ACFLS NEWSLETTER

Newsletter Editor
Sharon A. Bryan, J.D., CFLS

Association of Certified Family Law Specialists

SPRING 2005, No. 2

the qdro reader

by james m. crawford, jr.

CHAPTER 1

The Visit

It was a dark and stormy January afternoon. Your client just walked into your office and eagerly handed you a damp statement from her husband s defined benefit plan. "How much of this is going to be mine?" she asks.

You look down at the paper, which you see is dated December 31, 1990, one month before her date of marriage. It shows a vested annual benefit of $1,200[1] based on final average compensation of $12,000 per year, a multiplier of 1%, and 10 years of credited service. She tells you that this was earned years ago while he w as working as a janitor for Plumb Software; and that he had quit after 10 years when his first wife left him. You smile, this is going to be easy.

But before you have a chance to respond, she hands you a second soggy statement which she had just received in the mail. Not surprisingly, it show ed that her husband s benefit had not changed it was still $1,200 although with the rain-smeared ink it almost looked like $120,000. "I m sorry to tell you that none of this is yours," you tell her smoothly.

"You mean that my husband and his first wife are going to take the entire $120,000?"

Your jaw dropped and so did the papers. Picking them up, you point to the blurred number. "If this is really $120,000, how did it get to be so large?"

"Because after we were married I persuaded my husband to finish school, which he did, after which he rejoined Plumb as a software engineer. He stayed there for the next 10 years, doing very well. Then last December we received a notice out of the blue telling us of a special retirement offer from the company that w ould enable him to elect early retirement with 100% of his final average pay, which by then was $120,000.[2] Since this was just too good of an opportunity to pass up, we took it."

"Unfortunately," she continued, "my husband came home from signing all the paperwork yesterday and announced he w as leaving me and going to spend the rest of his life in Tahiti. So, tell me, how much of that $120,000 will I receive?"

Being familiar with the "time rule," and having recently read Marriage of Lehman[3] cover to cover, you calmly reassure her, "You are entitled to half of the additional benefits that

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1. The plan benefit formula at that time was 1% x final average compensation (FAC) x years of service. When husband quit he had 10 years of credited service, and FAC of $12,000 per year. 1% x 12,000 x 10 years is $1,200.

2. The new benefit formula was 5% x FAC x years of service. Husband had 20 years of service total, and FAC of $120,000 per year. 5% times 20 years x $120,000 is $120,000.

3 In re Marriage of Lehman (1998) 18 Cal. 4th 169.

What's Inside

ACFLS

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ACFLS Mission Statement

It is the mission of ACFLS to promote and preserve the Family Law Specialty. To that end, the Association will seek to:

1 Advance the knowledge of Family Law Specialist;
2 Monitor legislation and proposals affecting the field of family law;
3 Promote and encourage ethical practice among members of the bar and their clients; and
4 Promote the specialty to the public and the family law bar.

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From the Editor's Desk

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I suspect that readers will agree with me that family law is constantly forcing us to analyze different ways to approach an issue -- whether it be a pension or a business valuation -- in order to best serve our clients. Jim Crawford gives us a thought-provoking article on Qualified Domestic Relations Orders and the time rule as applied through the permutations of facts and circumstances in different cases. You can see from reading it that it is not a simple matter of applying the time rule to the pension, or if it is, we may be seriously disadvantaging our clients. This article is long and complex, so I elected to spread it over two issues, and to simplify it as much as possible. In the next issue, Mr. Crawford provides us with some of his thoughts on solutions.

What approach we use to valuing a business advantages or disadvantages our clients, and Mark Kohn walks us through an analysis which we should do in every case. The actual standard of value may, as Mr.Kohn suggests, require a bifurcated hearing on which standard to use in a particular case.

Dawn Gray gives us a great analysis of 2640(c), with some thoughts that may not have occurred to you in terms of how we should utilize the new Family Code /2640(c) in our practices, whether it applies retroactively, and whether it applies to other than jointly-owned separate property.

Vocational evaluations can be personally valuable for our clients who have not been in the workplace for a long time, since they can develop feelings of self esteem and guidance as to how to direct their efforts to the future. Not to appear sexist, but since it is often women who have not been in the work force for a long time, if you have been reading the recent news magazines, women starting all over again in their forties, fifties and sixties are the most satisfied group of people. So there is hope out there, and maybe a vocational evaluation can assist our clients in finding the way.

As usual, Joe Bell is on top of what is happening in the legislature and the most important bills are presented here so that certified specialists throughout the state can write to the legislature with respect to those bills of importance to them.

Lynette Berg Robe and Mel Ross have done their usual excellent job of writing a letter to the legislature regarding bills which would limit marriage in California to a union between a man and a woman.

Heidi Tuffias weighs in on the odd but generally productive relationship between family law attorneys and their judges.

Finally, John Harding gives us a detailed view of how he does his telecommuting. His article names the names of software and tells you what to buy and why he likes one type of software over another. We thought it might be really helpful for solo practitioners, which constitute a fair proportion of our membership.

I will be signing off with this issue for a year while Leslie Shear takes over as Editor of the ACFLS Newsletter. I will be back with next summer's issue. In the meantime, I wish you interesting clients, challenging legal issues, courtesy and professionalism from and toward colleagues, and good judges to make decisions that generally affect people more personally than in any other type of law.

Have a great summer.

From the President

RON LACHNER, J.D., CFLS
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Several objectives of importance to me this year are:

1 Maintain and enhance services to members;

2 Expand our statewide geographic diversity; and

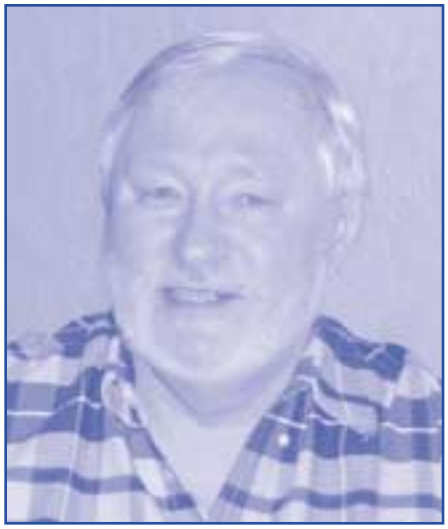
3 Foster institutional memory by administrator and directors.

ACFLS is blessed with another talented, dedicated board of directors. Directors are generous with their time and creativity on behalf of ACFLS.

While acknowledging the continuity and historical wisdom from current board members who have also served in the past, a special welcome is extended to five new members of the board:

1. Sandra L. Schweitzer (Butte);
2. Michael B Samuels (Marin)
3. Ronald K. Ziff (Los Angeles)
4. Sherry D. Graybehl (Orange); and
5. Roger M. Keithly Jr. (San Diego)

Lynn Pfeifer, a former administrator for the Marin County Bar Association, succeeds Patricia A.



Parson, our administrator of almost two decades.

Our thirteenth annual Spring Seminar was held in Orange County at the Aliso Creek Inn in Laguna Beach, California. President-Elect Ronald S. Granberg planned a fine collection of well-received events, seminars and presenters.

The newsletter is a major member benefit. Kudos to Sharon Bryan, Leslie Ellen Shear and their predecessors for distinguished service performed on a demanding, time-consuming duty.

Most family law practitioners practice solo or in very small firms. It can be a lonely existence in a demanding professional niche. The ACFLS list serve is an opportunity to dialogue with your colleagues statewide on challenging questions.

The website is ever-improving. Past-President, Frieda Gordon, has contributed mightily to it s present status. She continues to do so as our Technology Coordinator. She seeks contributions from all members to create a website bank of documents of mutual interest. The website includes a statewide calendar of family law events, educational, social or otherwise. It takes awhile for such a concepts to reach viability but they are in process. If you have not accessed the website recently or contributed to it, please consider doing so.

In closing I acknowledge one of our recent, former directors from Orange County, John Horwitz. His w orthy service as ACFLS Treasurer for several years, as enhanced by able supporting services from his accountant wife, brought our accounting up to a higher par. His early retirement to Hawaii with his family is a inspiration on those days when the practice of family law sometimes seems almost too much. Thanks, John. We miss you.

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were earned as a result of your husband's employment during your marriage--which comes to exactly $30,000."

Knowing your reputation for being a really fun attorney, she smiles knowingly. "You're kidding, right?" she asked.

You quickly rethink your Lehman analysis. Each marriage has a community interest in the plan benefits as they are defined at retirement, including the enhancement. Check. The time rule is appropriate to apportion benefits when service is a substantial factor in the retirement benefit formula. Check. The first marriage and the second marriage each contributed 10 years of the 20 total years of service, so each community must get half, or $60,000 per year. Check. One half of the amount attributable to the second marriage is $30,000, so your client's share is $30,000. Check.

