F L S

FAMILY LAW SECTION NEWSLETTER

The Family Law Section of the Desert Bar Association!

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FLS Newsletter September, 2017

SAVE THE DATES 2017-2018!

SEPTEMBER-OCTOBER	NOVEMBER-DECEMBER	JANUARY AND BEYOND
SEPTEMBER 12, 2017 Brown Bag Lunch with Judge Kira Klatchko at Noon! Dept. 3M, Larson Justice Center. Email questions for discussion ahead of time to Michael Peterson. (attympeterson@verizon.net)	**NOVEMBER 10, 2017** CFLR Course-Child custody in contested domestic violence cases. Starts 8:00 am, The Westin South Coast Plaza, Costa Mesa. Register @ www.CFLR.com	**JANUARY 12, 2018** Minor's Counsel Class-8:00 am to 5:00pm, location TBA. Class counts toward continuing education credits for [re]certification.
SEPTEMBER 15, 2017 DBA Cocktail Mixer-5:00 pm, Sullivan's Steakhouse, Palm Desert. PLEASE RSVP now @ www.desert-bar.com!!!	**NOVEMBER 17, 2017** DBA Luncheon-Check-in @11:30 am The Classic Club, Palm Desert. Presentation @ 12:00 pm by ABOTA.	**JANUARY 19, 2018** Minor's Counsel Class-9:00 am to 1:00pm, location TBA. Class counts toward continuing education credits for [re]certification.
OCTOBER 6-8, 2017 CFLR Basic Training: Family Law-Starts 8:00 a.m. Friday, The Westin South Coast Plaza, Costa Mesa. Register @ www.CFLR.com	**NOVEMBER 18, 2017** Inland Empire Inaugural Fall Formal-Event to be held at the Victoria Club, Riverside. More information coming soon!!!	
OCTOBER 28, 2017 The 66th Annual Installation of the DBA Officers & Board of Trustees. Starts at 5:30 pm. Indian Wells Country Club, Indian Wells.	**DECEMBER 14, 2017** 4th Annual DBA/Inn of Court Judge and Lawyer Hall of Fame Awards. Starts @ 5:30 pm, Resort Pavilion, Indian Wells. Keynote speech by Cal. Supreme Court Justice Ming W. Chin.	**GOT AN EVENT OR ANYTHING ELSE?** EMAIL JORDYN GIBBS @ jordynygibbs@verizon.net!

MESSAGE FROM THE CHAIR

As we return from our summer vacations, our extended periods of time with our friends and family, our divertissements, avocations, and fancies that emotionally balance us against the long hours and stressful moments necessitated by the practice of law, we should each take a moment to discover anew our courage, character, patience, excellence and worth both as people and as legal professionals.

For me, this summer brought with it a new experience, that of introducing and guiding a young mind into what it means to be a lawyer (and a good one, I think). My experience in doing so both reawakened my awareness of the need to bring these virtues to the table every day, and crystalized how applying these virtues to every word and deed helps the people of our desert community maximize peaceability despite the natural tendency to drift in the opposite direction.

Some of you may have observed me bringing to court a local young man named Max Wolfson. He interned with my office for the past two months, seeking a true understanding and hands-on experience of what jurisprudence is all about. And he got it. He waded through practice guides and my review lectures with him (full of my hypotheticals and anecdotal tales of litigation-past) in an effort to provide him with a top-down introduction to the language and mechanics of the law, and to have him on a fast track when he sits down to his first day at law school. He observed multiple client meetings, depositions, and evidentiary hearings, seeing the trenches and beginning the process of cutting his teeth. He now knows what he is getting himself into when he takes the LSAT this winter and begins the application process in the spring.

Max Wolfson gave as much as he got over the summer. He put this newsletter together (converting the template from an Apple-based format to a Microsoft Word one, which is deeply appreciated and will help me publish more consistently in the coming months), and even contributed an article. He gave me feedback on my court presentation. He gave me the opportunity to refresh myself on principles of jurisdiction, rules of evidence, and methods of procedure. Seeing through his eyes foundational aspects of the law and of the legal terrain in the Coachella Valley, he revitalized me. I thank him for the opportunity to be a guide on his journey. If any of you have occasion to mentor someone like Max Wolfson, please do take it.

News From The Court

By: Michael C. Peterson, CFLS

With summer winding down, bench and bar are getting back into the full swing of things, with thinking caps firmly attached. Judge Wells gave this author an interview with several important pointers for everyone to bear in mind, and he has taken a liking to a new mobile app called coParenter which may be advantageous to techy parents dealing with coordination and communication challenges (see page 14). Also, some important changes to Judicial Council forms are worth mentioning to help make sure you all and your staff have updated your applicable computer programs. Perhaps more exciting is that Marcus Walls, the Family Law and Juvenile Director for the County of Riverside, is heading up a program and looking for attorney volunteers to help with emancipation cases; yes, there is some compensation involved. Finally, we have a new 730 custody evaluator in Rancho Mirage, William Rose, Ph.D., with whom to make everyone's introduction.

Interview with Judge Wells

Tips from the bench are always well-received, and so are reminders for practitioners. As to RFO practice, the bar needs to be continually cognizant of CRC Rule 5.98 and its day-prior meet and confer requirements. This applies equally to attorneys litigating with self-represented, adverse parties. If you do not have your RFO settled when you walk into court, be prepared to explain why not via a meet and

confer declaration before your matter is called. Judge Wells is finding local practitioners are doing a respectable job overall with fulfilling the meet and confer requirements, but suggests we should strive to be both concise and provide more detail on critical issues in our declarations.

Concerning Trial Settlement Conferences, Judge Wells stresses that accurate time estimates for trial are essential, and attorneys will be held to such estimates, even if it means not all evidence is presented. Also, best practice is to exchange all exhibits by the TSC, but if not they must be exchanged at least ten days prior to trial.

Concerning exhibits ("writings" as defined by Evid. C. § 250, which includes videos, photographs, and electronic data, as well as material objects), there has been some shortcomings to how practitioners are authenticating them for trial; unauthenticated writings are inadmissible. Judge Wells strongly suggests attorneys meet, in-person and at least three weeks before trial, and stipulate to the authenticity of their respective writings/exhibits. Other means of authenticating writings are by pleading admission, Request for-Admission-authentication (found on the bottom one-eighth of the RFA form first page), judicial notice, custodian of records certification, statutorily-allowed self-authenticating records, and circumstantial evidence.

Trial binders are a neat and handy way to keep your exhibits organized and easily-accessible. Include a table of contents at the beginning of your trial binder, tab each exhibit, and have a copy of your trial binder for the court, for your client, and for the opposing party/counsel. Preparing trial binders for your authentication meet and confer will help streamline that process, and also satisfy your trial rules exhibit exchange.

Keep in mind how documents obtained by subpoena are received by the court for trial matters; if you use a subpoena duces tecum to obtain documents, be sure to check that box for the custodian of records to send a complete copy directly to the Court under seal. Finally, and perhaps most importantly, save a tree or two (as well as a bench officer's eyes) and really focus on critical documents for trial; please do not bury the court with hundreds of pages of material if only a couple pages contain the critical information you need to get into evidence.

Concerning the presentation of evidence at trials generally, Judge Wells notes we practitioners need to strive to be more sequential and logical, segregate and proceed issue-by-issue, and deal first with pivotal issues at the beginning of trial (e.g. validity of a prenup, determine a contested date of separation, and other dispositive issues). Even better, Judge Wells recommends we improve our utilization of bifurcated trials on pivotal issues, identify such issues prior to MSCs, and suggest bifurcation of such issues at the MSC (or earlier) so that judicial economy and party-budget efficiency is maximized.

He also suggests we can improve the overall quality of our local family law bar by observing non-family civil practitioners with sit-downs, watch them in their trials, and pay close attention to how they authenticate evidence and how to present closing argument.

