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What Family Court Judges Want You to Know

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I. CONTESTED CHILD CUSTODY MATTERS

A. EVIDENCE FROM THE CHILD

Family Code § 3042 states that "(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation." Section (b) gives the court discretion to "control the examination of a child witness so as to protect the best interests of the child."

Subsection (c)states that if a child is at least 14 years old and wishes to "address the court" the child is to be "permitted" to do so "unless the court determines that doing so is not in the child's best interests," in which case the court needs to state its reasons for such a finding "on the record."

The Court, under section (d) can allow a child younger than 14 to address the court, if it determines such testimony is appropriate. Under section (e) if the court precludes the calling of any child as a witness, "the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences."

BEWARE. Just because statue allows action does not mean such an action is productive or proper. Rule of Court 5.250 states "Children's participation in family law matters must be considered on a case-by-case basis. No statutory mandate, rule, or practice requires children to participate in court or prohibits them from doing so. When a child wishes to participate, the court should find a balance between protecting the child, the statutory duty to consider the wishes of and input from the child, and the probative value of the child's input while ensuring all parties' due process rights to challenge evidence relied upon by the court in making custody decisions." Cal. Rule of Court Section 2.50 sets forth the guidelines a court must consider in determine whether and under what conditions it will allow a child to testify. It should be noted, however, that if the child is less than 14 the

court must consider whether involving the child in the proceedings is in the child's best interest. If the child is age 14 or older the court must "hear from the child unless the court makes a finding that addressing the court is not in the child's best interest and states the reasons on the record."

B. TIMESHARING

Timeshare refers to the concept of parenting time. Stepping away from the concept of custody, one of the objectives in a child custody dispute is to work out an appropriate parenting schedule. These schedules can be as varied as a parents or a professional's creativity. Parents can share custody on a 2-2-5-5 schedule which gives each parent an static 2 days, or example Monday at 8:00 AM to Wednesday at 8:00 AM for one parent and then Wednesday at 8:00 AM to Friday at 8:00 AM for the other parent and alternating weekends from Friday at 8:00 AM to the Monday at 8:00 AM. Another less common joint schedule could be alternate weeks with a single weekly exchange. There may be a schedule that has a school parent and alternate weekends with or without a midweek visit for the non-school parent. The questions, really, ought to be what schedule works best for the circumstances of the individual family.

C. RELOCATIONS

The starting point for relocations, more commonly known in California as "move-aways" is Family Code sec. 7501(a) which provides that a "parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." Interpreting this statute, 19 years ago the California Supreme Court found that a custodial parent seeking to relocate with his/her child(ren) does not have to show that the move is necessary, essential, or expedient. *Marriage of Burgess* (1996) 13 Cal.4th 25. *Burgess* also found that the right to relocate under FC 7501 is a "presumptive right". *Id.* at p. 38. A custodial parent as defined by *Burgess* is one who has custody either on a de facto basis or via previous order of Court.

The Supreme Court subsequently held that the noncustodial parent must offer proof of detriment to the children) before having the right to an evidentiary hearing on

the issue of the move-away. *Marriage of Brown and Yana* (2006) 37 Cal.4th 947. When detriment is shown, the trial court must then progress to 8 factors in determining whether the move is in the child's best interests: stability, distance of the move, the ages of the children, the relationship of the child(ren) with both parents, the child's wishes provided he/she is competent to assert them, the reasons for the move, and the extent to which the parents are currently sharing custody. *Marriage of LaMusga* (2004) 32 Cal.4th 1072.

More recently, the Court of Appeal held that the court is required to assume that the parent is moving regardless of the outcome of the trial decision and that the Court is required to look at the 8 aforementioned factors. *F.T. v. L.J.* (2011) 194 Cal.4th 1.

On a final note, if the proposed move is to another country, the trial court must also look at cultural conditions in that country, visitation difficulties because of the distance involved in the relocation, and, significantly, the enforceability of the noncustodial parent's visitation rights by the trial court. *Marriage of Condon* (1998) 62 Cal.App.4th 533.

D. GUADIAN AD LITEM (for children)

Guardian Ad Litems are generally not used in family law except when a child is an actual party to litigation, for example a domestic violence proceeding where the child is the victim (and possibly in paternity cases – which is beyond the scope of this program). See *Marriage of Lloyd*, (1977) 55 Cal. App. 4th 216. However, in family law, the court can, and in high conflict cases does, appoint counsel for the children (AKA Minor's Counsel) pursuant to Family Code § 3150. In determining whether to appoint Minor's Counsel, the court, pursuant to Cal. Rule of Court 5.240 should consider the following factors:

(1) The issues of child custody and visitation are highly contested or protracted;

(2) The child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;

(3) Counsel representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;

(4) The dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child.

(5) It appears that one or both parents are incapable of providing a stable, safe, and secure environment;

(6) Counsel is available for appointment who is knowledgeable about the issues being raised regarding the child in the proceeding;

(7) The best interest of the child appears to require independent representation; and

(8) If there are two or more children, any child would require separate counsel to avoid a conflict of interest.

Before considering the appointment of Minor's Counsel, attorneys should be familiar with the scope, compensation and qualifications of Minor's Cousel as set forth in Cal Rule of Court 5.240-5.243.