But what about the fact that the time rule is supposed to apportion benefits based on the period of service that earned them? How could anyone in their right mind conclude that husband's janitorial work "earned" a benefit for the first marriage that is 50 times what it had accrued before he remarried and returned to work for Plumb, and 5 times his highest annual salary before his career change.[4] Your reread Lehman, and there it is:

> "That the nonemployee spouse might happen to enjoy an increase, or suffer a decrease, in retirement benefits because of postseparation or even postdissolution events or conditions is justified by the nature of the right to retirement benefits as a right to draw from a stream of income that begins to flow, and is then defined, on retirement (citations omitted), with the nonemployee spouse, at one and the same time, holding the chance of more (citations omitted), and bearing the risk of less (citations omitted), equally with the employee spouse. Because the nonemployee spouse is compelled to share the bad with the employee spouse, he or she must be allowed to share the good as well."[5]

Your hopes are momentarily dashed. But then you realize that what the court is talking about here is relevant only to the issue of whether the Plumb plan enhancements should be characterized as a community asset of both marriages, not how those enhancements should be divided between them. That much the court made clear:

> "The fact that a nonemployee spouse who owns a community property interest in an employee spouse's retirement benefits owns a community property interest in the latter's retirement benefits as enhanced does not mean that that enhancement is a community asset in its entirety. But the question what extent such an enhancement belongs to the community and separate estates is one of apportionment and not characterization."[6]

As to how this apportionment should be done, you find that the court was equally clear-- at least in principle:

> "Whatever the method that it may use, the superior court must arrive at a result that is reasonable and fairly representative of the relative contributions of the community and separate property estates."[7]

Okay, that's more like it. Your client has two possible "outs." First, you can examine the linchpin of the court's characterization analysis (i.e., the premise that a nonemployee spouse is locked into the plan until the employee spouse retires) to see if it is valid as it applies to your case. And second, you can look to see whether the "time rule" is a reasonable method for determining how much the first marriage contributed to the Plumb plan benefit. Intuitively, the latter approach looks more promising, given the outrageous numbers involved, but maybe that's because you are not familiar enough with this kind of retirement plan to know if the Lehman court was correct on the issue of characterization.

You hand your client an umbrella, and ask her to wait outside your office for a few minutes while you make a call. When she is out of earshot you call your buddy, who is an ERISA attorney. After you've explained the problem, he tells you the Lehman court's characterization analysis was not as solid as it seemed.

"How so?" you ask.

"Two things," he began. "First, in modern plans such as Plumb's, once the employee vests (a process that by law can take no longer than seven years), there is no real "bad" that can be shared by the non-employee spouse. By federal law, whatever benefits the employee has accrued as of the end of the marriage, and any post-vesting increases in those accruals are protected against being cut-back, and most are insured by the PBGC, an agency of the federal government similar to the FDIC. Second, even if there were a "bad" to worry about, it is no longer correct to say that the nonemployee spouse is compelled to share in that risk until the employee decides to retire, at least not since REA[8] amended the tax Code[9] and ERISA[10] to add the now-familiar QDRO[11] provisions in 1984. In fact, these days, the distribution rights of the nonemployee spouse are actually superior in some respects to those of the employee. For example, although the employee spouse must give us his or her salary to commence benefits and pay a penalty tax[12] if payment is received before 59; the nonemployee spouse may withdraw his or her share of the plan without that penalty, regardless of whether the employee decides to keep working. In many cases this distribution can be taken immediately following the date of separation, but worst case, it is always an available option once the employee has reached the "earliest retirement age", a defined term which usually means age 50. Under the terms of the Plumb plan,

4. Interestingly enough, had he not returned to work, the maximum annual benefit under any possible formula would have been limited by law to just $12,000 (i.e., 100% of his highest annual compensation). See Section 415(b) of the Internal Revenue Code of 1986, as amended ("Code").
5 Lehman at 179.
6 Lehman at 180.
7. Lehman at 187, citing In re Marriage of Poppe (1979) 97 Cal. App. 3d 1, 11
8. The Retirement Equity Act of 1984, as amended.
9. The Internal Revenue Code of 1986, as amended
10. The Employee Retirement Income Security Act of 1974
11. Qualified Domestic Relations Orders. See Code section 414(p) and its ERISA counterpart, section 206(d)(3)
12. See generally, Code section 71(t).

with which I have had some dealings in the past, the nonemployee spouse from the first marriage had a right to take her share as soon as she separated, so there was nothing compulsory about her staying in the plan to share the good."

"But there is another reason why I think the court's premise is faulty," he continued. "Think back to Marriage of Gillmore[13], a case cited extensively in Lehman, in which the court recognized the right of a nonemployee spouse to force the employee to buy out his or her interest once the employee spouse became eligible to terminate employment and commence benefits. That case also spoke with approval of voluntary buyouts by the employee spouse. Under either of these scenarios, even without the REA changes, the notion that non-employee spouses are entitled to share the "good with the bad" because they have no choice but to stay invested in the plan just does not apply".

"In fact, about the only remaining plans to which Lehman's compulsion concerns would apply are the military pension plans. Those are an entirely different kettle of fish."

"Okay", you interject, "but it seems to me that even if the court in my case were to decide that the first marriage left its interest in the Plumb plan voluntarily, since community assets retain their character until they are divided, I not sure what we would gain by winning the point. In either case the plan will still need to be apportioned based on the relative contributions of the community to the whole, and that has nothing to do with whether its interest is or is not locked into the plan until the employee retires."

"That's true," he replies, "but despite the court's portrayal of the issue of characterization as being distinct from that of apportionment, they may in fact be two sides of the same coin."

"To understand why this is so, we need to first see what it is about defined benefit plans that makes them so difficult to apportion between two periods of employment based on their relative contributions to the total. The reason is that in most of these plans benefits are defined by a formula that is based on just two factors: length of service and highest compensation, usually a number that is an average of three or more years. Although by working the formula at any period of time you can tell as of that date exactly how much of the benefit has been earned as of the end of a given period, some of those new accruals may come about because the compensation for the period is multiplied by past service credited in earlier years. As a result, the total benefit accrued as between two periods of employment, whether or not consecutive, usually consists of three pieces. Two of the pieces are made up of the respective portions that each period accrued independently, i.e., without regard to any other compensation or service credits. The third, which I'll call the "crossover" benefit for lack of a better term, is the additional benefit earned when the compensation increase contributed by one period is used in the formula along with the credited service contributed during an earlier period."

"Take your case for example. There, husband's retirement benefit has all three components. The first is the **$1,200** benefit that was earned by his initial 10 years of employment under the formula applicable at the time (1% per year for 10 years multiplied by a $12,000 salary). The second piece is the **$60,000** benefit that was earned during the second 10 years using the amended formula, higher salary, and only those years of service (5% per year for 10 years multiplied by $120,000 salary). The last, and by no means the least significant piece is the crossover benefit of **$58,800,** which is the enhancement obtained when the service credits from the first period were used in the new formula along with the increased compensation provided by the second."

"Since neither the first nor the second marriage could have earned the crossover benefit on its own, it would not seem reasonable to say that it was "contributed" entirely by one or the other. Yet when you run the numbers that is what the time rule would have you believe. It will always award 100% of the crossover benefit to the earlier period, ignoring the fact that not one penny of that money could have been earned without the help of the service provided by the second period."

"Although this skewing of the results is typical, in instances where there is no crossover benefit to worry about, it could go the other way. For instance, suppose the accrual at the end of the first 10 years was $1,200, and that due to a demotion, this was increased by only $100 to $1,300 by the end of the second 10 years. In that case, since time rule would give each period half the total benefit, it would require the court to take away $550 of what the first period earned independently, and hand it to the second."

"By the way, I did some research and found out that several states use a different rule for pensions, sometimes called the "bright line rule", under which the first period of employment gets only the benefit accrued as of the last day of employment (i.e., the $1,200 in your case), with the rest being considered as having been earned post-marriage.[14] This rule produces the same arbitrary results as the time rule, although in reverse. That is, it always awards all of the crossover benefit to the second period, and none to the first."

"As you can see, the fundamental problem here is that any rule that attempts to resolve a multi-dimensional problem by looking at only one variable is destined to be wrong to some degree most of the time. It would be like expecting Johnny Appleseed to be able to tell you what portion of the alcohol in a glass of apple jack came from tree A and what came from tree B just by knowing that it was made with three apples from tree A and three from tree B. Despite his expertise, unless you also allow him to examine the quality of the fruit from each in terms of its size and sugar content, he would have no way of knowing. But ask him the same question and tell him to ignore any qualitative differences between the two batches of apples, and he would then be able to tell you confidently, although probably incorrectly, that each tree contributed exactly half of the juice."