Also regarding trials, practitioners need to be keenly aware of discovery cut off rules, and plan well in advance of a TCS for their discovery needs. This has been a reoccurring problem at the Indio Courthouse for some time, and Judge Wells stresses the bar needs to adhere to the 30/15 rules found in CCP § 2024.020 (all discovery proceedings under the Discovery Act must be completed on or before the 30th day before *the date initially set for the trial*, irrespective of continuances or postponements of that trial date, unless an exception applies, and all discovery motions must be heard on or before the 15th day before *the date initially set for trial*). No statute or rule of court exempts marital dissolution proceedings from the application of the Civil Discovery Act, including those provisions that govern the time for completion of discovery. Once the discovery cut-off date has run and discovery has closed, the only means provided in the Discovery Act for reopening discovery is a motion for leave of court. If you have not been diligent in your discovery completion, you will probably find little to no empathy from your bench officer when you seek to re-open discovery and continue the trial.

Another problem area which Judge Wells sees concerns motions to compel. Many practitioners are filing them without a separate statement for discovery to which a response has been made. This is only allowed where the other side has failed to respond altogether (CRC Rule 3.1345; and, incidentally, no meet and confer is required under CCP § 2030.290, but best practice is to send one out anyway if you are asking for attorney's fees). When responses are unsatisfactory (i.e. incomplete, evasive, etc.) a motion to compel further responses requires a separate statement. Judge Wells suggests practitioners prepare separate statements as part of the meet and confer letter, thus killing two birds with one stone. Remember that separate statements must include:

- Each interrogatory (or other discovery request) to which further answer is sought, numbered and set forth verbatim;

- The answer or objection made by the opposing party to each such discovery request, also verbatim;

- The reason why further responses should be ordered by the court (i.e., the factual or legal reason why the objection is invalid or the answer given is incomplete);

- If necessary, the text of all definitions, instructions and other matters required to understand each discovery request and the response to it;

- Other discovery requests and responses if they are relevant to why further responses are necessary to the present discovery request; and

- A summary of any pleadings or other documents on file by the party relying on them in the present discovery dispute.

Finally, continuances continue to be a concern for the bench, both for motion practice and for trials. Judge Wells wants to remind the bar to ask for a continuance from the opposition, and then the court if necessary, as soon as the need arises. He recognizes that continuances can often cure procedural problems with RFOs and allow additional time for settlement for both RFOs and trials, so don't be shy if you have a legitimate reason for a continuance (i.e. new counsel on the case, illness, etc.). Continuance requests on RFOs are much more well-received if made before the bench officer reviews the file, so don't wait until the afternoon prior to a hearing to inform the court of the need, and immediately email the applicable department clerk to give the court a heads-up. Trial continuances are more likely to be scrutinized, and factors the court will consider include the reason for the request, the number of prior continuances, the length of trial set (large blocks of afternoons are more difficult to move around a court's calendar), whether the issues can be narrowed by converting a full trial into a bifurcated trial on a key issue, and the attorney making the continuance request's reputation for abusing continuances or not. Discovery cut off is generally not a good reason to continue a trial, and if relief is granted, it is likely to be in the form of taking the trial off calendar with the expectation that an RFO to re-open discovery will be filed shortly thereafter.

Judicial Council Form Changes

►Effective July 1, 2017 the following Family Law forms have been updated for mandatory use:

- FL-510 Summons for UIFSA Petitions (interstate support)

- FL-800 Joint Petition for Summary Dissolution

►Effective September 1, 2017 the following Family Law Forms will be updated for mandatory use:

- FL-307 Order on Request to Continue Hearing

- FL-950 Notice of Limited Scope Representation

- FL-955 Notice of Completion of Limited Scope Representation

- FL-956 Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation

- FL-957 Response to Objection to Proposed Notice of Completion of Limited Scope Representation

- FL-958 Order of Completion of Limited Scope Representation

- FW-008 Order on Court Fee Waiver After Hearing (Superior Court)

►Other noteworthy and recent changes to common non-mandatory forms include:

- FL-303 Declaration Regarding

Notice and Service of Request for Temporary Emergency (*Ex Parte*) Orders

- FL-306 Request to Continue Hearing

- FL-570 Notice of Registration of Out-of-State Support Order

- DV-800/JV-252 Proof of Firearms Turned In, Sold or Stored

Attorney Referral List for Freedom from Parental Custody Case

Mr. Marcus Walls is the Family Law and Juvenile Director for the County of Riverside. He is building a referral list for the courts to use and provide the public of attorneys able to help represent parents contesting emancipation petitions, and conversely children seeking emancipation.

Appointment authority can be found in Fam. C. § 7860 to 7864, which provides for procedure, appointments for child and parent(s), and reimbursement. Discretionary appointment for minor petitioners must occur at the beginning of an emancipation proceeding, whereas mandatory appointment for parents unable to afford counsel may occur at any point in the proceeding, so having a ready-made list of legal service providers will be invaluable to the court staff and officers. Practitioner case work will include meeting with parties, preparing the presentation of evidence, review and analysis of mandatory investigation reports, and appearing at and presenting argument at hearings. Reasonable compensation for private counsel is available by court order from parents and from the county in cases involving parents unable to pay.

Please contact Mr. Walls by email or telephone for further information and if you are interested in helping to provide such services to the court and community. His telephone number is 951-777-3121, and his email is marcus.walls@riverside.courts.ca.gov.

730 Evaluator William Rose, Ph.D.

Dr. Rose recently rejoined the ranks of mental health professionals in our desert community offering therapeutic, clinical and forensic psychological services (including 730 child custody evaluations with testing), and his Rancho Mirage office is conveniently and centrally-located in Rancho Mirage off Highway 111. Dr. Rose has been in practice over 20 years, and offers a wide range of services for a wide range of age-group patients including co-parenting counseling and other treatment for children, adolescents and adults, psychotherapy for depression, anxiety disorders, relationship counseling, aging and health related issue counseling. Dr. Rose uses a treatment philosophy centered on providing highly personalized and tailored services to help attain the personal growth his patients seek.

Dr. Rose's team includes MFT Intern April Hanig, M.A., M.F.T.I. Ms. Hanig serves as the Program Director for CancerPartners, a nonprofit organization in Palm Desert that provides social and emotional support for cancer patients, their loved ones and the bereaved. She specializes in teen counseling, play therapy for young children, and parenting support for children and teens experiencing emotional and behavioral problems. Through individual child therapy and parent coaching in the use of play techniques and parenting strategies, she helps families enhance safety, communication and resiliency, as well as improve children's emotional, behavioral and cognitive functioning.

William Rose, Ph.D. & Associates is located at 71-687 Highway 111 in Rancho Mirage. The office telephone number is 760-834-8770. Dr. Rose's email is drwilliamrose@gmail.com. The office's website is www.drwilliamrose.com.

"The partners are very excited about your interview, Mr. Moe."

Affirmative Self-Defense and Domestic Violence: A New Arrow in the Quiver for Defending DV Abuse Claims

By: Michael C. Peterson, CFLS

A trend in California appellate courts over the past five to ten years concerning domestic violence litigation has been to flush out the meaning of "abuse" as defined by the Domestic Violence Protection Act ("DVPA"; Fam.C. § 6300, *et seq.*), and particularly conduct constituting harassment and/or disturbing the peace of another. Appellate decisions generally reflect an ever-increasing awareness and sensitivity to what conduct constitutes abuse as grounds for a restraining order, particularly in light of technological change and its impact on society's mediums of communication. Appellate cases have recognized abuse occurring in the following notable contexts:

►Unwanted, repeated contacts [*Sabato v. Brooks* (2015) 242 CA4th 715, 725, 195 CR3d 336, 344];

►Communicating inappropriate sexual innuendo by text messages [*Burquet v. Brumbaugh* (2014) 223 CA4th 1140, 1144, 167 CR3d 664, 668];

►Accessing, reading and publicly disclosing another's confidential e-mails [*Marriage of Nadkarni* (2009) 173 CA4th 1483, 1496, 93 CR3d 723, 73].