E. EXPERTS AND HOW TO USE THEM

1. Child Custody Evaluators

Family Code § 3111(a) provides that "[i]n any contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation in cases where the court determines it is in the best interests of the child." This forensic evaluator is either an LCSW, MFA, or licensed psychologist who is either chosen mutually by the parties, or ordered by the court to provide a neutral evaluation of the litigants and/or their children. In a custody evaluation, the evaluator renders a recommendation related to the residential arrangements based upon what he or she deems to be the best interests of the children. In a psychological evaluation, the evaluator addresses the question of whether there are any mental health limitations or concerns regarding either parent serving as the primary residential parent of the child or whether there are any mental health limitations

or concerns regarding either parent being awarded residential time with a child. The analysis is written and submitted to the Court.

California Rule of Court 5.225 describes the licensing, experience, education and training qualifications for child custody evaluators. California Rule of Court 5.230 sets out the mandatory training in domestic violence required of child custody evaluators appointed under Evidence Code § 730 and Family Court § 3111(d). Said training requires not only a basic training and instruction in techniques for the identification of domestic violence, the effects of domestic violence on children, the nature and extent of domestic violence, the familial and social dynamics of domestic violence are but a few areas. In addition to this basic training, a child custody evaluator shall complete at least 16 hours of advanced domestic violence training within a 12 month period. The evaluator is required to file with the court Judicial Council FL-326 to state that he/she has complied with these requirements prior to undertaking a court-ordered child custody evaluation. A copy of this form is attached to these materials.

Each county has additional local rules governing child custody evaluations that may require additional forms and/or procedures for the choice and appointment of a forensic child custody evaluator, his or her duties and obligations, complaint process and the like. An additional Judicial Council Form, FL-327, "Order Appointing Child Custody Evaluator", attached hereto, is now required whenever an evaluator is appointed. Part of the form requires the Court to define the purpose and scope of the evaluation and it may be reversible error not to comply with this mandate. *Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116.

SB 594, which was signed by the Governor on July 16, 2015, amends Family Code Section 3111. This section also known as the "Anti-Winternitz Legislation" (*In re Marriage of Winternitz* (2015) 235 Cal. App. 4th 644) adds the following language to the family code:

> A child custody evaluation, investigation, or assessment, and any resulting report, may be considered by the court *only if it is conducted in accordance with the requirements set forth in the standards adopted by the Judicial Council pursuant to Section 3117*; *however, this does not preclude the consideration of a child custody evaluation report that contains nonsubstantive or inconsequential errors or*

both.(*Italics* added for emphasis)

The minimum requirements are set forth in California Rule of Court 5.220 (e). All evaluations must include:

(1) A written explanation of the process that clearly describes the:

(A) Purpose of the evaluation;

(B) Procedures used and the time required to gather and assess information and, if psychological tests will be used, the role of the results in confirming or questioning other information or previous conclusions;

(C) Scope and distribution of the evaluation report;

(D) Limitations on the confidentiality of the process; and

(E) Cost and payment responsibility for the evaluation.

(2) Data collection and analysis that are consistent with the requirements of Family Code section 3118; that allow the evaluator to observe and consider each party in comparable ways and to substantiate (from multiple sources when possible) interpretations and conclusions regarding each child's developmental needs; the quality of attachment to each parent and that parent's social environment; and reactions to the separation, divorce, or parental conflict. This process may include:

(A) Reviewing pertinent documents related to custody, including local police records;

(B) Observing parent-child interaction (unless contraindicated to protect the best interest of the child);

(C) Interviewing parents conjointly, individually, or both conjointly and individually (unless contraindicated in cases involving domestic violence), to assess:

(i) Capacity for setting age-appropriate limits and for understanding and responding to the child's needs;

(ii) History of involvement in caring for the child;

(iii) Methods for working toward resolution of the child custody conflict;

(iv) History of child abuse, domestic violence, substance abuse, and psychiatric illness; and

(v) Psychological and social functioning;

(D) Conducting age-appropriate interviews and observation with the children, both parents, stepparents, step- and half-siblings conjointly, separately, or both conjointly and separately, unless contraindicated to protect the best interest of the child;

(E) Collecting relevant corroborating information or documents as permitted by law; and

(F) Consulting with other experts to develop information that is beyond the evaluator's scope of practice or area of expertise.

(3) A written or oral presentation of findings that is consistent with Family Code section 3111, Family Code section 3118, or Evidence Code section 730. In any presentation of findings, the evaluator must:

(A) Summarize the data-gathering procedures, information sources, and time spent, and present all relevant information, including information that does not support the conclusions reached;

(B) Describe any limitations in the evaluation that result from unobtainable information, failure of a party to cooperate, or the circumstances of particular interviews;

(C) Only make a custody or visitation recommendation for a party who has been evaluated. This requirement does not preclude the evaluator from making an interim recommendation that is in the best interest of the child; and

(D) Provide clear, detailed recommendations that are consistent with the health, safety, welfare, and best interest of the child if making any recommendations to the court regarding a parenting plan.