"While it is not obvious to me why,

13. In re Marriage of Gillmore (1981) 29 Cal.3d 418.
14. For a detailed discussion of the two rules as they apply in the context of a military retirement plan, see Marriage of Hunt, 909 P.2d 525, 532 (Colo. 1995), holding that the non-employee spouse should be compensated for the risk of forfeiture, delay in receipt, and lack of control over the timing of receipt of benefits, but only when immediate distribution is not available.

despite its procrustean tendencies, the time rule is still touted as a reasonable method to apportion defined benefit plans, my guess is that it has a lot to do with the courts having nothing better to work with. After all, how does one go about rationally deciding how much of a crossover benefit comes from the period that supplied the service multiplier, and how much comes from the period that supplied the compensation increase? Not having the luxury of saying I don t have a clue like Johnny, they have been left to choose between a rule that awards the first period all of the crossover benefit to the exclusion of the second, and another that does the reverse. This is, I think, where the Lehman discussion of the equities come into play, and why I think that the courts in California have ended up siding with the period that, at least back in the 70s when these rules were first formulated, really was forced to stay in the game, and thus really did risk losing or winning based upon what the employee did or did not decide to do in the later years of employment.

'And this is also why I think it is important for today s courts to understand that the pension world (not including military plans) has changed in the 30 plus years since the time rule w as formulated, and that many of the old equitable arguments are no longer realistic concerns. In fact, the bigger concern should be whether to continue to use a rule that enables the first period, by choosing to the stay in the plan, to force the second period into a kind of economic partnership in which the first period is able to passively participate, but take 100% of the additional benefit derived from the arrangement, and risk nothing other than the possibility that those proceeds might not be as large as hoped."

"While one might argue that such a partnership should still be allow ed because the value to the employer of the services provided in the second period is due in part to the years of service contributed in the early period the so called marital foundation, or momentum theory that argument actually proves too much since the same can be said for the remainder of the employee s current compensation package, including his or her salary which is clearly separate property."

"On the other hand, for a couple of related reasons it might be just as difficult to argue in favor of substituting the bright line rule, which would effectively dissolve the partnership and leave the second period free to take all the advantage available from the first service credits. First, from the employer perspective it may be that at least some or all of the crossover benefit was prefunded during the earlier period, in which case the earlier period rather than the later would seem to have the better claim. Second, on the employee side, to the degree that the increase can be attributed to cost of living raises and similar passive market forces, it seems more a product of the design of the plan, than the employee s subsequent personal effort."

You are intrigued. "Maybe the only w ay out of the mess we are in is to continue to use the time rule, but add to it a qualitative dimension that will provide a more balanced means of apportioning the crossover benefit, and at the same time protect the benefits accrued independently by each period?"

"Yes, I think so, but that s at least a two beer discussion."

Hanging up, you suddenly remember that your client was still standing out in the rain. Sheepishly, you open the door, smile, and tell her it may be all right after all.

The Evolution of the Specious

It s been days now , and no word from your ERISA friend. Finally, late one Friday afternoon he staggers into your office. Unshaven, unshod, and generally unkempt, he looks like he hasn t slept for days.

"I haven t slept for days," he says.

You nod encouragingly, "You look fine, what do you have for me"

"I got so wrapped up in this thing that I decided to write an article about it. Here." He leans over my desk, shoves his manuscript under my nose and collapses on the floor. I start reading:

CHAPTER 2

When Not to Use the Traditional Time Rule

If there is one thing that QDRO practitioners and family law judges usually dread seeing in the disclosure of community assets, it is a defined benefit retirement plan. The good news is that these days even though such esoteric features as actuarial equivalencies, early retirement subsidies and survivor annuity elections might be a source of argument on occasion, at least the division of the underlying benefits in the typical plan is rarely in question. For that we have the now familiar "time rule", which is not only simple to use, but virtually foolproof when it comes to establishing how much of the benefit at retirement derives from service during the marriage. Or is it?

The purpose of this article is to explain why the traditional time rule is long overdue for its own semi-retirement, and to propose a next-generation replacement more in keeping with the w ay that modern defined benefit plans w ork.

What is the old rule?

In a nutshell, the traditional time rule states that whenever credited service is a "substantial factor" in determining the benefit payable under a defined benefit (or "DB") plan, the extent to which that service was provided during the marriage in comparison to the total will alone determine the community share.[1]

What is it about the way benefits are earned in a defined benefit plan that makes time alone a poor index of benefit derivation?

Unlike the more familiar profit sharing, 401(k), and employee savings plans, in which there are individual accounts to determine benefits based on traceable contributions and earnings, a true defined benefit plan has no individual

1. The use of the time rule is not unreasonable when the "amount of the retirement benefits is substantially related to the number of years of service." (In re Marriage of Poppe, supra, 97 Cal.App.3d at p. 8; accord, In re Marriage of Judd, supra, 68 Cal.App.3d at pp. 522-523.) Marriage of Lehman (1998) 18 Cal.4th 169,

accounts.[2] Instead, the benefits payable to each participant at retirement are determined or "defined" by a formula that typically applies a percentage multiplier to two variables: the participant's final average compensation and length of service.[3] Each year as benefits are earned, it is up to the plan actuary to determine the amount that the employer must contribute to the plan in order to fund for this future liability, based upon the current value of the plan assets, anticipated earnings and a number of other assumptions about future events. Because DB plan benefits are earned independently of any of these funding decisions, apportionment as between contributing periods of employment can only be done based upon how the participant's service and compensation in each period interacts with the benefit formula. And therein lies the rub, to borrow from the Bard, since in most DB plans the benefits payable on account of any given period of employment usually are not limited to what was earned during that period.

Conceptually, the final benefit in a DB plan is typically the sum of pieces, a "basic" benefit and what we will call the "crossover" benefit. The basic benefit is that which is earned (or "accrued" in plan parlance) as of the end of a given period, solely as a result of the compensation and service provided during that period. The crossover benefit, on the other hand, is that which accrues when the credited service from one period is combined in the formula with the (higher) compensation factor earned during another. Regardless of whether this benefit accrues during the employment period that contributes the higher compensation factor, or during the period that provides the length of service factor, it is always going to the combined result of both contributions, and therefore cannot reasonably be said to derive exclusively from only one.

It stands to reason, therefore, that when apportioning a DB plan pension between periods of marital and non-marital service, the basic benefits should all go to the period that accrued them; and any crossover benefits, having been jointly produced by both periods in acting together, should be allocated based on the relative contribution of each to that accrual.[4]

Unfortunately, this is easier said than done, or would be were it not for the old time rule. This is because in order to determine the contribution of one period relative to another, logically one must in some fashion find a way of converting two disparate measurement units: compensation (the qualitative aspect of service) and length of service (its quantitative aspect). How does the traditional time rule accomplish this? Easy, it simply assumes away the problem by declaring all service to be qualitatively the same value as a benefit producer even though it clearly is not.

This can be demonstrated by a few examples.

Example 1. Suppose that Wendy's plan formula is a typical 2% x final average compensation x total credited service. Suppose also that she works for 10 years at a salary of $10,000 per month, after which she quits because of stress at age 50, and marries. At the urging of her new husband, Harry, Wendy decides to return to work for the same employer, although in much less demanding role, and with a commensurate cut in pay to $3,000 a month. She then works another 10 years with steady raises until she retires with a final average salary of $5,100. Wendy divorces Harry. Harry wants his share of Wendy's total retirement benefits, which under the formula are $2,040 per month (20 years x 2% x $5,100). He points to the numerous cases in which exactly this type of formula service was held to be a "substantial factor" in the production of the benefit, and demands that the community share be computed based on the time rule.

The court, of course, agrees; and since the marriage contributed exactly 10 of the 20 years that Wendy worked, awards the community exactly half of the total benefit, or $1,020 per month. So what's the problem?

The problem is that there are not enough benefits to go around. Here is why. By the end of year 10, before the community was even in existence, Wendy had already earned as her separate property a non-forfeitable contractual right to receive $2,000 per month (2% x 10 years x $10,000 per month) at retirement, regardless of whether she continued employment or not. Since Wendy created and therefore owns this "basic benefit" outright, she is entitled to it. In addition to this $2,000, she is entitled to some portion of the $40 benefit that was earned during her second 10 years while married to Harry. Harry, however is entitled to $1,020 under the time rule, such that the total "entitlement" between the two is over $3,000. But with only $2,040 available, Harry cannot get his "time rule share" without taking away about half of what Wendy took with her into the marriage. Of course, exactly the same problem would result were the married years to come in the first half of Wendy's service, except that then the community, rather than the separate property estate would be shorted.

The reason the old time rule fails us in this example is precisely because it uses only the duration of employment (i.e., time) to determine who contributed what, and ignores the fact that the quality of the service provided during the period of marriage (as measured by the compensation the employer was willing to pay for it) was so low that it was not until the year 20 that Wendy's additional service produced

2. Many governmental plans, such as CalPERS, offer an annuity component of the total benefit that is based solely on member contributions, and is thus account-based (and traceable) to that degree. The remainder of the benefit is determined based on the typical formula service, compensation and a negotiated multiplier that depends upon the member's classification. Although such plans are technically considered hybrid plans as defined in /414(k) of the Internal Revenue Code, the benefit has traditionally still been divided according to the time rule alone. Another type of defined benefit plan, commonly known as a "cash balance" plan, presents a special case. In such plans, a hypothetical contribution account is annuitized to determine or "define" the retirement benefit, rather than a more typical formula. As a result, even though the benefit is still formula-determined and independent of any actual plan contributions or investment growth, it usually can be traced reliably to a given period of service using standard account-based methods. For this reason, time rule is not ordinarily used for such plans.