More rare are appellate cases providing facts of what is not abuse under the DVPA. One example is found in *S.M. v. E.P.* (2010) 184 CA4th 1249, 1265-1266, 109 CR3d 792, 803-804 where an appellate court determined that, over the course of a single night, pulling covers off a sleeping romantic cohabitant, turning lights on and off in a room occupied by said sleeping cohabitant, and calling said cohabitant a "cold bitch" was not abuse. Another is that a person's infidelity and seeking a restraining order against the other is not abuse [*Altafulla v. Ervin* (2015) 238 CA4th 571, 582, 189 CR3d 316, 324].

However, this author has never reviewed a published case discussing the extent *a person opposing a DVPA restraining order request might use a degree of physical force to defend themselves against the other party in connection with the underlying events*. This changed in May, 2017 with the certification for publication of *In re Marriage of Grissom*, delivered by the Fourth Appellate District, Division One, appellate case number D070495.

In *Grissom*, the wife filed a DVRO request against her husband, alleging he had physically injured her on at least two recent occasions. The husband answered, alleging the wife had instigated each of the physical contacts resulting in injuries to her (and had repeatedly done so in the past by taking his work-related property and preventing him from accessing it until he acceded to her demands).

The first discussed incident in *Grissom* occurred in August, 2015 and involved the wife snatching the husband's laptop, her hiding it, him finding it in a hidey hole in the parties' bedroom, and him taking it back. A physical struggle then ensued over the laptop with the wife simultaneously spitting in the husband's face and then covering his mouth and nose with her hand, him biting her thumb to get her to release her grip, and them falling to the bed with the wife becoming injured (a scraped knee on the bedpost and a bruised, bitten thumb).

The second incident discussed in *Grissom* occurred in November, 2015 and involved the wife snatching the husband's cell phone in their garage, her looking through it in his presence, him snatching it back when she came close, a physical struggle over the cell phone wherein he told her to stop and that she was hurting him, him attempting to wriggle away, and her falling and hitting her head on the car bumper and tailbone on the ground when he did wriggle away causing her to lose her balance.

The third incident in *Grissom* occurred the day after the second, when the husband began packing a bag to leave and the wife again snatched his cell phone from him, with the parties struggling into the kitchen whereupon the husband pinched a nerve in his back and collapsed, and the wife ran the cell phone under running water in the sink. Any of this sound familiar? It sure does to this author in the course of his legal practice.

The *Grissom* trial court found no abuse by the husband, and the appellate court agreed that the husband did not commit an act of abuse merely by defending himself and his property. The courts respectively found and upheld that the wife's aggressive conduct "triggered" the husband's responses, and that the husband did not use excessive force in connection with his responses to the wife's aggressive conduct.

In holding that a person may use a reasonable amount of force to defense himself or herself from aggressive, triggering behavior, the appellate court rejected the wife's argument that the DVPA provided no affirmative defense of self-defense, and therefore any intentional or reckless conduct on the part of a person defending in a DVRO proceeding required a restraining order result. The appellate court said that "the language of the statute coupled with long-standing and fundamental principles of responsibility and culpability" precluded it from overturning the trial court's decision.

The appellate court went on to discuss Fam. C. § 6305 and its language concerning the requirements for a mutual restraining order, that both parties acted as primary aggressors, reasoning that the "clear purpose of this requirement is to avoid restraining a party who is not culpable, and reflects the Legislature's understanding that reasonable self-defense is a defense to a claim of abuse."

The appellate court next went on to discuss codified and common law principles of self-defense as recognized by the California Supreme Court in *Calvillo-Silva v. Home Grocery* (1998) 19 CA4th 714, agreeing that in the domestic violence context, a person may use reasonable force, under the circumstances, to defend against injury to person or destruction of property, and to retake property obtained by force.

To a degree, the nomenclature used by both the trial court and the appellate court seems imprecise by ruling that the husband committed no act of abuse, whereas to a practitioner of jurisprudence it would be more accurate to say that the self-defense and defense of property conduct which the husband employed, being reasonable under the circumstances, constituted an affirmative defense such that denial of the wife's requested restraining order was appropriate. But a practitioner in the trenches of Family Law could also see the problematic nature of such a pronouncement, there being multiple other statutes and case law which turn on an abuse finding with no codified exception for new case law's recognition of self-defense as an affirmative defense. Take Fam. C. § 3044 and its specific provisions that a finding of abuse creates a rebuttable presumption against the abuser's having custody of children; the statute make no mention of an exception for self-defense. How would CCRC departments uniformly deal with a trial court's finding abuse and self-defense simultaneously in a prior hearing? Possibly not very well. Thus, the *Grissom* appellate court made a cleaner pronouncement by characterizing the facts of the case, in total, as non-abuse and thereby avoided the sticky details such as requiring of a body of statutes to be revised to comport to new case law.

Interestingly, the *Grissom* appellate court saw fit to expressly make a footnote, number 5, of the fact that the wife sought sole legal and physical custody orders of the parties' child in connection with the proceeding. As custody was not directly relevant to the issues before the Court, perhaps this was a signal that, at even the appellate level, there is an ever-increasing awareness of the problem of using domestic violence to gain child custody advantage? This author thinks the only answer must be yes, it does.

Can Spouses Be Found to Have Gifted Their Share in Community Property to the Other? Problems Affecting SP Residences.

By: Thurman W. Arnold, III, CFLS

Community Property Gifts to the Separate Property of the Other Spouse

When the community estate pays money towards the separate property assets or expenses of the other spouse, is it always entitled to be reimbursed?

Not always. It is possible for a court to find that a contribution in favor of the other spouse on the CP dime is a gift, and so not capable of reimbursement. However, this is an outcome that trial and appellate courts may seek to avoid, and it is both highly transaction and subject matter specific.

The Common Family Residence Owned by One Spouse Situation

It is not uncommon that when parties marry, one or both spouses already own certain assets like – for purposes of this article – a home. Unless and until the other spouse is added to the title on the home (which is a "transmutation"), that property always remains the SP of the titled owner. There are two situations that commonly arise in such circumstances: 1) there is a mortgage that is paid down with CP funds or earnings during the marriage, along with real estate taxes and home insurance; and/or 2) improvements and/or repairs may be made to the property using joint (CP) funds.

In neither situation does the application of these funds change the character of the title and ownership. But under the law as it has evolved over the past 40 years, there is often a right of reimbursement. However, that right can sometimes be waived, or gifted, to the other party.

We've written extensively about "Moore-Marsden" (M-M) reimbursements and apportionment. Where community property funds (including the earnings of either party, in the absence of a premarital agreement saying that earnings in the parties' marriage will not belong to the community estate) are used to pay a mortgage, over time principal is reduced (except as to 'interest-only' loans). The property may go down in value, its value may remain flat, or it may appreciate by the time the parties separate and begin to war over identifying and splitting the community pie. M-M holds that unless a right to be reimbursed for these contributions and the resulting increase in net equity in the home has been waived, the CP estate must be reimbursed for its share in the overall acquisition of the property. The amount of the reimbursement will be a ratio function of the increase in equity as represented by the principal reduction and any increase in value. However, for this reimbursement to exist there must be a calculable increase in the net equity of the party claiming the separate property interest as measured from the date of marriage to the date of calculation (for instance assuming a transmutation prior to separation) or date of separation (where there was never a change in title during the marriage). It is certainly possible that the M-M reimbursement amount will be found to be zero, most obviously where the property's value has declined. Or in shorter marriages, where little appreciation has yet occurred.

M-M is founded on the idea that CP funds used for the "acquisition" of property should be reimbursed in order to avoid what would otherwise amount to a constructive fraud upon the party who does not benefit from an increase in the other's separate property net, at the expense of the community (or really the outspouse's half). Constructive fraud does not speak to "intention"; it is a legal fiction that is imposed in order to protect the financial interests of the disadvantaged spouse, where they did not consent to the outcome. "Acquisition" that may give rise to a reimbursement right is limited to payments that increase equity, and does not include interest, real estate taxes, or insurance.