1. Reasons to Implement a Child Custody Evaluation

A child custody evaluation may be requested or ordered if there is a prima facie showing of a behavior or psychological problem with one or both spouses as well as the child(ren). In establishing a permanent order of child custody, the court may appoint a child custody evaluation to establish the best interests of the child pursuant to FC § 3011. An additional reason may be needed in in a move-away case to determine a bonding study. An evaluator may also be helpful if the county involved does not allow its mediators to make child custody and visitation recommendations, or the mediator does not make recommendations in light of proposed or actual changes in child custody mediation procedures. Alternatively, an evaluator may be helpful if the court mediator is unable to identify or does not possess the resources to identify a particular problem or divergent allegations.

2. Reasons to Avoid Child Custody Evaluations

Evaluations can be very expensive because of the typical rate of the type of expert who is appointed. In the three counties represented at the instant seminar, a typical evaluation ranges from $12,000 to $15,000, but can cost in excess of $25,000. Needless to say, a child custody evaluation is simply not accessible to many if not most family law litigants. This inequity presents a real challenge for the Court when the aforementioned reasons necessitating an evaluation are present with a low income or moderate means litigant. Evaluations can also cause delays. This is because it may take months for the Evaluator to even be available to commence with the Evaluation let alone the several months required to contact all the necessary collateral contacts and review provided information in addition to the time involved in the actual writing of the

evaluation and recommendations.

Child custody evaluations are time consuming for the attorneys themselves and therefore costly to the parties, aside from the fees that must be paid to the evaluator. At the very least, there will be two hearings in open court – one for the evaluator to be appointed and another for the receipt of the evaluation. If the recommendations or the methodology of the evaluation itself is challenged by a party, an evidentiary hearing is required which, due to the limited availability of most court calendars, may be months out. These delays only add to the attorney's fees and costs.

Finally, a child custody evaluation is incredibly intrusive for all parties involved, including the children. Once the parties submit to an evaluation, their entire lives are open to the scrutiny of the evaluator, the various attorneys involved, court staff, treating therapists, minor's counsel, and perhaps most damning, the other party. Clearly, if the parties are so polarized that they must resort to a child custody evaluation to determine how, where, and with whom their child(ren) are raised, it is highly probable, if not inevitable, that the parents are incredibly antagonistic. To have the results of psychological testing, diagnosis, and shortcomings detailed to the other parent increases the level of conflict. The child custody evaluation itself can impact children by causing long lasting emotional scars that extend into adulthood. In a child custody evaluation, except in the cases of very young children, the child is placed directly in the midst of the dispute and knows full well that the animosity of the parents and the legal battle associated therewith is only due to that child.

2. Public Recommending Counselors/ Mediators.

Family Code § 3160 states that each court shall "make a mediator available. §§3161 – 3188 sets forth the rules related to family court services, along with Cal. Rule of Court 5.210 and 5.215 which sets forth the training requirement and process). Depending on your county, mediation is either recommending or confidential. If you are in a recommending county, the recommending counselor will attempt to work out an agreement between the parties. Failing that, the mediator will make a recommendation (thus the designation in those counties of "Recommending Counselors"). Mediator are

employees of the court and have relatively little time to spend with each family.

3. Private Recommending Counselors

As an alternative to Family Court Services mediation, the parties can privately retain a private mediator. Some private mediators have their own process, for example some will meet with both parents jointly and individually and then workup a recommendation. Others will look to counsel for the parameters of the appointment. The benefit of private mediation is that the mediator can spend more time with the family and conduct a more detailed analysis in make recommendations. The detriment of using a private mediator is typically cost.

When using either private or public mediation services, it is prudent for counsel to spend some time with the client educating him or her about the mediation process and getting them familiar with the different kinds of parenting plans that may be appropriate.

4. Consulting Experts

Different from the court appointed experts discussed above, parties may find it helpful to work with a private counselor to prepare for mediation or an evaluation. The counseling expert can be a great resource for counsel and the parties, and if just consulting does not need to be disclosed.

5. Testifying Experts

Alternatively, if a matter is set for trial, the parties and counsel can hire an expert to testify at trial, either in opposition to the work product of a child custody evaluator, or if there is no child custody evaluation to provide some testimony as to the child(ren)'s best interest.

II. CHILD SUPPORT

A. Child Support Guidelines and Statutes

In California, child support is determined by a computerized formula that looks at essentially five factors: the gross income of the mother, the gross income of the father, the percentage of time the children are with the noncustodial parent, the number of children, and the tax status of each parent as a result of available deductions related to home mortgages, different tax treatment of various types of income, qualifying retirement plans, and the like. Additional factors are mandatory expenses for employment-related expenditures, health care costs, additional children from other relationships, earning capacity, and mandatory retirement contributions.

The determination of income available for child support, and thus utilized in the computerized guideline formula, differs from what is considered income available for spousal support. The definition of income for child support purposes is not determined by the definition of income under Section 61 of the Internal Revenue Service. In addition to wages, bonuses, overtime, rent, unemployment, spousal support from another relationship, dividends and interest, the Court has the further discretion to include employee benefits such as car allowances, rent- free housing, unused vacation time, health club memberships, education, child care, etc. Some cases have even held that the trial courts have discretion under FC 4058(a)(3) to treat *any* benefits as income available for support to the extent that those benefits reduce the living expenses of the receiving party. Attached to these program materials is a reprint of an article first published in 2007 that provides a brief history of the State Disbursement System

B. CHILD SUPPORT CASE LAW

Earning Capacity:

The Court further has the discretion to look at the earning capacity of a party where there is a finding that said party is unemployed or underemployed. The Court need not look to the motive of the under or unemployed party, but may look at the *ability* to work, considering factors such as age, occupation, experience, as well as the

opportunity to work. *Marriage of Regnery* (1989) 214 Cal.App.3d 1367. In such a consideration, the burden of proof is on the party seeking to establish the other party's earning capacity. *Marriage of LaBass and Munsee* (1997) 56 Cal.App.4th 1331.