3. Such a formula might define the benefit at retirement age as being equal to 2% x total credited service x final average compensation. There is, however, no limit on the number of different ways the benefit might be defined so long as the accrued benefit is definitely determinable at any given point in time, and for ERISA covered or tax qualified plans, the minimum accrual requirements are satisfied.

4 As the supreme court recently put it in Marriage of Lehman "[t]he fact that a nonemployee spouse who owns a community property interest in an employee spouse's retirement benefits owns a community property interest in the latter's retirement benefits as enhanced does not mean that the enhancement is a community asset in its entirety. But the question to what extent such an enhancement belongs to the community and separate estates is one of apportionment and not characterization."

the first dollar of additional benefit.[5] In fact, had it not been for Wendy s final average compensation of $5,100 being multiplied by all 20 years, the 10 year community service period would have produced NO benefit whatsoever. Thus, by ignoring the qualitative aspect of service in determining benefit derivation, the time rule in this case produced a result that was skewed in favor of the second 10 years by several thousand percent. Since Wendy s benefit is a monthly annuity amount, payable for life, this is not exactly a small potato error.

Example 2. Suppose that we change Example 1 by assuming that for the first 10 years Wendy was working at $5 per hour, 100 hours per month, earning annually $6,000, and one year of credited service. She then quits, departing with an accrued retirement benefit of $100 per month[6] payable beginning at age 65. Wendy promptly marries Harry, goes back to school to get her MBA, and is hired back by her old company with a salary of $10,000 per month. When Wendy retires as CEO 10 years later (with 20 total years of service), her final average salary is $30,000 per month, and her retirement has grown to $12,000 per month ($30,000 x 20 x 2%). In her divorce from Harry, the time rule was applied to give Wendy three fourths of this, or $9,000 per month (she had 10 separate property years, and half of the 10 community years, for a total of 15/20 or 75% of the service). Harry was awarded $3,000 as his time rule share (half of the $6,000 earned during years 11-20), effectively receiving nothing for the fact that due almost exclusive to Wendy s efforts during the marriage, her benefit from the first period of service was enhanced from $100 to $6,000 per month.

These examples demonstrate a fundamental principle that holds true for the apportionment of any qualified DB retirement plan in which benefits "derive" from a combination of credited service and compensation:

> All other things being equal, when the effect on benefit production of qualitative differences in service is ignored, the result in every case will be skewed in favor of the period of service earning the lower compensation. The greater the disparity, the more skewed the result.

Example 3. Consider one other example, similar to the last, but one in which the marriage occurred in the first period of employment. In this scenario, James worked for ABC company for 14 years while married to Ramona. When he left ABC, his salary was $30,000 per year and his accrued pension benefit was a life annuity of $137 per month, beginning at age 65.

A little more than 10 years later, James was rehired by ABC, but this time at a salary of $100,000 per year. He worked for 5 more years and then retired with a total of 19 years of service credit, and a lifetime pension of $2,500. Thus in the final five years of employment, he accrued more than $2,370 in additional monthly benefits. The time rule would award to the community on these facts 72.95%, or just over 13 times the benefit actually earned during the marriage. This award includes the basic benefit of $137, plus all of the jointly produced crossover benefit ($1,687). James, for his separate property effort that helped earn the $2,370 increase, was awarded only his basic benefit of $676.

Some of you may recognize this case as In re Marriage of Gowan (1997) 54 Cal.App.4th 80, in which the court did in fact find, citing a solecism from Marriage of Judd about all service having equal dignity[7], that $22,500 of a $30,000 dollar per year pension had been "earned" by the community,even though the total annual benefit accrued by that period of service alone was only a small fraction of this amount: $1,646.

How many of us read this case and asked ourselves how the court could reasonably have come to this conclusion? The answer of course, is that reason had nothing to do with it. Such results are inevitable artifacts of a rule that ignores a key factor in benefit determination.

(Continued next issue with a new time rule solution)

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5. Thus, in year 9 of the marriage, the benefit determined by multiplying Wendy s salary times the combined service of both periods of employment was still only $1,938 (2% x 19 years x $5,100). Interestingly enough, had W retired in year 19, the community would have been unable to pass even the threshold test of characterization (see In re Marriage of Lehman (1998) 18 Cal. 4th 169), since the marriage had accrued no rights under the plan whatsoever up to that point.

6. 2% x 10 x $500 = $100

7. "Finally, we consider the argument, made implicitly by James, that his later service years at high salaries contributed more to the value of his pension [54 Cal.App.4th 91] than his earlier years at lower salaries. Similar arguments in cases involving continuous employment have been repeatedly rejected by California courts. For example, in In re Marriage of Judd, the husband argued that because his annuity payments were based in part upon postmarital years of service, which would have a significantly greater dollar value than his years of service during the marriage, the community property award should not give equal weight to the different years of service. The Judd court, however, held that a husband and wife share the same qualitative interest in the retirement rights, and the fact that a plan reflects subsequent salary increases does not alter the community's interest in those rights. "[A]n employee's contributions in the early years of employment during the marriage, even though based on a smaller salary, may actually be worth more than contributions during the post-separation years, due to the longer period of accumulated interest and investment income prior to the commencement of benefit payments." (In re Marriage of Judd, supra, 68 Cal.App.3d at p. 523.) The court therefore gave the first service years (during the marriage) as much weight in computing total service as the last few years (after separation)." The obvious flaw in this reasoning is discussed below in footnote 10, below.

The Standard of value in divorce business valuations

by
Mark Kohn, J.D., cpa, cfe, cva, abv

There are different standards of value that can be used in valuing assets, and a review of certain appellate cases reflects that different standards apply to different assets. This article will explain the primary standards of value, and then discuss which standards are to be used in divorce cases.

Liquidation Value

This is the net amount that can be realized from the sale of a business if the business is terminated and the assets are sold piecemeal. Liquidation can be either "orderly" or "forced". This standard of value assumes that the business will no longer remain as a going concern.

Fair Market Value

This is the value of an asset when there is a willing buyer and a willing seller when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts. This standard also includes the concept that the asset can be sold. Therefore, if fair market value were the standard to use in the value of a law practice, and if law practices could not be sold, as was true in the past, then there could not be a value established for the value of the law practice. If it cannot be sold, there could not be a willing buyer and willing seller, and therefore, using this standard, there could not be a value. Another example would be minority discounts. If, for example, someone owned 20% of a business, and other people owned the other 80%, that person has what is called a minority interest in the business.

Using the standard of fair market value, and assuming that the business was worth ten million dollars, that 20% interest would be worth less than ten million dollars. That is because on the open market, willing buyers pay perhaps 15% of the total value for a 20% interest because they are subject to the control of the 80% owners.

Investment Value

This is the specific value of an asset to a particular investor based on individual investment requirements or the specific value of a particular business to another particular business or person. For example, Cingular recently acquired AT&T Wireless. They would probably have paid more for AT&T Wireless than Walmart would have paid, because Cingular could have integrated AT&T Wireless into their own business, in either a vertical or horizontal integration. This standard values the asset based on the economic value of the asset to its owner, regardless of whether or not the asset could be sold. Using this standard, a law practice could be valued even if it could not be sold, and it would be valued based on the income generated by the practice to the lawyer owner. Similarly, using this standard, there would not necessarily be any discount for a minority interest. One might value the 20% interest using the income stream that is earned by the 20% owner, and if he actually earns 20% of the total income, it is quite possible that his 20% interest is worth exactly 20% of the entire company.

California case law has tried to clarify which standard of value is to be used. A major principal was established by In Re Marriage of Hewitson (1983) 142 Cal. App.3d 874. That case rejected a fair market approach in that specific case because the methodology used was improper. In that case, an expert valued a business using data from publicly traded companies, and the court ruled that such a methodology was flawed because one cannot compare small closely-held companies with large publicly traded companies. Therefore, the court ruled that fair market value could not be determined – not that it should not be used – and therefore, to determine a "hypothetical market value," one should use the investment value standard of value. The court, to my understanding, was stating that fair market value should be used if possible, and if not, one should arrive at a hypothetical market value using an investment value methodology so that one effectively ends up with a fair market value equivalent.

The above principle was refined in the same year by In Re Marriage of Sharp (1983) 143 Cal. App.3d 714. That case rejected a standard of value which it described as "going concern" and ruled that the standard to be used in the valuation of a business was fair market value. Apparently, in that case, fair market value was determinable, and the court overturned the trial court s usage of a going concern standard. Note that a going concern assumption simply means that the business will not be liquidated, but it could apply to both a fair market value standard or an investment value standard, which is presumably why the court rejected it. There is no standard per se of going concern ; going concern is an attribute of other standards of values, and the lack of a going concern assumption is an attribute of the liquidation value standard.