Where property that is owned by one spouse alone is improved on the community dime, where for instance the spouses or one of them renovates the home, this is not considered to be an "acquisition" in the sense of M-M and those funds play no part in a M-M calculation. There is another avenue for reimbursement for improvements nonetheless, discussed below, although the right to a reimbursement is not guaranteed. It can be effectively waived. *Many lawyers fail to analyze whether their facts support a waiver.*

Until 1975, husbands under the law had the sole right of management and control of the community property. Yes, as hard as it is to imagine, only 40 years ago California husbands had the exclusive right to make financial decisions affecting their wives' rights and interests in the parties' assets. As a consequence and to equalize the playing field, a rule developed that where a husband in managing these assets made the decision to use community funds to improve the wife's property, it was *presumed* that he was making a gift of his half of that CP to the wife – and that she owed no obligation to reimburse the husband for any of it. This result did not require any kind of writing or formal waiver by the husband, and could be based upon evidence of "oral transmutations", i.e., pillow talk.

Note the operative word in the previous paragraph is "presumed." Presumptions are very important in determining who has the burden of proof on any given issue in CA divorces and family law proceedings, and when they exist in favor of one party they put the other on the defensive to overcome them.

In 1975, Civil Code § 5125 and 5127 were enacted (current Family Code § 1100 and 1102), to declare that husbands and wives henceforth would share equally in the right to manage and control the community estate. And yet the rule presuming a gift where one spouse used community property to allow the other spouse to "acquire" (or increase) that spouse's equity position did not go away. It matters which spouse controlled the funds and so made the decision on any given transaction – i.e., that it is not the spouse who owned the separate property whose financial position was being aggrandized, since that party should not have the power to make a gift to themselves. Clearly, those funds should be reimbursed (and indeed the rule is that the reimbursements should be the larger of the actual cash value paid or the value of the enhancement). Generally speaking, community payments made by one spouse that improve the other spouse's separate property continue to be presumed to be a gift, and in such cases no right of reimbursement-back exists absent proof of an agreement that the contribution would be reimbursed – which can be oral. *Marriage of Camire* (1980) 105 Cal.App.3d 859. *Camire* was decided after 1975, and noted the change in the law providing that spouses have equal management and control of the community property, but nonetheless applied the former gift rule, and presumably would have done so if the genders had been reversed.

This gift presumption, though, has been viewed unfavorably by the courts in certain settings, and so its reach has come to be limited. For instance, no gift presumption exists where the CP payments are used to pay a SP mortgage. *E.g., Marriage of Moore* (1980) 28 Cal.3d 366. Some years after Civil Code § 5125 was enacted, the court in *Marriage of Frick* (1986) 181 Cal.App.3d 997, 1020, opined "Beginning in 1975, both spouses were granted equal management and control of the community real and personal property, with limited exceptions (Civ. Code, §§ 5125 and 5127). However, we do not believe this change in the law should alter the basic principles discussed above. Indeed, we believe the effect of this change should be to place each spouse in the same position as the husband was before 1975. If either spouse appropriates community funds for his or her own benefit, without the consent of the other spouse, the community should be reimbursed. Even if in theory both spouses have an equal right to management and control, if one spouse acts in his or her self-interest to the detriment of the community interest, the community should be entitled to restitution." (The *Frick* husband managed the community assets. However, the wife was denied a reimbursement because she failed to present evidence that husband had in fact used CP funds to make the relevant expenditures, or their cost/value).

The gift presumption has been further eroded. In *Marriage of Wolfe* (2001) 91 Cal.App. 4th 962, apparently dealing with a situation where the husband controlled certain joint funds and used them to improve his own separate real estate property with the installation of a drip agricultural system, the court refused to apply the gift presumption to SP improvements made with CP funds. It ruled: "There is little logic in a rule that presumes an unconditional gift when one spouse uses community funds to improve the other spouse's property. Husbands and wives rarely plan for dissolution of a

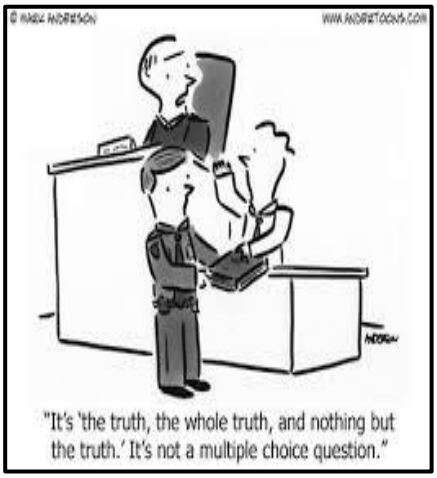
marriage, and if they did, it is fanciful to suppose that a spouse would wish the divorcing partner to walk away from the marriage with property enriched by an infusion of community funds and with no obligation to reimburse. The presumption is simply not grounded in human nature or experience. Nor is it in accord with public policy, which presumes acquisitions during a marriage to be community [citation omitted], and disfavors changes in characterization without strict adherence to formalities; this ensures thoughtful deliberation before decisions with potentially far-reaching consequences are made. [Citation omitted] As we explained, our courts do not indulge such a presumption when community funds are used to assist in the purchase or to reduce an encumbrance on a separate asset. The application of community funds results in what amounts to co-ownership of the asset. [Citation omitted]. There is no reason to presume a gift when funds are applied to improve separate property."

The Gift Doctrine, However, Is Not Yet Dead

Despite *Frick* and *Wolfe*, the gift presumption is still on the books and even if there is no presumption, you might be able to win the gift argument if there is a sensible reason explaining why the spouse managing the community made the contributions to the other's SP, supported by evidence of an agreement. Neither case said that funds applied to improve separate property cannot be a gift, but only that the transaction would not be presumed to constitute a gift. Circumstances remain where a party may be able to prove that a gift was intended, based upon an oral agreement.

By the way, it certainly remains the rule that one spouse can make a gift of their own separate property to the separate property of the other spouse without a right to reimbursement later, and that they are presumed to do so in a number of different types of transactions (most commonly where a spouse pays joint credit card debt with separate property). People are understood to more likely intend a gift when the thing they give up belongs to them alone, and the reason for protections against self-serving transactions are not implicated to the same degree (although one can always claim undue influence) when one is managing their own property only.

Winning at the trial court level will, as usual, probably be a predicate to winning on the gift issue on appeal. Or, when this issue gets revisited by the appellate justices in the future, the gift rule may go bye-bye, at least insomuch as the facts apply to CP contributions to SP, as opposed to SP contributions to the other's SP.



Legal Analysis and Commentary

Tell Me Why . . . You Deviated

By: Mark D. Gershenson, Esq.

How many times have you walked out of a courtroom after hearing the judge say "denied" (or received a conformed copy of your *ex parte* application stamped "denied pending hearing") and not had a clue as to on what the ruling was based? Or perhaps heard "granted," but were left wondering on which of the several alternative grounds in your papers the court hung its hat?

Family law bench officers are not obligated to explain most of their rulings. That they *should* explain *all* of their rulings, even though they do not have to, so that the litigants feel as if they have been heard and can understand (and therefore more easily accept) rulings that are against them, and so their attorneys learn the court's thinking, frequently takes a back seat to expediency in this era of long calendars.

There is one area, however, where a trial court *must* explain the basis for its ruling if it hopes to avoid reversal, even when that ruling is well within the court's discretion. Moreover, in that situation, the court does so even if not requested by the parties. (Contrast that with the court's obligation to provide a statement of decision "upon the trial of a question of fact by the court" only where the SOD is requested. Code Civ. Proc. § 632).

The area to which I refer is when the court deviates from guideline in making a child support order. In *Y.R. v. A.F.* (2017) ____ CA4th (2nd Dist.), the defendant ("F") was a married producer and director who was living with his wife and three children. He had a brief liaison with the plaintiff ("M"), resulting in the birth of a child ("C"). M had sole custody of C. For the first eight years of C's life, F provided M with direct and indirect financial support totaling about $5,000 per month. M then filed to establish parentage and sought guideline support.