Waiver of Child Support:

Court's cannot respect agreements that waive a parent's right to child support. See *Marriage of Catalano*, (1988) 204 Cal. App. 3d 453. See also Family Code Section 1612 (with respect to premarital agreements).

C. SUPPORT OF SPECIAL NEEDS:

Family Code Section 3910 provides that parents have an equal responsibility to "maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means." However, the court can also look to the estate of the child as a basis for his or her own support. See *In re Marriage of Drake* (1997) 53 Cal. App. 4th 1139, 62 Cal. Rptr. 2d 466

III. IN THE BEST INTEREST OF THE CHILD

A. BEST INTEREST OF THE CHILD V. CLIENT'S GOALS

The court is obligated to make its decisions based on the child's best interest. In the case *Banning v. Newdow* (2004) 119 Cal. App. 4th 438 the Court stated "The principle of the best interests of the child is the sine qua non of the family law process governing custody disputes. Although a parent's interest in the care custody and companionship of a child is a liberty interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect."

Where the best interest of the child is divergent from the needs/ wants of a parent, the children's interest and wellbeing is paramount. As a practical matter, a parent in the family court system is typically in the family law system as a result of actions and decision he or she made- adult decisions. The child usually did not ask for his or her parents to separate, are confused and conflicted. A good attorney will remind the client, frequently

(clients are almost always stressed and don't necessarily remember what you tell them), of the impact of the client's decisions on the child or children and provide guidance to the parent on how to minimize the negative impact of the litigation on the child.

B. CLIENT IN NEED OF A GUARDIAN

A problem that comes up from time to time is what to do when a client lacks the capacity to prosecute or defend his or her case. In family law, attorneys deal with clients with carrying degrees of capacity. Many, if not most, are distraught. However, when a client lacks the capacity to act, he or she may suggest that the client obtain a conservator or a guardian ad litem. However, according to Cal Bar Ethics Opinion 1989-112 a lawyer cannot "initiate a conservatorship proceedings on the client's behalf without the consent of the client…" If the client will not agree to obtain a conservatorship or a guardian ad litem, the attorney needs to withdraw.

C. CLIENT'S ACTIONS IN VIOLATION OF ORDERS

Attorneys are officers of the court. We have an ethical obligation to support the integrity of the legal system. This requires us to advise our clients to comply with court orders. It is not uncommon for a parent to In response to a violation of court orders a party can contemplate:

1. Financial Penalties pursuant to Family Code §271
2. Contempt charges
3. Modification of Orders
4. Appoint an *Elisor* to act on behalf of non-complying party
5. Wage Assignments
6. File Abstract of Judgment
7. File Notice of Pendency of Action (real estate)
8. Ex parte orders freezing accounts

IV. DOMESTIC VIOLENECE

A. ACTS WHICH CONSTITUTE DOMESTIC VIOLENCE

1. Abuse is defined as Intentionally or recklessly to cause or attempt to cause bodily injury.

2. Sexual assault, which is defined as placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

3. Engaging in any behavior that has been or could be enjoined pursuant to Section 6320, hich includes molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party.

B. EX-PARTE ORDERS OF PROTECTION

1. The truly ex parte application is the Emergency Protective Order described in Family Code Section 6240 et seq. These orders are issued by law by the appointed on duty judge by telephone based on an oral recitation of facts by the law enforcement officer. These orders may be issued where a law enforcement officer assets reasonable grounds to believe any of the following:
    1. That a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought.
    2. That a child is in immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member.
    3. That a child is in immediate and present danger of being abducted by a parent or relative, based on a

reasonable belief that a person has an intent to abduct the child or flee with the child from the jurisdiction or based on an allegation of a recent threat to abduct the child or flee with the child from the jurisdiction.

4. That an elder or dependent adult is in immediate and present danger of abuse as defined in Section 15610.07 of the Welfare and Institutions Code, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse.
5. EPOs expire the earlier of 5 court days or 7 calendar days (see Family Code Section 6256).
6. Burden of Proof: Reasonable grounds of immediate and present danger of abuse.

2. Family Court Ex Parte Temporary Restraining Orders

Family Code Section 6300 et seq.

1. Available to protect against abuse as defined by Family Code Section 6203
2. Available for 20 days, or if good cause shown, 25 days (Family Code Section 242).
3. Burden of Proof: Reasonable proof of past acts (See Family Code Section 6300)
4. On an *ex parte* basis the court can order:

Personal conduct order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the

discretion of the court, on a showing of good cause, of other named family or household members.

Exclusive care, possession, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent. The court may order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.

An order excluding a party from the family residence.