The above concepts were then clarified further ten years later in the case of In Re Marriage of Cream (1993) 13 Cal. App.4th 81. The court rules that

> "In our view , the fair market value of a marketable asset in marital dissolution cases is the highest price on the date of valuation that w ould be agreed to by a seller, being willing to sell but under no obligation or urgent necessity to do so, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing. W e restrict the use of this definition to marketable assets because some marital assets are not marketable, but nonetheless may have to be valued."

This opinion is consistent with, and clarifies, the above two cases. The standard to be used in divorce cases is fair market value provided that the business is marketable. If the business is not marketable, then, per Hewitson, the standard of value is the investment value — which itself is intended to arrive at a hypothetical fair market value.

There are many consequences of the above understanding, which will be listed below as specific examples.

Law Practice

A law practice can be valued whether or not it could legally be sold, or whether or not there is a market for law practices. If there is a market, and there are good statistics, then it seems that the standard of value to be used is fair market value, and the marketplace should be the basis for the valuation. In many cases, the law practice may be unique, and therefore the value may be difficult to determine using marketplace statistics, and then investment value should be used. The use of investment value would require that one use excess earnings or some other methodology to determine the economic value of the law practice to the lawyer.

Minority Discounts

If the business is marketable, then fair market value is the standard of value, and therefore a discount should be applied to someone who owns a minority interest in that business. A 25% interest in a business would be w orth, as an example, perhaps 15% of the value of the entire business. If the business is not marketable, then it seems that investment value should be used, and therefore no discount should be made for a minority interest. Under the investment value standard, one values the investment to that specific owner, and if he or she has a 25% share of the profits, for example, then one could value his or her interest as being 25% of the value of the entire business. Therefore, the value of the minority interest may differ greatly depending on which standard of value is being used. In certain situations, just as one has a bifurcated hearing to determine the date of valuation, there might be a need to have a bifurcated hearing to determine the appropriate standard of valuation.

Synergy or Special Value

There are businesses that are worth a certain amount on the open market using the fair market value, but they would have a higher value to another buyer because that particular business would fit in very well with their own business, such as the above example of Cingular and AT&T Wireless. In a divorce situation, where the family business may have synergistic value to certain businesses, and that value would be greater than the value determined using fair market value, it seems that if the business is marketable, the standard to use is fair market value and therefore, the low er value should be used. This could be particularly complicated in situations where the divorce proceedings are taking place at the same time as business merger or acquisition talks are being explored. It may be that the business is worth ten million dollars using a fair market value standard while at the very same time that the divorce proceedings are moving along, someone is offering to buy the business for fifteen million dollars. This type of situation may also warrant a special hearing to determine which standard of value is appropriate. (Of course, it often makes sense for both parties to agree that the business simply be sold at the higher value.)

Unusual Sale Price

Another example where the standard of value may have relevance is where the controlling spouse sold the family business at the time of the divorce proceedings, and the sales price doesn t seem to make sense. It might seem to be below market value. If the out-spouse agreed to the sale, then there was a willing seller as both the in-spouse and out-spouse agreed to the sale price. How ever, if the out-spouse was left out of the negotiations, and did not agree to the sales price, then quite possibly the court would agree that fair market value should be used, and not the actual sales price. One would, therefore, not have to look for possible kick-back arrangements or other explanations for the abnormal sales price. One simply values the business as if it were not sold, using a fair market value standard (since the business was in actuality sold, it w ould have been a type of business that is marketable, and therefore the standard to use is fair market value).

In summary, the standard of value is a key issue in divorces that involve business valuations, and the resulting value of the business would depend on which standard is used. ■

Support: assembly bill AB19 oppose: sca1 and aca 3

by
lynette berg robe, J.D., CFLS and melvin j. ross, J.D., CFLS
los angeles

The following letter was sent to the Honorable Dave Jones of the state assembly judiciary committee, as well as copies to many legislators. The letter is printed here because it addresses important issues currently before the legislature.

March 21, 2005

The Honorable Dave Jones
Chair, Assembly Judiciary Committee
State Capitol, Room 3126
Sacramento, California 95814

RE: Assembly Bill 19 [Leno - Gender-Neutral Marriage]

SUPPORT-

SCA 1 - [Morrow- Amend the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California, whether contracted in this state or elsewhere]

OPPOSE -

ACA 3 - [Haynes-Amend the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California, whether contracted in this state or elsewhere]

OPPOSE -

Dear Assembly Member Jones:

On behalf of the Family Law Section of the Los Angeles County Bar Association and our nearly 1,100 Section members, representing the largest active practicing Family Law bar in California, we have been authorized and directed in this single letter to express to you our support of Assembly Bill 19 and our opposition to both SCA 1 and ACA 3.

In addition to forwarding this letter to all members of the Senate and Assembly Judiciary Committees (which includes Senator Bill Morrow, the author of SCA 1, Assembly Member Ray Haynes, the author of ACA 3, and Assembly Members John Laird and Sally Lieber, authors of AS 19), it is also being forwarded to all of the other authors of AB 19, Assembly Speaker Fabian Nuñez, Assembly Member Mark Leno, Assembly Member Jackie Goldberg and Assembly Member Paul Koretz.

With conviction, our members last year solidly supported Assembly Member Leno's efforts with Assembly Bill 1967, and this year we strongly return to proclaim not only our committed support of AB 19, but also our vigorous opposition to both SCA 1 and ACA 3.

We thank you for this additional opportunity to be heard.

We support the language and purpose behind AB 19 and trust that our California Legislature (despite the well-publicized deepening, and increasingly bitter, political divide) will not only find the politicized will to enact a meaningful gender-neutral bill this year, but will also send both SCA 1 and ACA 3 down to deserved ignominious defeat.

While the reasons underlying our support for AB 19 (and opposition to SCA 1 and ACA 3) are myriad (Constitutional; legal; political; psychological; societal), they really all boil down to just two: permitting gender-neutral marriage to be legal and fully recognized under law is the right and fair thing to do, and now is the time to do it here in California!

We believe that the State of California does and should stand for the principle of inclusion, not exclusion, and AB 19 is merely the latest in a long line of principled and progressive "the time has come" positions embraced by our state when displaying its most distinguished blush of enlightenment though the extension of "due process" and "equal treatment under the law" to all persons.

In our view, both SCA 1 and ACA3 represent an egregious impermissible backward tampering with our honored State Constitution.

continued on page 25(AB 19)

ACFLS SPRING S

Aliso Creek Inn • I

(Above) Commissioner Gale Hickman, Orange County, and Lyn Greenberg, Ph. D., lecture on obtaining and presenting psychological evidence in relocation cases.

(Below) Dynamic Duo: Dawn Gray, Nevada County, and Steve Wagner, Sacramento County, lecture on new Family Code §2640(c) and transmutations in estate planning documents.

Drafting Marital Agreements for Domestic Partner's: Diane Goodman, Los Angeles, and Garrett C. Daily, Alameda County.

Rapt Attention . . .

from Frieda Gordon and other attendees.

Camaraderie after classes.

(Above) Ro rent presi Monterey

(Right) Les Dawn Gr nar site.

Ron Granberg, Monterey County, says he's a well-prepared family law attorney, as he lends a handkerchief to Administrator Pat as her retirement is mentioned.

Sterling Myers, Los Angeles, and wife Joann.

(Below) Debra Frank relaxes in room at our meeting resort.

Roger and Sandra Keithly, San Diego.

EMINAR 2005
Laguna Beach

n Lachner, Los Angeles, cur-dent, and Ron Granberg, County, president elect.

lie Shear, Los Angeles, and ay enjoy the beautiful semi-

Ron Ziff, Los Angeles

Our new administrator Lynn Pfeifer

(Above) Our new Secretary-Elect Sandy Schweitzer, Butte County.

(Left) Leroy Humpel, San Francisco.

(Above) Dawn Gray, Nevada County, Sharon Bryan, Los Angeles, and Cecilia DeLury.

(Right) New Board member Sherry Graybehl, Orange County.

L to R: Dawn, Sandy, Jan and Mark Berry, Santa Clarita, and Mike Samuels, Marin County.

L to R: Joe Bell, Nevada County, and Diane and Tom Woodruff, Sacramento County, enjoy Friday night get-together.

L to R: Vince Jacobs, Sacramento County, and President Ron Lachner, Los Angeles.

new family code §2640(c): closing a loophole or creating a new right

by
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Before January 1, 2005, Family Code /2640 had existed in the same form since it was incorporated into the new Family Code on January 1, 1994. It came into the Family Code from Civil Code /4800.2 in the old Family Law Act. It was enacted in 1983 and effective on January 1, 1984 (Stats. 1983, ch. 342). Its incorporation into the Family Code did not change its language. However, effective January 1, 2005, the legislature enacted new Family Code /2640(c) in response to the Fourth District's decision in Marriage of Cross (2001) 94 Cal.App.4th 1143, 114 Cal.Rptr.2d 839. Does new /2640(c) close a loophole in the law, or create a new substantive right? The answer to this question will affect the way the court will apply the new subdivision to your cases.