M sought detailed information about F's income and lifestyle. F objected, contending that he is an extraordinarily high earner whose income was just shy of $2.3 million per year (which works out to about $190,000 per month). After F produced some limited financial documents, M accepted the "extraordinarily high income" classification and did not move to compel further discovery responses. (While $2.3 million per year would likely be deemed "extraordinarily high" here in the desert, would the Los Angeles court where this case was heard have viewed it as such? Hard to say).

M, meanwhile, worked as a stylist and grossed $1,833 per month, and was living in a small rented apartment (that she characterized as "cramped") with C and her two other children.

Per F's attorney's DissoMaster, guideline support was $11,840 per month. F took the position that M only needed $7,180 per month to pay her expenses.

M's forensic accountant contended that F's income was $4,037,636 per year ($336,470 per month), and that guideline support was $25,325 per month.

The trial court found some of F's alleged business expenses unsubstantiated, and accepted M's accountant's numbers. The court also found that M's expenses were far less than $25,325 per month, and awarded her "'$8,500 per month plus the payment of the child's medical insurance, 90% of the child's uncovered medical costs, 75% of the child's extracurricular activities, and 100% of the child's private school tuition at an institution comparable to those that [respondent's] other children attend,'" stating this would 'meet the minor child's reasonable needs.'" (The "extras" totaled less than $3,600 per month.) The court's order did not explain how it arrived at the $8,500 number, why it believed that $25,325 was excessive, or on what evidence it relied in concluding that the support order was consistent with the C's best interests.

M appealed. The Court of Appeal reversed, accepting M's contentions that the findings required by Family Code § 4056 cannot be inferred from the record, that the trial court improperly burdened M with justifying a guideline award and focused on M's historical expenses rather than F's income and lifestyle in determining C's reasonable needs.

Family Code § 4056 provides:

(a) To comply with federal law, *the court shall state, in writing or on the record*, the following information whenever the court is ordering an amount for support that differs from the statewide uniform guide-line formula amount under this article:

(1) The amount of support that would have been ordered under the guideline formula.

(2) The reasons the amount of support ordered differs from the guideline formula amount.

(3) The reasons the amount of support ordered is consistent with the best interests of the children.

(b) At the request of any party, the court shall state in writing or on the record the following information used in determining the guideline amount under this article:

(1) The net monthly disposable income of each parent.

(2) The actual federal income tax filing status of each parent (for example, single, married, married filing separately, or head of household and number of exemptions).

(3) Deductions from gross income for each parent.

(4) The approximate percentage of time pursuant to paragraph (1) of subdivision (b) of Section 4055 that each parent has primary physical responsibility for the children compared to the other parent. (Emphasis added.)

The lengthy opinion in *Y.R. v A.F.* makes the following points:

a.) In adjudicating child support, the court must begin by calculating guideline support.

b.) The party who seeks a downward deviation from the guideline amount must prove that such amount would be unjust or inappropriate and that a lower number would be consistent with the child's best interests.

c.) A child's needs are not determined by some objective, one-size-fits-all (my phrase, not the court's) standard; such needs exceed bare necessities and should reflect the parents' incomes.

d.) In deviating from the guideline amount, the court must strictly comply with Section 4056.

e.) "The obligation to provide the information required by section 4056, subdivision (a) arises sua sponte [citation], and the court's failure to comply with the statute's procedural requirements, standing alone constitutes ground for reversal of a child support order and remand for compliance. [citation]"

f.) In providing such information, the court "must do more than issue conclusory findings; it must articulate why it believes the guideline amount exceeded the child's needs and why the deviation is in the child's best interests."

g.) "A child's needs are primarily a function of the higher earning parent's disposable income and standard of living."

h.) "[T]he existence of substantial evidence in the record does not take the place of the reasoning required by section 4056, subdivision (a).

The Court of Appeal rejected M's contention that on remand, the trial court must award guideline support because F allegedly did not prove that the guideline amount exceeded C's reasonable needs. The court noted that F had provided detailed information about his lifestyle and expenses, and that M had presented information as to the upgraded housing and extracurricular activities she wanted to provide for C. In short, the trial court is free to deviate from the guideline, but only after reassessing the evidence under the correct standard and making the required findings.

Finally, the Court of Appeal noted that the Judicial Council has adopted form FL-342(A) (Non-Guideline Child Support Findings Attachment), the use of which is mandatory. While that form includes the findings required by § 4056, "Even when that

form is used, however, the court must state the reasons for the findings in writing or on the record. [citation]"

So what guidance does *Y.R. v. A.F.* provide?

1.) If you are a person of child-bearing age, you can dramatically improve your income and lifestyle, and that of your existing children, by having another child with a wealthy person.

2.) If you are an extraordinarily high earning person (and especially if you are married and already have children), consider keeping it in your pants or at least investing in and using condoms.

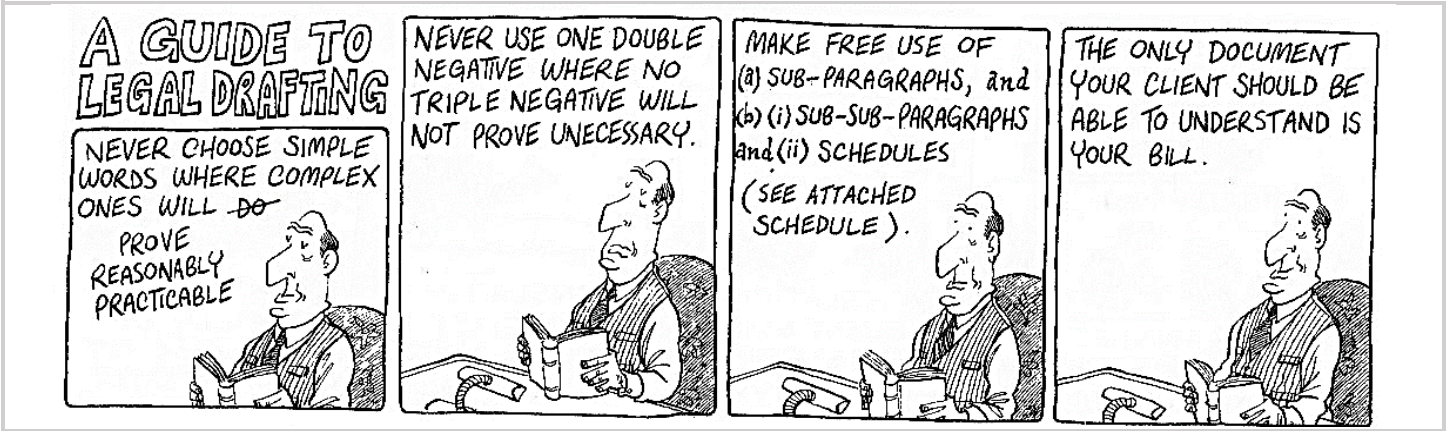
3.) If you are a bench officer ruling on child support in a case involving an extraordinarily high earner, pay more attention to the high-earner's FL-150 than to that of the other parent; and, if you decide to deviate from the guideline amount, explain in great detail why, on what evidence your decision is based, and why the amount you award is consistent with the child's best interest.

A final comment: In the vein of "you can never be too thin or too rich" (and leaving aside, for the moment, those who suffer from malnutrition or anorexia or other diseases that result in unwanted weight loss), how can a below-guideline support award *ever* be in a child's best interest? If the inquiry is "Will the below-guideline amount reasonably meet the child's needs as determined in the context of the child's more affluent parent?" then fine. Surely neither a child nor the child's less-affluent parent needs unlimited funds. But is less support, rather than more support, really in a child's best interest?