Other restraining necessary to effectuate the court's order.

Temporary custody of children

Temporary use of property and payment of debts.

C. PERMANENT ORDERS OF PROTECTION

a. Available Orders:

i. Same as TRO

ii. Plus: Child support, spousal support, restitution for out of pocket expense, Batter's treatment program, attorney's fees and costs.

a. Burden of proof: Preponderance of the evidence.

b. Duration: up to 5 years. Renewable without a showing of further abuse (Family Code Section 6345)

NB: DVPA actions should be distinguished from Civil Harassment:

Pursuant to Cal. Code of Civil Procedure Section 527.6 a person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section.

For the purposes of this section, "harassment" is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or

harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.

The burden of proof for civil harassment is clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment.

D. POWERS OF THE COURT

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E. CIVIL CONTEMPT

While civil contempt is available as a remedy for violations of Domestic Violence Restraining Orders, it is infrequently used as a violation of such an order is a crime and punishable criminally. DVPA orders are entered into the state wide domestic violence computer system (CLETS). The DVPA order itself contains a plethora of warnings that violations of the orders can result in criminal fines and prison.

Regardless, civil contempt proceedings are available. To prevail on a civil contempt charge, the charging party needs to establish, beyond a reasonable doubt the following:

1. Existence of a valid, clear and unambiguous court order

2. Notice of the Court order

3. Willful non-compliance with the court. See *Moss v. Super. Ct.* (1998) 17 Cal.4th 396, 71 Cal.Rptr.2d 215, 950 P.2d 59

F. IMPACT OF DVPA FINDINGS ON CHILD CUSTODY MATTERS (see Family Code Section 3044)

Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five

years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.

G. IMPACT ON FIREARM OWNERSHIP

Pursuant to Family Code §6389 a person subject to a protective order shall not "own possess, purchase, or receive a firearm while that protective order is in effect."

V. LEGAL ETHICS- THE JUDICIAL VIEW (These sections intentionally left blank for note taking)

A. BEST PRACTICES IN COMMUNICATION BETWEEN THE BENCH AND BAR

B. THE BOUNDARY OF ADVOCACY ABD ETHICAL LITIGATION CONDUCT

C. PROTECTING CONDIDENTIALITY

D. ETHICAL CONDUCT IN THE COURTROOM

E. WHICE CASE DECISIION IS IT ANYWAY? WHEN ATTORNEYS CAN AND CANNOT SPEAK IN CLIENTS'S STEAD

VI. FINANCES AND PROPERTY DIVISION ISSUES

A. MARITAL ESTATE

Family Code Section 760 states "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." Generally includes property interest in pension & retirement plans. Generally excludes lump sum post- separation Workers' Compensation payment for pre-separation injury. See *Raphael v. Bloomfield* (2003) 113 Cal. App. 4th 617.

There is a split of opinion on evidentiary burden to overcome this presumption: generally appellate decisions hold that clear and convincing evidence is required but see In re *Marriage of Ettefagh* (2007) 150 Cal. App. 4th 1578 setting a preponderance of the evidence standard. Other presumptions, such as presumption of lenders' intent, family expenses paid with community property, instrument in writing, loss of identity by commingling, active management of separate property and mixed use acquisitions are generally rebuttable by preponderance of the evidence. (Evidence Codes Sections 603 and 1150).

Separate Property is defined in Family Code Section 770 as Property owned before marriage; Property acquired by gift, bequest, devise, or descent; Rents, issues and profits of SP. Pursuant to Family Code Section 771: Earnings and accumulations after separation are SP.

B. DISSIPATION OF MARITAL ASSETS

Family Code Section 1101(a) states that a spouse has a claim against the other for any breach of the fiduciary duty that results in impairment of the claimant's undivided one-half interest in the community estate. But Note (1): A managing spouse's duty is that of good faith dealing, full disclosure and accounting; thus negligence in managing assets is generally not recoverable. The mismanagement must rise to gross negligence, deliberate mismanagement, fraud or concealment. See for example, *In re Marriage of Schultz* (1980) 105 Cal. App. 3d 846.

Note (2): While the burden is on the spouse who did not squander the community assets, deliberate mismanagement can be found when the managing spouse cannot account for expenditures or an asset's nonexistence. See for example, *In re Marriage of Ames* (1976) 59 Cal. App. 3d 234.

Pursuant to Family Code Section 1101(b) & (c) A court may order an accounting or that title to property be reformed to reflect the community nature (except for certain partnerships, professional corporations and unincorporated businesses). Pursuant to Family Code Section 1101(e), In any transaction affecting community property, the court may, upon motion, dispense with the requirement of the other spouse's consent if the transaction is in the community's best interest and the consent has been arbitrarily refused or cannot be obtained.

Family Code Section 1101(g): Remedies for fiduciary breach shall include an award to the claimant spouse of 50 percent of the value of an undisclosed or transferred asset plus attorney's fees.

Family Code Section 1101(h): Where the breach malice, oppression or fraud under Civil Code §3294, the award shall include an award of 100 percent of the asset's value. See also, *In re Marriage of Rossi* (2001) 90 Cal. App. 34 and *In People v. Wallace* (2004) 123 Cal. App. 4th 144 [where criminal liability may arise for intentionally causing damage to community property].