In Cross, Husband and Wife lived in Wife's separate property house during their four-year marriage. At their dissolution trial, they stipulated that Husband had contributed $39,654 of his separate property funds to improve the property and also traded the services of his separate property business for another $40,000 in services to improve the property. Husband asked for reimbursement of these amounts under Family Code /2640, but the trial court held that the section did not apply because the property "acquired" was not a community asset. The Fourth District affirmed, holding that "(n)othing in section 2640 gives one spouse a right of reimbursement for separate property contributions made to the other

spouse's separate property. If the Legislature had intended to give a spouse [such] a right ..., the Legislature could have included language to achieve this intent. It did not. Hence, section 2640 is not applicable in this case, and husband's reliance upon it is misplaced."

The Legislature took up this invitation and on February 19, 2004, Sheila Kuehl introduced SB 1407 for the purpose of addressing the issue raised in Cross. As chaptered, the bill added new subsection (c), which provides that "(a) party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division." The enactment of this section raises several interesting issues.

The first issue which will arise is whether or not the new provision will be applied retroactively to contributions made prior to its effective date. When the legislature enacted the original version of CC /4800.2, litigation went on for years over its retroactive application; the legislature amended the section to specifically authorize retroactive application but the California Supreme Court ultimately held that it could not be applied to contributions made prior to its effective date, as such an application would constitute a deprivation of vested property rights without due process. See Marriage of Buol (1985) 39 Cal.3d 751, 218 Cal.Rptr.31; Marriage of Fabian (1986) 41 Cal.3d 440, 448, 449, 224 Cal.Rptr.338; Marriage of Heikes (1995) 10 Cal.4th 1211, 44 Cal.Rptr.2d 155.

Neither new /2640(c) itself nor any uncodified language in the enacting legislation indicate Legislative intent that it be applied retroactively. Under the constitutional analysis which was applied to former CC /4800.2, whether or not courts will do so depends on whether it alters vested property rights

or simply makes a procedural change. The June 15, 2004, Assembly Judiciary Committee s analysis of SB 1407 says that "(a)ccording to the author, this bill seeks to rectify the Marriage of Cross situation and close this hole in the area of reimbursements that has not been previously clearly addressed by either statute or case law." This language indicates that the subdivision creates new rights which had "not been previously addressed," which means that contributions of separate property by one spouse to the other s separate estate made prior to January 1, 2005, are not reimbursable under the new subsection, although they may have always been reimbursable under civil theories.

One of the differences between this type of contribution and those made with separate property to a community asset is whether or not there is an alternative to the Family Code for reimbursement. Prior to the enactment of former CC /4800.2, a spouse who contributed her separate property to the acquisition of a community asset had no right of reimbursement absent an understanding or agreement with the other spouse. See Marriage of Lucas (1980) 27 Cal.3d 808, 166 Cal.Rptr. 853. Such a spouse had no other recourse for obtaining reimbursement for the contributions. Absent such an agreement, the contributions were considered a gift, and because of the nature of community property, only half of the contribution enriched the other spouse. Also, the family law court was the only court with jurisdiction over community assets.

That is not true with regard to separate property contributions to the other s separate estate. A person who makes such contributions has long had remedies for reimbursement or other claims depending on the nature of the contribution, just as if he or she had contributed funds to the improvement of a stranger s property, intentionally or by accident. For example, one who improves the property of another under a mistaken belief that he is the owner of the property can obtain relief as a "good faith improver"; CCP / 871.1(a) defines a "good faith improver" as someone "who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land." One who acquires property in his name by using funds contributed by another for an intended joint acquisition holds the property as a resulting trustee; that was one of the arguments W ife made in Della Zoppa v. Della Zoppa (2001) 86 Cal.App.4th 1144, 103 Cal.Rptr.2d 901, in seeking an interest in property acquired in Husband s name prior to the parties marriage. Also, "(t)he Marvin court also held that, in the absence of an express agreement, the courts may look to a variety of remedies to protect the parties' expectations. Among those remedies, the court suggested that principles of constructive trust, resulting trust or quantum meruit might be employed by the courts." Friedman v. Friedman (1993) 20 Cal.App.4th 876, 883, 24 Cal.Rptr.2d 892. Then there is always an unjust enrichment claim; "(r)estitution is available to plaintiff when the defendant has been unjustly enriched through fraud, mistake or coercion." Hultin v. Taylor (1970) 6 Cal.App.3d 802, 806, 86 Cal. Rptr. 285. See also Grappo v. Coventry Financial Corp. (1991) 235 Cal.App.3d 496, 286 Cal.Rptr. 714.

Civil law has always provided remedies for one party who contributes more than the other to the acquisition of property held in both parties names as separate property; this is known as an "equitable compensatory adjustment." In Marriage of Leversee (1984) 156 Cal.App.3d 891, 203 Cal.Rptr. 481, the court noted the lack of jurisdiction over separate property and said that "(b)ecause the residence is true joint tenancy property and the court lacked jurisdiction to divide or affect the parties' interests in it, its disposition must be pursued in a separate partition action. (Code Civ. Proc., /872.010 et seq.) In the partition action the court may order an equitable compensatory adjustment to compensate Paula for her use of separate funds for the down payment on the residence."

The availability of these other remedies arguably makes it less compelling to apply new /2640(c) retroactively because a spouse who contributed separate funds to the other spouse s separate property under circumstances which would justify such a remedy is not left without recourse if it is not so applied. However, that difference may persuade a court to find that the enactment of /2640(c) was not so much a change in the law as simply the enactment of an alternate remedy, thus permitting retroactive application. CC /4800.2 was not applied retroactively even though the contributing spouse did not have any other such remedies prior to its enactment; this may have supported the courts conclusions in cases dealing with that issue that the right to reimbursement was vested prior to the effective date of /4800.2. In Cross, Husband argued only for reimbursement under /2640, which at the time did not apply. He did not seek another remedy, so that case does not stand for the proposition that he was without one.

In addition, arguably the legislature has already expressed its intent that the new section apply to "past events" in Family Code /4, which provides transitional rules from the old Family Law Act to the Family Code which replaced it effective January 1, 1994. Family Code /4(a)(1)(B) defines "new law" as including an "act that makes a change in this code, whether effectuated by amendment, addition, or repeal of a provision of this code." Per /4(c),

> "(s)ubject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action."

Family Code /4(a)(3) defines "operative date" for this purpose as "the operative date of the new law".

In Marriage of Fellows (2004) 121 Cal.App.4th 607, 615, 17 Cal.Rptr.3d 325, which was vacated on December 1, 2004, when the California Supreme Court granted review, the Third District held that

> "[Family Code] Section 4 provides

continued on page 19 (Code /2640)

legislative report

by
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Introduction

Despite the reports that the Legislature has been diverted from business by politics vis a vis the Governor, the legislative hopper of family law and related bills is overflowing, at least compared to the 2004 session. Last year we tracked about 40 new bills, of which 15 related to family and juvenile matters were chaptered.

This year, there might be 69 bills of interest to family and juvenile law practitioners, including a constitutional amendment and four other bills related to marriage itself. The topics include marriage, domestic and protective orders, child abuse and dependency, custody, parenting rights and children's rights, child support, property and attorney's fees. Only a few can be discussed here.

Many of the originally introduced bills have already been amended. More amendments are inevitable. It is therefore important to check on the current status of bills. Also, staff reports and statements in support or opposition which are linked to the Legislative web site can be helpful in understanding a bill.

All of the bills shown, along with their history and links to many documents created by the legislature in this process, are on the legislature's web site. Additionally, anyone can request e-mail notice of the continuing progress of any particular bill. Go to **www.leginfo.ca.gov.** Once there, it is reasonably easy to select a bill or bills for which you may have a particular interest (or opinion), to download the current and prior versions to disk, to flag those of most concern for e-mail notice, and to track the progress or lack thereof, as the session continues.

MARRIAGE AND MARITAL RIGHTS

AB 19 [Leno - Gender Neutral Marriage]

This bill would enact the Religious Freedom and Civil Marriage Protection Act, which would instead provide that marriage is a personal relation arising out of a civil contract between two persons. The bill would make conforming changes with regard to the consent to, and solemnization of, marriage, and would make related findings and declarations.

Interestingly, the bill contains eleven findings which set forth the history of the development of marital law in California. The actual language of the bill simply amends Family Code section 300 to replace the words defining marriage as between a man and a woman with the words two persons.

AB 1102 [Hancock - Marriage License Procedures]

This bill makes changes to 37 particular sections of the Family Code (within Sections 300-536), and 14 sections of the Health and Safety Code which regulate marriage procedures for the county clerk and notaries.

The bill would revise, recast and conform various provisions in those sections. Among other things the bill would prohibit the issuance of confidential marriage licenses based upon an inability of the parties to appear, and would make related changes with regard to notaries public and the state registrar. In issuing a duplicate marriage license or confidential marriage license, the bill would allow the county clerk to charge any fee to cover the actual costs of issuing that duplicate license, and would change the fee charged notaries public for approval to issue confidential marriage licenses to an unspecified amount. The State does not have to reimburse local cost.