The numbers in this case make the decision for the trial court on remand difficult. On the one hand, F could likely afford to pay $25,325 per month in support given his income of somewhere between $2.3 million and $4 million per year. On the other hand, should M, who has historically lived quite modestly, suddenly be catapulted into the top 5 percent of the population, income-wise, merely because she conceived and birthed a third child?

The opinion is silent as to whether and to what extent M is receiving support from the father(s) of her two older children. Presumably she either is not getting any, or at least not much, support from them, or she wouldn't be living in a "cramped" apartment. That implies that the other father(s) are not high-earning; perhaps they are actually down-and-out. Were the court on remand to award M $25,325 per month from F, that would seemingly create a large discrepancy between the standards of living M and the other father(s) enjoy, which might in turn have an adverse impact on the relationship M's older two children have with their father(s). While I have never seen any authority for a California court to consider the impact of a high support award on a parent's other children who are not the subject of the award, perhaps such factor warrants attention in the interest of family harmony.

May we all be blessed with many cases involving extraordinarily high-earners, however that category is defined.



What is coParenter?

By: Maxwell D. Wolfson

Co-parenting is a parenting approach that seeks to align how separated parents raise their children. This approach aims to avoid the issues of parallel parenting, such as inconsistencies in rules and schedules, which can be harmful to child development. The CoParenter Program is a management device that facilitates co-parenting. This is accomplished through the use of the coParenter app (only available on iPhone's 5 and up).

The purpose of the app is "to help separated parent[s] communicate/ organize everyday coParenting responsibilities." The app's features enable the following:

(1) Co-parent creation of customized parenting plans, custody agreements, and schedules that synchronize across accounts.

(2) Direct contact with licensed mediators (licensed practitioners, therapists, attorney mediators, etc.) who assist in resolving disagreements.

(3) An authenticated record of communication between co-parents. This non-editable communication "is time-and-date stamped, biometrically authenticated and securely stored in the cloud [where it] can be accessed by accredited third-parties."

(4) Co-parent "Check In", which verifies and records the time, date, and GPS location, for child pick up and drop off.

Using these features, court ordered use of coParenter in cases has been shown to increase order compliance and decrease miscommunication. Note that "unless the use of coParenter has been ordered by a Judge, nothing is admissible in court." Additionally, any communication between a co-parent and a coParenter Professional is deemed to the fullest extent possible to be confidential and inadmissible.

Becoming a coParenter Professional is free to any practicing mediator, attorney, or therapist. "In order to be listed in the professional listings and offer services to parents outside of your existing client base, you must be approved by coParenter."

Some qualifications include:

(1) Operating within the United States and/or Canada.

(2) Completion of supervision hours and licensing exams.

(3) Have current malpractice insurance.

Additionally, the professional registration process requires the creation of a professional account, an interview with coParenter's Industry Development Team, and a training course with the coParenter team.

The value of the coParenter Program in assisting separated parents to coordinate their children's activities and visits could prove to be a useful tool. Through the use of this app, perhaps, many of the conflicts that arise between parents due to inconsistent rules and schedules can be avoided. While better co-parenting may draw some cash away from the wallets of lawyers, a marriage of parenting and technology should result in less gray–hairs for everyone involved.

Family Law Three-Card Monte – Limitations to Remedies Concerning Military Pension Benefits Being Shifted to VA Disability Benefits

By: Michael C. Peterson, CFLS

A November, 2016 appellate decision in California (*Cassinelli*), coupled with a May, 2017 United States Supreme Court decision (*Howell*), seemingly forecloses all meaningful enforcement avenues in California for aggrieved spouses of former military members whose divided share of community military pension benefits has been diluted or eliminated by the latter party's unilateral, extra-judicial election to receive VA disability benefits (thereby waiving all or part of their military pension). These developments require all Family Law attorneys and bench officers to use caution and to be aware of the current state-of-the-law in cases involving military pensions, and also to get creative on how to constitutionally safeguard parties' expectancies.

The Cassinelli Decision

California's *Marriage of Cassinelli* (2016) 4 CA5th 1285, 210 CR3d 311, a decision reached by our own Fourth Appellate District, Division Two in Riverside, is now published and citable per California's Judicial Council (but note that a Petition for Certiorari is presently docketed with the United States Supreme Court).

Cassinelli places significant limits on the remedies available in California for the aggrieved non-military spousal whose community interest in the veteran-spouse's military pension has been reduced or eliminated due to a shifting of payments from pension to disability benefits, and also makes an announcement of what that remedy is solely to be: Money damages (and of a non-fraudulent nature under the facts of that case).

In *Cassinelli*, the parties entered into a stipulated judgment whereby they equally divided the community interest in the husband/military-member's pension, and reserved jurisdiction on spousal support. The wife's share of that pension was to be 43%, or $541 per month, and the husband's share was 57% for $791 per month. After 26 years or so receiving the pension, the husband was determined to have a combat-related disability, and he began receiving $1,743 in VA disability benefits and $1,389 per month in combat-related special compensation (likely related to his exposure to Agent Orange in Viet Nam). In doing so, the husband was required to waive a dollar-for-dollar portion of the pension under federal law. With the waiver of the pension, the wife began receiving nothing from DFAS. The wife moved for an increase in spousal support equal to the amount of her share of the waived pension. The trial court awarded the wife $541 per month in increased spousal support (apparently increased from zero).

On appeal, among the various issues raised by the husband, the *Cassinelli* Appellate Court held that the trial court erred in awarding the wife's lost portion of the military pension as spousal support. In so concluding, it provided an analysis of the problem of pension-shifting in the context of then-federal-case-law-and-statute, and state court responses to it. It provided an in-depth discussion of California's leading case on military pension shifting, *In re Marriage of Krempin* (1999) 70 CA4th 1008, and its dissection of the majority rule (22 states, including California, allowing for some equitable remedy to the non-military spouse in the form of support reassessment or redistribution of martial property) and minority rule (5 states allowing for no remedy) nationwide. The reason for the majority rule boils down to: (1) The non-military spouse has a *vested property right* which should not be unilaterally reduced/eliminated by the action of/waiver by the former military member spouse, and (2) There are other potential assets of the former military member spouse to reimburse the non-member spouse.

The Appellate Court in *Cassinelli* went on to discuss the intention of the parties as manifested in the MSA/judgment. In so doing, it held that an express indemnification agreement protecting the non-member spouse in a MSA/judgment dividing a military pension is not required to allow a court to equitably redistribute, and that the language of the Cassinelli's

MSA/judgment led to the conclusion that the parties did not intend to allow the military member to defeat the retirement pay division terms by the husband's unilateral waiver. It discussed the need for uniformity, the fact of a great number of self-represented litigants in family law created a significant policy concern about losing vested property rights without express indemnification provisions, and the *Krempin* statement that the lack of express indemnification language was not fatal. As to the specific terms of the Cassinelli's MSA/judgment, it noted that: (1) Language in the document dealt with pension benefits, but that no express waiver of disability benefits was present, and (2) A presumption existed that the non-member's right to retirement pay was "indefeasible."

In terms of the remedy used by the trial court, the *Cassinelli* Appellate Court made dollar-for-dollar spousal support increase to effectively indemnify the wife for her lost pension benefit expectancy an unavailable remedy in California. It noted that, of the majority rule states, only a minority allowed for modified spousal support to be the remedy. Moreover, it stated that California courts could not do so because they were bound by Fam. C. § 4320's factor analysis, and the fact that the trial court increased spousal support dollar-for-dollar in the amount lost by the wife as a result of the husband's waiver of pension belied any credible position that a 4320 analysis had been, in fact, used by the trial court. In part, it reasoned that "a civilian spouse" should be entitled to recover the amount lost, regardless of earning capacity, other assets and obligations, remarriage, the former martial standard of living, or other 4320 factors.

The *Cassinelli* Appellate Court then went on to renounce constructive /resulting trust as to other assets held by the (former) service member spouse as available remedies as well, reasoning that would violate federal law and the holding of *Mansell v. Mansell* (1989) 490 U.S. 581, particularly its prohibition against community property states treating disability benefits as divisible property.