C. CASE LAW

Family living expenses are presumed paid from community earnings. No reimbursement where SP used to pay community expenses without express agreement to the contrary. See *See v. See* (1966) 64 Cal. 2d 778.

Family Code Section 913: SP of married spouse not liable for other's premarital debt or SP debt during marriage. Family Code Section 914: Reimbursement for SP used to pay community debt incurred by other spouse if non-exempt CP (or incurring spouse's SP) was available.

Commingling & Tracing:

Source of property determines its classification as SP or CP; subsequent changes of form are not relevant. Direct tracing involves exact accounting. Indirect tracing, when CP and SP funds are mixed together, is achieved by circumstantial evidence (e.g., a showing that insufficient CP funds available at purchase so that item must be, in part, SP. Commingled funds that cannot be traced are presumed community.

Profitable Separate Property (e.g., business) (2 non-exclusive approaches):

Pereira: Capital growth formula (fair return on SP investment is SP, balance is CP). (*Pereira v. Pereira* (1909) 156 Cal. 1, 103 P. 488). *Van Camp*: Salaried services formula (fair compensation for CP labor, balance is SP). (*Van Camp v. Van Camp* (1921) 53 Cal.App. 17, 199 P. 885)

Acquisitions using SP and CP:

Family code Section 2640:

(a) SP contributions to acquisitions include down payments, improvements and reductions in loan principal used to finance purchase or improvements.

(b) Reimbursement to contributing party if no written waiver – requires tracing, does not include interest, cannot exceed net value at time of division.

Moore / Marsden: CP contributions to SP accrue *pro tanto* CP interest. (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 168 Cal.Rptr. 662, 618 P.2d 208; *In re*

Marriage of Marsden (1982) 130 Cal.App.3d 426, 181 Cal.Rptr. 910)

Epstein Credits / *Watts* Charges:

A party's post-separation SP payments to maintain CP assets can be reimbursable to SP. S Party's post-separation CP usage may require reimbursement to community. (*In re Marriage of Epstein* (1979) 24 Cal.3d 76, 154 Cal.Rptr. 413, 592 P.2d 1165; *In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 217 Cal.Rptr. 301).

VII. TRIAL PRACTICE TIPS IN FAMILY COURT (These sections intentionally left blank for note taking)

A. EFFECTIVE DISCOVERY (AND DISCOVERY ALTERNATIVES)

B. PRETRIAL PROCEDURES

C. PREPARATION OF WITNESSES

D. EFFECTIVE USE OF INCOME AND EXPENSE DECLARATIONS

E. EFFECTIVE USE OF DISCLOSURE DOCUMENTS

F. EFFECTIVE PRESENTATION OF EVIDENCE

G. CHAMBERS CONFERENCES

H. PROFESSIONALISM

DCSS Liaison Report: An Overview of the New Automated Child Support System for Family Law Practitioners

By David M. Lederman, Esq.[1] and George Nielsen, Esq.[2]

The State of California is in the process of implementing a new statewide automated child support enforcement system. This system, which we will describe, significantly impacts the manner in which we as attorneys interact with the Department of Child Support Services (DCSS), and how child support is established, modified and collected. As explained below the biggest impact for private attorneys is the manner in which child support is collected, and for those who practice before the child support commissioner, the new vehicle for calculating support.

Before we discuss the components of the new system, it is important to understand how these changes came about. The first section of this article provides a short history of the statewide child support system. The second section will explain the changes, and the final section will discuss its possible impact on the private bar.

History:

The 1988 Family Support Act (FSA) amended the Social Security Act to mandate that each state establish a single statewide uniform child support enforcement system by October 1, 1995. This deadline was later extended to October 1, 1997.[3]

The functional requirements for the computerized enforcement system are described in 45 CFR 307.10 et. seq. These requirements include opening cases, finding obligor parents, tracking arrearages, centralized support collection and disbursement system, automatic use of enforcement procedures, and the calculation of child support.[4]

To compel the states to comply with this new mandate, the federal government provided grants to pay for the creation and maintenance of the system. The federal government levied significant fines against states that failed to timely create and implement a compliant system.

California's First Attempt:

In 1992 the State of California entered into a contract with Lockheed Martin to develop and implement a Statewide Automated Child Support System (SACSS). This first attempt was a disaster costing California, after 5 years of design, in excess of $157 million, plus penalties and fines exceeding $1 billion.

According to the California State Auditor, the failure of the Lockheed Martin project was the result of a "cascade of events" from three sources: the federal government, Lockheed Martin, and the State of California.[5]

Although FSA was enacted in 1988, the federal government did not issue the final system requirements until June of 1993, leaving a little more than one year for the states to develop and implement a compliant program by the original deadline in October 1, 1995. Even with the extended deadline of October 1, 1997, none of the 10 largest states were able to develop and implement a program meeting the federal system requirements.