AB 1236 [DeVore - Choice of Marriage Act of 2005 as amended]

This bill would reverse the no-fault divorce procedures now in effect in California, on specific terms and conditions. The bill contains numerous findings to the effect that no-fault divorce degrades the general welfare by, among other things, undermining marriage, harming children, making divorced men smoke more, drink more and have more unhealthy diets, causing various cultural neuroses, impoverishing women and children, and so forth.

The bill would also establish elective

procedures by which a couple may enter into a marital contract rejecting the right to a no fault divorce, except in certain circumstances. The bill would require couples seeking to enter into this type of marital contract to undergo specified marital counseling and education before entering into that contract, and also before divorcing.

The bill would require county clerks to develop and make available to the public, choice forms, as defined, in accordance with the act. The bill would also require a county clerk to file and keep completed choice forms within the county's permanent records and to establish a directory of marriage education or skills training providers within its office, as specified. By placing additional duties on local officials, the bill would impose a state-mandated local program.

SB 1031 [Hollingsworth - Dissolution Counseling, as amended]

This bill adds a new Family Code section 2330.2 to extend a new requirement where it appears to the court that there is a reasonable possibility of reconciliation, and the court decides to stay the proceedings for 30 days. Existing law makes reference to a rarely seen family conciliation court, which may be implemented by the superior court in each county, to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.

The new section proposed by this bill would require the parties to a proceeding for dissolution of marriage, if minor children are involved, to complete four hours of family education, either together or separately, during the 30-day period immediately following the filing of the petition for dissolution of marriage. The bill would allow the court to order the parties to attend education focused on the effects of divorce or separation on children.

ACA 3 - SCA 1 [Haynes/Morrow - Constitutional Amendment re: Marriage]

These identical bills would amend the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Moreover, the amendment would reverse and prevent all marital rights, responsibilities, benefits, and obligations from being conferred on any other union or partnership.

The proposed amendment is being opposed by various bar associations. The ACFLS Board of Directors voted unanimously to oppose the amendment on April 15, 2005.

DOMESTIC VIOLENCE AND PROTECTIVE ORDERS

AB 99 [Cohn - Expiration of Protective Orders as amended]

This bill would amend Family Code sections 6345 and 6361 regarding the expiration of personal conduct, stay-away, and residence exclusion orders. The amendment would reduce the duration of such orders from ten years to five years, and the renewal period would be changed from three to five years, or permanently, from the date the judgment is issued, after notice and a hearing.

AB 118 [Cohn - Protective Orders: Minor Children, as amended]

This bill would amend Family Code section 3100 to provide that where a criminal protective order has been issued any visitation order issued under the section shall make reference to the criminal order and limit the exposure of a minor child to domestic conflict or violence.

AB 429 [Chu - Service of Temporary Restraining Orders as amended]

This bill would amend various sections of the Code of Civil Procedure, the Family Code, and the Welfare and Institutions Code regarding the service of temporary restraining orders and protective orders.

In sum, the bill would require that a law enforcement officer serve such orders at the scene of reported unlawful violence or a credible threat of violence, whether or not the defendant has been taken into custody. Other provisions would require that a law enforcement officer determining that a protective order has been issued, but not served, shall immediately notify the defendant of the terms of the order and where the order may be obtained. The officer shall at that time also enforce the order.

SB 585 [Kehoe - Protective Orders, as amended]

This bill would amend Family Code section 6389 to revise the protective order form to allow the petitioner to identify weapons and their location that are subject to seizure. The respondent would be required to surrender or sell any such firearm within 24 hours and to notify the court of relinquishment or sale within 48 hours rather than within 72 hours. The court, with probable cause, would be authorized to issue a warrant for search and seizure of any firearm in the possession of the respondent. The court may grant use immunity for the act of relinquisting.

SB 720 [Kuehl - Protective Orders, Contempt, as amended]

This bill would amend Code of Civil Procedure section 1218, Family Code section 6380, and amend certain Penal Code sections. Specifically, this bill would authorize a district attorney or city attorney to imitate and pursue a court action for contempt against any party failing to comply with a Family Code order. Further, the bill would alter provisions regarding the transmission of protective orders to law enforcement personnel, and would require the District Attorney to notify a victim 30 days prior to the termination of certain protective orders, as specified. Finally the bill would provide that monetary fines on conviction of contempt would fund domestic violence shelters.

AB 978 [Runner - Restraining Orders: Stalking, as amended]

This bill would add new sections to the Code of Civil Procedure, the Family Code, the Penal Code and the Welfare and Institutions Code to create a requirement that the court restrain actions by the respondent to find the

confidential address or location of protected parties.

Specifically, the bill would require the court to order that the restrained party shall not take any action to obtain the address or location of a protected party, "unless there is good cause not to make that order."

CHILD ABUSE AND DEPENDENCY

AB 114 [Cohn - Child Abuse: Evidence, as amended]

This bill would amend section 1109 of the Evidence Code to provide that when a defendant is accused of child abuse in a criminal action, evidence of the defendant's prior acts of domestic violence may be admitted to prove the defendant's conduct, except as specified. This exception to the admissibility rules tracks the similar exception for acts of domestic violence. The bill is pending in the Assembly.

AB 253 [Aghazarian - Child Abuse, as amended]

This bill would amend Penal Code section 273a to create a new crime for use of a controlled substance in the presence of a minor child. Specifically, any parent, guardian, or caregiver of a minor child who knowingly and unlawfully consumes . . . or otherwise uses" certain controlled substances including cocaine, LSD, heroin, methamphetamines, in the presence of, or where such use is witnessed by a minor is punishable by imprisonment in the state prison for 16 months, or two, or three years.

AB 299 [Maze - Abuse Reports and Juvenile Case Files, as amended]

This bill would amend Penal Code section 11166 to allow child abuse mandated reports to be made by facsimile or electronic transmission. The bill has passed the Assembly.

AB 541 [Harman — Guardians, as amended]

This bill would amend section 3041.5 of the Family Code and sections 2341 and 2854 of the Probate Code related to drug testing and guardian registration. Specifically, the bill would authorize a court to require persons seeking custody or visitation in any guardianship proceeding under the Probate Code to undergo drug testing, in the same manner as presently permitted in Family Law proceedings. An exception to the registration requirements for nonrelated guardians would also be deleted.

CUSTODY, PARENTING RIGHTS AND CHILDREN S RIGHTS

SB 116 [Dutton - Child Abandonment, Newborns, as amended]

This bill would amend various sections of the Health and Safety, Penal and Welfare and Institutions Codes to extend indefinitely the provisions in law related to the voluntary surrender, without criminal liability, of a child, 72 hours old or younger, to a public or private hospital.

AB 265 [Haynes - Child Custody, Parents on Military Duty]

This bill adds new Family Code section 3047 which would prohibit a court from modifying an order granting custody of a child if a party who was granted custody of the child is a member of the California National Guard on active duty, unless the court determines that modifying the order is in the best interest of the child and the party has either died while on active duty or is no longer able to provide adequate care for the child. The bill is pending in the Assembly.

SB 302 [Scott - Adoption Procedures]

This bill would amend the Family Code presumptions and procedures for termination of parental rights, and in particular of the rights of presumed fathers under Family Code section 7611 et seq. Specifically, this bill would provide that the presumption of fatherhood may be rebutted by clear and convincing evidence that another man is the natural father. The bill would authorize a presumed father to waive his right to notice of adoption proceedings by executing a form so stating before a representative of a licensed adoption agency or private placement agency licensed by the State. In a stepparent adoption, the bill would authorize the consent of either or both parents to be signed in the presence of a notary public. The bill would also authorize an adoption agency to whom the child has been or is proposed to be relinquished or a person who intends to adopt the child to bring an action to determine paternity.

SB 359 [Ortiz - Supervised Visitation, Protective Order]

This bill would add new section 3100.5 to the Family Code, concerning visitation orders where the court has issued a protective order directed to a parent. Specifically, this bill would require the court to impose supervised visitation, despite any stipulation to the contrary by the parties or recommendations of the mediator, when the court has granted visitation to a parent, and has been made aware of evidence of risk to the child indicating that is necessary to protect the child from risk of harm due to physical or sexual abuse, neglect, substance abuse or domestic violence by a parent or member of the parent's household.

The bill would also prohibit unsupervised visitation for a parent convicted of felony abuse, except as specified. Further, the bill would require a court to find by a preponderance of the evidence that a biological or adoptive parent to whom the child is attached poses a risk to the child, as specified, before denying visitation or imposing supervised visitation on that parent.

AB 519 [Leno - Dependent Child Rights, as amended]

This bill would amend Welfare and Institutions Code sections 213.5 and 366.26 to create a new right for a dependent child who has not been adopted after the passage of at least three years from the termination of parental rights or is no longer adoptable, as specified, to petition the juvenile court for reinstatement of parental rights, according to specified procedures. The bill would also make technical changes to the ex parte orders provi-

sions for dependent children. The bill has passed the Assembly and is pending in the Senate.