The *Cassinelli* Appellate Court went on to state that "[w]e believe it is better to hold that the military member has caused the loss or destruction of property right belonging to the civilian spouse and therefore be required to pay the civilian spouse money damages." It continued "we do not mean to characterize this action as fraudulent, a breach of an implied covenant of good faith and fair dealing, contempt of court, or otherwise blameworthy. But the action (merely) upset the division of property as adjudicated in the judgment."

Perhaps in the most unsatisfying portion of the *Cassinelli* opinion, the Appellate Court gave no substantive direction to enforcement of its pronounced money damages remedy for the aggrieved civilian spouse. It said there was little to distinguish the special combat pay from the disability pay in terms of enforcement. It simply pointed to the husband's other assets as potential sources of recovery: His house and his car. Cynically, it stated "[i]t is possible that Janice will end up with a paper judgment that she can never enforce. Or Robert will choose to pay her out of his exempt assets to protect his nonexempt assets from seizure. Or Janice will settle her claim for a significantly reduced amount in exchange for immediate payout of Roberts's exempt assets. Or Robert will win the lottery. But even if he is judgment-proof, she is entitled to a judgment."

Key Takeaways from *Cassinelli*

The remedies available to non-military member spouses aggrieved by the other spouse converting his/her military pension benefits to disability benefits shrank considerably in California under *Cassinelli*, and now the likelihood of the former ever collecting is equally dubious: No in-kind spousal support increases, no reallocation of already-divided property, and no constructive trusts on property of the veteran-spouse. Without a doubt, many current and former military members will be 'judgment-proof' in terms of the existence of non-exempt assets in the traditional money judgment-enforcement context.

Moreover, particularly with the non-fault language of the *Cassinelli* decision concerning pension waiver under the facts (there was no evidence the husband's purpose was to cut off the wife's share of

his pension, but simply that his purpose was to convert it to larger monthly disability benefits, which are tax-free by the way), essentially making it akin to a breach of contract, this could mean the sole remedy of money damages as allowed by the decision would be fully dischargeable in a bankruptcy proceeding by the military spouse. Under the Bankruptcy Code as amended in 2005, only domestic support obligations based on need (11 USC § 523(a)(5)), and a debt to a spouse, former spouse or child that is not a "domestic support obligation" but that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other court order, or a determination made by a governmental unit in accordance with state or territorial law (11 USC § 523(a)(15)) are non-dischargeable debts in bankruptcy's interaction with family law. A money judgment for damages as a result of the pension waiver, without the fault/fraud color, arguably would not fall within either of these exemptions from discharge, as it is not need-based and temporally not rendered in the course of divorce or (especially absent an express indemnification clause concerning pension-waiver-for-disability-benefits).

Another area of concern is the fact that many MSA/judgments involving military pensions occur, unlike the facts of *Cassinelli*, while the member spouse is still in the military and earning credit towards the 20-year vesting period. As such, many cases necessarily involve division orders that do not specify a dollar amount, but rather a set of contingency language about the anticipated future retirement becoming vested with the percentage determined by arithmetically dividing the number of months of CP pension gains by the number of total creditable military service months. Does this mean that, there being no set dollar amount for pension payments to the civilian spouse in those kinds of MSAs, it is more likely to be dischargeable in bankruptcy? Probably, yes. Is it more likely that the lack of express indemnification provision will allow for no equitable remedy at all? Probably also yes.

Conversely, does it mean that a modification of spousal support, if not dollar-for-dollar reimbursement of the out-spouse's lost pension payment but rather under a 4320 analysis, as an end-around of *Cassinelli* would be more viable? Likely yes, but because most MSAs do not include judgment-time marital standard of living and other 4320 factors as recited facts, some (perhaps years) after-the-fact determination of what the marital standard of living was at the time of separation will often need to be litigated so that a change can occur. Moreover, what if the non-member's spouse's lot in life has improved dramatically through career development, inheritance, or upwardly-mobile remarriage? Those spouses might not receive any form of compensation for their lost pension benefits under a 4320 analysis. And what about all those spouses who agreed to waive spousal support and terminate the trial court's jurisdiction over the issue? And what about cases that were not settled but instead went to trial, and resulted in a bench decision where the trial court did not consider the pension-waiver-for-disability-benefit possibility and did not include some contingency provision should such a scenario occur in the future? As discussed below regarding the USSC's decision in *Howell*, it is possible that aggrieved spouses in such circumstances are likely without any kind of legally-cognizable remedy.

The Howell Decision

In the wake of California's *Cassinelli* comes the USSC's decision in *Howell v. Howell* (2017) 581 U.S. ____ (a copy of the opinion can be 'googled' by entering "USSC Howell," and otherwise located at https://www.supremecourt.gov/opinions/16pdf/15-1031_hejm.pdf). It was published six month after *Cassinelli*, in May, 2017.

Howell's holding is a sweeping bright-line rule effectively gutting equitable remedies as developed over the past 40 years in California: A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. In other (and this author's) words, any remedy sounding in indemnification or

reimbursement is a violation of the U.S. Constitution.

An excellent article on *Howell* entitled "The Death of Idemnification" was published by ACFLS in the Summer, 2017 Journal edition, and was authored by Mark E. Sullivan, Esq. of Sullivan & Tanner in Raleigh, North Carolina (author of the Military Divorce Handbook, a must-own for any family law practitioner who deal with service member divorces). While Mr. Sullivan's article discusses *Howell* as a USSC precedent under federal case law, the instant article attempts to deal with Howell in the context of California law, and particularly *Cassinelli*.

The pertinent, substantive facts of *Howell* are near-identical to those of *Cassinelli*: The wife was awarded 50% of the service-member husband's military retirement pay; the divorce took place in a community property state (Arizona); 13 years after the parties had been receiving military pension pay (50% each), the husband was determined to have a 20% disability, the husband unilaterally and extra-judicially elected to receive VA disability benefits of $250 per month causing a corresponding decrease by waiver of $250 per month to his military pension income; this waiver caused the wife's one-half of the military pension pay to be reduced by $125 per month.

The *Howell* court began by reasoning that many former military service members elect to waive a portion of their pension income, which is taxable, to receive non-taxable VA disability benefits, this being a logical, economic-maximizing choice allowed by law. It then went on to discuss the legal history of military pension division, and waiver of pension benefits, in community property states, starting with *McCarty v. McCarty* (1981) 453 U.S. 210 [holding that military pensions were not community property subject to division], Congress's 1982 response to *McCarty* with enactment of the Uniformed Services Former Spouses' Protection Act [expressly allowing military pensions to be divisible community property, except as to portions thereof waived], and the USFSPA's interpretation by the USSC in *Mansell v. Mansell* (1989) 490 U.S. 581 [holding that the pre-judgment waived portion of military pension pay, and any other portion of a military service member's total retired pay, could not be divided by a California court despite those parties' express agreement in their judgment to the contrary because Congress only gave a "precise and limited" exception expressly and only to military pensions as being divisible under the USFSPA].

Backtracking to the procedural history of the case, the *Howell* wife requested the Arizona Family Law trial court to enforce the original decree. It did so. The case made its way to the Arizona Supreme Court, which framed the issue as one of indemnification by reimbursement from the veteran-husband to the wife for pension income the latter lost on account of the former's choice to waive a portion of the pension for disability income benefits, and upheld the trial court's decision that such indemnification and reimbursement was lawful.

