke
1897 California Ave., Ste. 102
Corona, CA 92881
Phone: (951) 734-6371
Fax: (951) 734-8832
Email: cmoss@hbplaw.com

Regional Liaison — North Bay
Susan Barrett
Conner, Lawrence, Rodney, Olhiser & Barrett, LLP,
829 Sonoma Ave,
Santa Rosa, CA 95404
Phone: (707) 523-0480
sbarrett@clrob.com

Regional Liaison — Sacramento
Chair: Jessica Abdollahi
Cordell & Cordell
500 Capitol Mall, Ste 2060,
Sacramento, CA 95814-4754
Phone: (916) 248-5900
Fax: (916) 848-0278
Email: Jabdollahi@cordelllaw.com

Regional Liaison — San Diego
Chair: Naghmeh Bashar
10531 4S Commons Dr, Unit #110,
San Diego, CA 92127
Phone: (619) 261-8085
Email: naghmehbashar3@gmail.com

Regional Liaison — Santa Clara
Co-Chair: B.J. Fadem
111 North Market Street, Suite 910
San Jose, California 95113
Phone: (408) 280-1220
bjfadem@fademlaw.com

Co-Chair: Sharon Roper
191 N 1st St,
San Jose, CA 95113-1006
Phone: (408) 882-2932

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CALIFORNIA LAWYERS ASSOCIATION

California Lawyers Association
Family Law Section
400 Capitol Mall
Suite 650
Sacramento, CA 95814

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