According to a California State Auditor's report Lockheed Martin "underperformed" on the project. Only 10 of the 87 staff members specifically named as working on the SACSS project, actually did any work on the project. Lockheed Martin had high staff turnover, developed a "flawed system," and failed to test it adequately.[6] Even though the State of California paid $3 million to a quality assurance contractor, it failed to heed the contractor's warnings of the deficiencies with Lockheed Martin.[7] On November 20, 1997, after lengthy negotiations with Lockheed Martin and consultations with the federal government, the Independent Verification and Validation Vendor, the counties, the legislature, and others, the State terminated the project entirely. The ensuing litigation between the State and Lockheed commenced in June 1998 and ended with a judgment in June of 2000 in favor of Lockheed against the state for an additional $46.4 million, on top of the initial contact price of $111 million, bringing the total price paid to Lockheed Martin for SACSS to $157 million.[8]

California's Second Attempt:

In 1998 the State attempted to implement a statewide child support system, based on a consortium method under which each county would select one of four systems that already existed in the Kern, Los Angeles, Riverside, and San Francisco Counties. The intention was to link these systems together to form a statewide system. However, by early 1999, the federal Department of Health and Human Services rejected the consortium approach and required a single statewide automated child support system.[9]

Fines and Penalties:

In 1990 the federal government reimbursed the states for 90% of the cost of planning, developing and implementing an automated child support system. Because of California's noncompliance, the Office of Child Support Enforcement (OCSE) reduced its funding to California to the statutory base amount of 66% under 42 USC 655 (a).[10] Note the 90% funding level for states with compliant programs ended in 1998. Additional grants above and beyond the base 66% were available pursuant to 42 USC 655 (a) to states that had a certified automated system through the 2001 fiscal year ending in 2002.[11]

The cut in funding was only the start. Since California failed to meet the revised federal deadline of October 1, 1997 to develop an approved child support system, California started paying penalties to the federal government in 1998. According to 42 U.S.C.655, the penalties increased in severity over the course of 5 years. During the first year the penalty was 4% of the amount of the reimbursement grant described above and increased to 8% in the second year, 16% for the third year, 25% for the fourth year and 30% for the 5th and any subsequent years. In dollars this meant that for California, the penalties started at $11.9 million for fiscal year 1998-1999, and grew to $157 million by fiscal year 2001-2002.[12] For fiscal year 2005-2006 the penalty has reached $223 million, for a cumulative total of almost $1.2 billion.[13] By June of last year, only South Carolina and California did not have a certified automated child support system.[14]

The California Child support Services Automation System (CCSAS):

In 1999, AB 150 set out the approach currently being implemented. It began with Version 1 under which each county converted to one of two systems that are now linked together. The federal government has approved this approach and is now evaluating the State's application for actual certification. Version 2 will bring all the counties from the two existing systems onto the CSE statewide system, discussed below.

California started to develop the new plan, known as the California Child Support Automation System (CCSAS) in 2000. CCSAS has two components. The first component is called the Child Support Enforcement (CSE) system, which is being developed by a team of vendors led by IBM. IBM was awarded the CSE contract in July of 2003 for $801 million. The second component of the system is the State Disbursement Unit (SDU) which is a service contact awarded to Bank of America in December 2004. The initial contract is for seven years and costs the State $186 million.

On September 20, 2006 the State of California requested federal certification for CCSAS. DCSS anticipates that it will take a year or more for the federal Office of Child Support Enforcement (OCSE) to make a decision. Regardless, additional penalties will be suspended for the certification period.[15]

CSE:

The CSE will be linked to SDU and will, among other functions, provide services related to the establishment of paternity, and setting, modifying and enforcing child support orders.[16] Elements of the CSE will include a new child support guideline calculator.

The CSE guideline calculator was developed, certified by the Judicial Council, and rolled out to all counties by the State Department of Child Support Services (DCSS) as a part of CCSAS, Version 1. DCSS attorneys will start bringing printouts from this system. However, calculations from a commercial system can still be produced in court at this time. Pilot counties will come up on CCSAS Version 2 (the version to be implemented) in February 2007. Contra Costa is scheduled to convert in August of 2007. Final implementation of Version 2 statewide is scheduled to be completed by the end of 2008. Once completed it is anticipated that the child support guideline calculator program, in some form, will be available on the internet for free use.

Note: the CSE child support guideline calculator does not calculate spousal support or family support. However, the State is in the process of analyzing the feasibility of adding a spousal support calculation feature to the system. Apparently, even if a spousal support component were added to the system it would not include family support and would be limited to only one of the county guideline calculations.

In addition, another mandate of the CSE system is that it be entirely electronic, self contained, and automated. All documents generated by the Department of Child Support Services must be on forms that can be automated as well. No production of child support case related documents will be able to be done outside the system. All DCSS activities, including those done by attorneys must be done on the system. For example, a Summons and Complaint will be generated using the system, and all processes from that point on to obtain a judgment will either be done or tracked by the system. Other examples include locating parents, logging phone calls, answering correspondence, etc. In addition, each county will have access to the case data in all

other counties. Because of the federal requirement to have a single statewide system, support establishment and enforcement practices, including legal processing, in all the counties must become much more uniform than at present. As a result, attorneys and litigants dealing with the Department will notice some significant changes from the way things are done now.

SDU:

The second component of CCSAS is the SDU. The SDU is the central collections agency for both State and private child support collections and distribution.