According to the USSC, the Arizona Supreme Court's analysis and resulting decision incorrectly turned on the timing of the waiver: Because the veteran-spouse waived/elected disability benefits after (rather than before) the judgment, federal law under the ruling of *Mansell* did not control or preempt reimbursement and indemnification. Not true according to the USSC which came back with a harsh analysis of the temporal-reasoning supporting the Arizona Supreme Court's decision (and expressly noted "like several other states" perhaps forewarning California), countering that such "temporal difference" merely meant the *Howell* wife and the Arizona trial court should have recognized her portion of the pension could be worth less than she thought or expected, because it was based on a contingency such as a veteran-spouse's subsequent waiver. In other words, the *Howell* wife's right to a dollar-amount-certain from the military pension *was not truly 'vested' in any cognizable sense of the word*, despite the Arizona Supreme Court's characterization to the contrary, because state courts cannot give that which they do not have: Only Congress can mandate what is includible and excludable from the USFSPA in terms of divisible property interests related

to military retirement benefits, and while Congress included military pensions for community property states as dividable, it excluded waived portions thereof.

The USSC went on to rule that state courts should not use nomenclature tricks like "reimburse" and "indemnify" rather than "divide" as to military retirement benefits that are not specifically a military pension because "the difference is semantic and nothing more." State court attempts to compensate and make whole aggrieved military spouses improperly "displace the federal rule and stand as an obstacle to the accomplishment of purposes and objectives of Congress. All such orders are thus pre-empted."

The *Howell* decision effectively holds that there is no valid and direct form of indemnification, such as a state court ordering the former military service member to pay the other spouse a monthly amount to make the other spouse whole (as the wife had requested). Nor can a state court order DFAS to re-apportion the remaining military pension benefits among the spouses, available to such an aggrieved spouse.

The USSC concluded its opinion in *Howell* by recognizing the "hardship congressional pre-emption can sometimes work on divorcing spouses." It offered that state family courts can discount the value of military pensions as subject to contingency in the form of waiver. Moreover, they can take account of such potentially reduced value "when it calculates or recalculates the need for spousal support." But in any event, the Arizona Supreme Court's decision upholding reimbursement and indemnification was reversed.

Key Takeaways From *Howell*

First, it seems very dubious that *Cassinelli*, its decision, and its holding, if reviewed and an opinion becomes published by the USSC, will stand. There is nothing really to distinguish compensation in the form of "money damages" as the sole remedy in California from reimbursement and indemnification in Arizona as it relates to monies lost by aggrieved spouses whose exes have converted military pensions to VA disability and other benefits. California case law on this subject, and its notion of "vested" and indefeasible" rights must be totally scrapped for they are misplaced and the conclusions they have led to are unconstitutional.

Second, all those court orders in California and the other 21 states in this nation sounding in indemnification going back to 1982's enactment of the USFSPA, except those that increased spousal support predicated on an increased need and/or increased ability to pay, are probably null and void. Oh, what a headache. It is ironic that the trial (but not appellate) court in *Cassinelli* apparently got it right, at least to the form of remedy (spousal support modification) which does not offend the U.S. Constitution (but may offend 4320 and other statutes such as remarriage terminating spousal support).

This author has racked his brain for viable and effective solutions to the problems for out-spouses facing situations similar to *Cassinelli* and *Howell*. One option for the bar's best practices might be to include express indemnification clauses in every judgment involving military pensions, whether retirement age and eligibility has been reached or not by the parties in a particular case. However, such certainly runs afoul of *Mansell*, and would result in unenforceable terms for want of constitutionality. Another option would be for bench and bar to have present value calculations of military pensions, and in-kind divide or otherwise equalize that value with awarding other property to, or creating a money judgment in favor of, the non-military spouse. But that runs afoul of *Howell* and its clear indication that pension rights are not vested other than for past payments and for the month the check is sent out in the mail by the DFAS to the non-military spouse. It probably also runs afoul of California law concerning division of contingent, future benefits. A third possible option is for attorneys representing non-military spouses to bargain-for and include clear recitals of 4320 factors in MSAs that include expectancies of non-vested pension benefits as part of the analysis; perhaps more protective would be contingent language that should such benefits be waived that spousal support shall be increased dollar-for-dollar

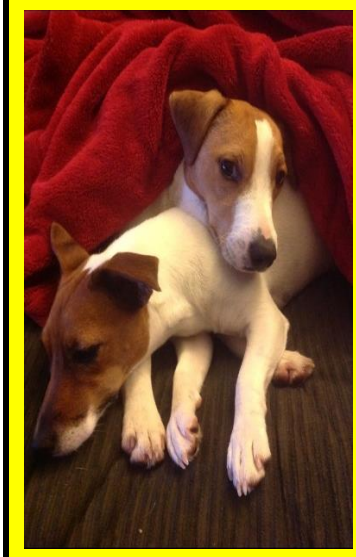
to the amount lost by the non-veteran spouse (thus creating a contract right and not necessarily requiring a reevaluation of 4320 factors).

Really, a legislative response is required to fix this state of affairs. The 97th Congress did so in 1982 (under a Republican President and Senate, and a Democratic House), and it could do so again today by allowing family courts in community property states to divide military retirements benefits other than pensions. Perhaps the California Legislature might also help the situation by making an exception from full 4320 analysis cases that present military pensions waived in favor of disability benefits. But as things stand, need-based 4320 spousal support modification appears to be the only viable, constitutionally-sound method of practitioners and bench officers working under *Cassinelli* and *Howell*, and as a result many military member's spouses have seen their share of a military pension shrink or disappear, such as those who have remarried, have waived spousal support, or have otherwise improved their circumstances since divorce will have no remedy through the courts of California to recapture the benefits of the bargain they made, and for others the remedy might not result in a satisfying dollar-for-dollar reimbursement (and have high litigation costs barriers to boot – pun intended).

SHARE YOUR PUPPIES AND OTHER SMALL CREATURES AND HUMANS TOO!

SEND PHOTOS TO jordynygibbs@verizon.net!

Attorney Carol Adams' dogs, "Emi" and "Hank"



Attorney Iris Joan Finsilver's cat, "Lolita"

That Last Nickel

Supplied By: Carolyn Martino, Esq.

A father walks into a restaurant with his young son. He gives the young boy 3 nickels to play with to keep him occupied. Suddenly the boy starts choking, going blue in the face.

The father realizes the boy has swallowed the nickels and starts slapping him on the back. The boy coughs up 2 of the nickels, but keeps choking. Looking at his son, the father is panicking, shouting for help.

A well dressed, attractive, and serious looking woman, in a blue business suit is sitting at a coffee bar reading a newspaper and sipping a cup of coffee. At the sound of the commotion, she looks up, puts her coffee cup down, neatly folds the newspaper and places it on the counter, gets up from her seat and makes her way, unhurried, across the restaurant.

Reaching the boy, the woman carefully drops his pants; takes hold of the boy's testicles and starts to squeeze and twist, gently at first and then ever so firmly. After a few seconds the boy convulses violently and coughs up the last nickel, which the woman deftly catches in her freehand.

Releasing the boy's testicles, the woman hands the nickel to the father and walks back to her seat in the coffee bar without saying a word.

As soon as he is sure that his son has suffered no ill effects, the father rushes over to the woman and starts thanking her saying, 'I've never seen anybody do anything like that before, it was fantastic. Are you a doctor?

'No,' the woman replied. 'Divorce attorney.'

"Oh, no. They're three doors down. We're People for the Ethical Treatment of Attorneys."

We Live Together Under a Rainbow. The Desert Family Law Professional Community is Like None Other. Let Us Work Together this Year, and Support Each Other and Our Community as the Professionals that We Are!

Please share with Mike Peterson and Jordyn matters of interest, whether to the lawyer and non-lawyer community, so that we can spread your interests and views around! Pictures of babies and small furry animals would be terrific!

The FLS Newsletter will be published 6 or so times a year, hopefully every 6 to 8 weeks. This gives you more time to contribute and burns us out a lot less.

PLEASE SHARE WITH YOUR COMMUNITY!

FLS Section Contributors this Month:

Michael C. Peterson — FLS Chair
Mark D. Gershenson — Legal Analysis and Rants
T.W. Arnold — Internet and Newsletter Slave
Jordyn Y. Gibbs — Secretary and Coordinator
Maxwell D. Wolfson — Intern

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Please send your stuff to jordynygibbs@verizon.net