The SDU is already in full implementation for existing DCSS cases, in that all payments that used to come to a local DCSS are being sent to the SDU. But for Non-IV-D Cases the main method of implementation of this system will be through the employers. The State is in the process of sending notices to employers instructing them to send payments directly to the SDU as opposed to whoever the recipient is on the wage assignment. This may take some time to process and may cause some delays as the employers change the recipients. It seems to us that for new wage assignments, we would be saving possible prospective delays because the employer will not have to transition to the SDU at a later date.

It is now necessary to submit Child Support Registry form, FL-191. When the SDU receives the form on a new case, they assign an SDU identifier and then input the identifying information about the parties and court order. This information is used to account for and process payments received from employers on Non-IV-D Cases; however the SDU does not maintain arrearage balances on Non-IV-D cases. When they get a form on an existing case, they will update that case with the new information.

Practitioners should also note that under the SDU system, payments will be credited to the payor's account in the month that the payment is <u>received</u> and <u>processed</u> by the SDU, as long as the payment is received and processed by the last day of the month (as opposed to the old system of the credit being on the date of the withholding). So, for example, if the employer withholds a January payment from an employee's wages on January 20th and the payment is sent to the SDU on the same day, but is received by the SDU on the 1st of February, that payment will be credited to the payor's account for the month of February - creating an automatic arrearage.

Note: if a Payor has multiple obligations for support around the state, the SDU will distribute the payments between recipients on a pro rata basis.

Child support recipients will have 3 payment options: check, electronic funds transfer to a bank, and electronic pay cards. The electronic pay cards function like a store debit card and can be used anywhere visa is accepted.

The address that employers should be advised to send payments is:

State Disbursement Unit
P.O. Box 989067
West Sacramento, CA 95798

Additional information is available at the SDU website, https://www.casdu.com/CAS_SDU/, along with information on how to transfer funds electronically.

Attorneys will not need to reissue old wage assignments. The SDU system emphasizes employer compliance. Employers should expect to receive notices from the California Department of Child Support Services, see attached "Appendix A," that will provide instructions on how to handle wage assignments through the SDU.

In addition, the SDU cannot collect child support add-ons unless it is part of a single monthly payment.

Conclusion:

As Bob Dylan would say - the times they are a changing. The two changes that affect private attorneys and their clients most are the establishment of the SDU and the implementation of a new child support program.

The SDU is currently in place. All wage assignments will be collected through the SDU. Since the SDU will function as the central clearing house for all wage assignments, it will become quite effective at processing wage assignments. It cannot, however, process private arrearages collections, or medical or health care reimbursements. If an attorney has an order that is for anything that requires monitoring, private counsel may want to consider not filing a wage assignment, unless there is non-compliance with the support order. It may be more convenient for counsel to instruct the payor clients to pay by electronic funds transfer or bill pay. Should the payor fail to make a timely payment, the support recipient could still request a wage assignment in the future.

Note as well that the SDU is for processing child support, not spousal support. If your client is receiving spousal support, you may continue to use the Earnings Assignment Order to Spousal or Partner Support, FL-435 and have the employer pay the recipient directly, avoiding the SDU.

As it stands, the private vendors of support programs have little to fear from the State's child support calculator. Its use, at least for the foreseeable short term, will not be mandatory in any department except for the child support commissioner in Department 52. It does not have the flexibility that the private programs have to determine family support, and even if the State support calculator does include a spousal support component, it does not appear that it will have enough flexibility for the counties to use in applying their individual guidelines. The state free program may evolve, but for now maintain your subscription with your private support calculator vendor.

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[3] See *Child Support Automation System: Project Charter,* Rev. August 1, 2002. California Government Document DCN: PROJ-00160-2.0-080102, document is available at www.ftb.ca.gov; see also 45 CFR 302.85. PL 100-485 (HR 1720). The automation deadline was extended pursuant to PL 104-35 (HR 2288).

[4] See 45 CFR 307.10 et. seq.

[5] See *Health and Welfare Agency: Lockheed Martin Information Management Systems Failed to Deliver and the State Poorly Managed the Statewide Automation Child Support System*, California State Auditor Report 97116, March 1998.

[6] *Ibid.*

[7] *Ibid.*

[8] The Capitol Connection, Vol. 4, Issue 9, October 2002, http://courtinfo.ca.gov/courtadmin/aoc/documents/capcon1002.pdf

[9] See *Child Support Enforcement Program: The Procurement of a Single, Statewide Automated Child Support System is Taking Longer Than Initially Estimated, With Several Challenges Remaining,* California State Auditor Report 99028.1, December 2002.

[10] *Ibid*. at page 10.

[11] 42 USC 655 (a)(2)

[12] *Child Support Enforcement Program: The Procurement of a Single, Statewide Automated Child Support System is Taking Longer Than Initially Estimated, With Several Challenges Remaining,* California State Auditor Report 99028.1, December 2002 at page 10.

[13] *The Child Support Program in California: Current Challenges, Future Objectives,* paper prepared by Leora Gershenzon, Counsel, the Assembly Judiciary Committee, March 2005.

[14] Administration for Children & Family Services website, see www.acf.dhhs.gov/programs/cse/stsys.

[15] *State's Child Support Computer System Ready for Federal Approval*, California Health & Human Services Agency, Press Release dated September 20, 2006.

[16] 42 U.S.C. 654 (4); 42 U.S.C. 654A

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