SB 594 [Torlakson – Custody, Sex Offenders, as amended]

This bill would amend Family Code section 3030 and add section 3030.5 to expand the prohibition for a court to order custody or unsupervised visitation with a child to a registered sex offender. Specifically, the bill would also prohibit such orders for a person who either resides with a registered sex offender or who has been convicted of specified crimes against a child. The bill would also require modification of existing custody and visitation orders that are inconsistent with the amended provisions. The bill is pending hearing in the Senate.

CHILD SUPPORT

AB 498 [Haynes - Guidelines, National Guard Members]

This bill would add Family Code section 4059.5 to alter the child support guideline for parents who are on active duty as members of the National Guard. Specifically, such child support would be calculated on the basis of gross income from the National Guard for each month or part of a month that the parent is on active duty. The bill would make other procedural changes and would apply retroactively.

PROPERTY RIGHTS MISCELLANEOUS

AB 69 [Multiple Party Accounts, as amended]

This bill would amend Probate Code sections 5301, 5303, and 5401 regarding the ownership interests in a multiple party account, as defined. Specifically, the bill would provide that the proportional ownership interests in such accounts are not limited to the sums on deposit, and would make clarifying changes with regard to survivorship interests, and other changes affecting financial institutions.

AB 214 [Richman - Public Employees, Retirement Compensation]

This bill would add Government Code section 20037.1 to the Government Code, to redefine final compensation for any member of PERS who retires or dies after January 1, 2006. The new definition, in sum, would be the average compensation earned by the member during the final three years of employment, prior to the effective date.

SB 1088 [Bowen - Family Law Motions, Orders, as amended]

This bill would add section 218 to the Family Code regarding rules governing ex parte communications in Family Law proceedings. Specifically, the bill would require the Judicial Council to adopt a rule of court regarding such communications between mediators, evaluators, and the court, parties and attorneys. The rule would be required to be adopted by March 1, 2006.

CORRECTION

NB: For readers of the ACFLS Year End Legislative Wrap Up, in the Winter 2005 issue, we apologize for two inadvertent errors: The private child support collection bill, SB 339, was vetoed after the article was written. It is again before the Legislature in this session, as SB 896. Also, a provision in SB 1313 changing the reporting requirements for "sexual assault" was deleted in the last hearing before the final vote enacting the law [Penal Code 11165.3]. ■

Code §2640

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that amendments to the Family Code, including the one at issue here, are intended to apply to past events unless the amendment provides otherwise, or the case fits into one of the particular exceptions enumerated in the remainder of section 4. Because section 4 demonstrates the Legislature intended amendments to the Family Code shall apply retroactively, we conclude section 4502(c) applies retroactively to conduct that predated that section. In doing just this, the trial court did not err".

Arguably, in Family Code /4 the Legislature has already expressed its intent that /2640(c) apply to "past events" as the "new law." Regardless of the review granted in Fellows, a party may make this argument and a court may come to the same conclusion that the Third District did; unless and until the Supreme Court holds that Family Code /4 cannot be so interpreted, the argument that Family Code /4 applies to this amendment is certainly a viable one.

Another issue raised by the new subdivision is jurisdiction. Currently, the family court only has jurisdiction over jointly-owned separate property, which was conferred by Family Code /2650 to "close the loophole" mentioned in Leversee, supra. New /2640(c) includes no grant of jurisdiction to the family court over solely-owned separate property. If the court has no jurisdiction over such property, what effect will a reimbursement order under new /2640(c) have? Can the court even order reimbursement for contributions to the property if it has no jurisdiction over it? If so, can it order that property sold in order to provide reimbursement? If not, must a party file a separate civil action, consolidate the cases and ask for such an order?

Also, in Marriage of Walrath (1998) 17 Cal.4th 907, 923, 72 Cal.Rptr.2d 856, the California Supreme Court held that "the phrase the property in section 2640 ... includes not only the specific community property to which the separate property was originally contributed, but also any other community property that is subsequently acquired from the proceeds of the initial property, and to which the separate property contribution can be traced." The legislature is presumed aware of existing law and interpretations when it passes new

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Computerization and telecommuting for the solo and small firm lawyer

by
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John E. Harding is the principle of Harding & Associates, with offices in Pleasanton and San Francisco. He practices is in the areas of family law litigation and divorce mediation. He has been certified as a family law specialist by The State Bar of California Board of Legal Specialization. More importantly, he is a husband, father, youth sports coach, grandstand cheerleader, family chauffeur, back yard grilling expert, and dog washer.

If you are a lawyer reading this from your 25th-floor office within the opulent digs of your five-hundred lawyer law firm, this article is not for you. For the topics about which I write, you can turn to the in-house technology department, T-1 network connections, and an army of secretaries, paralegals, and associates. My suggestions would only get in your way. But, if you are a solo or small firm lawyer looking for hints to improve your use of technology and to get work done away from the office, read on. You just might learn a thing or two...

My wife and I decided to have kids. We wanted children. We wanted to be around them, watch them grow, share our lives with them. Our wishes were answered with the birth of our son, Jack, and two years later our daughter, Ryan. Before Jack was born, my wife and I created a plan whereby I would be a stay-at-home dad each Wednesday. Except for the occasional deposition, hearing, or trial, we have been able to realize that goal. The key to spending more time with my family, while still maintaining an active law practice, is telecommuting. This is a quality of life benefit. Woe was the day of getting up at four in the morning to drive off to the office and get started on work (or stay at the office late into the night) during those especially busy times. I enjoy being at home with my wife and children. Still, the work must get done. Fortunately, I am now comfortable with my telecommute. I can be away from the office, without totally sacrificing professional productivity. There was a learning curve. I have gotten through that, and now I am happy to share the tricks I have learned.

Mine is a busy family law practice. For the most part I do still spend the bulk of my lawyer time at my law office. Fortunately, my home office has evolved to the point that I can duplicate most tasks there. The keys to my success: computers, the Internet, great software, and an ability to tolerate the noise that two kids, one dog, and the surrounding neighborhood can generate. Here's how I do it.

First: The Telephone. Regardless of your type of practice, the telephone is an indispensable tool. A second phone line is a wonderful accessory for the home office. The convenience of being able to operate telephony software (i.e., fax software, Internet access, etc.), and still have a dedicated line for voice communication is quite a treat. Additionally, if your work-at-home time is to be shared with other members of the family, their use of the main phone line will not shut down your vital telephone link to the rest of the world.

Of course, there are also cellular phones. My cell phone allows me to make work calls while waiting in courthouse halls, while stuck in traffic, while walking the fairways of the AT&T Open at Pebble Beach. My particular cell phone is a PalmOne Treo, which is an integrated phone and personal digital assistant (now they are called "PDAs" or "smart phones", in the old days we use to call them palm pilots). All of my contact and calendar information is at my fingertips. My cell phone also includes modem technology so that I can use it to connect my laptop to the Internet (once I even used it to connect my laptop to the Internet while passing through Grand Junction, Colorado, from the comfort of an Amtrak train). Admittedly though, the quality of the connection on a cellular can be spotty at times. If I need crystal clear connections, a land line is essential.

Second: Computers. I am a big believer in buying as much computer power as possible. My remote computing involves running several applications simultaneously. The more muscle under my computer's hood, the faster and more reliable my telecommuting will be. That includes the laptop computer that I use at home. While laptops have not mirrored the drop in price and improvement in technology of desktops, laptop computers have come a long way. For about twice the price you can have the same capacity and function of a desktop, but without the bigger screen and keyboard. I have also set up a wireless network in my home. This technology allows the five computers that we have at home to share one Internet modem. It also allows me to carry my laptop around and work from anywhere within the house, rather than chaining me to one desk. If I want to work from the kitchen table so that I can keep an eye on the kids while they are playing in the yard, the wireless technology lets me do that.

Third: Remote Computing Software. My method of telecommunicating exploits remote access technology. My brand of choice is an online service called GoToMyPC.com (although there are alternatives, such as point to point phone line connection software like PCAnywhere). The GoToMyPC technology involves installation of a resident software program on each of the computers that I want to include in my personal remote computing network. Then all I have to do is log on to my member section within the GoToMyPC.com website (www.gotomypc.com) and access my computer of choice. The technology works wonderfully, and makes my office personal computer available to me wherever I can access the Internet. GoToMyPC includes a reliable security component to ensure that access is totally within my control, and no one else's. Once the connection is established, I am prompted for a sign-in name and password. Upon successful login, my home computer monitor literally displays the electronic screen for my office computer. I am running my office computer from my home computer! If I want to run the word processor on my office machine I simply open the program by moving and clicking the mouse on my home computer. If I want to run my billing program, same thing. Mouse, click, compute. The technology is fantastic. Everything that I can do on my office computer while seated at my office desk, I can also do on my office computer while I am seated at home. In fact, I am updating this article by running my office computer from my living room while watching football on TV. The full functionality of my telecomputing also includes printing. GoToMyPC includes a remote printing feature that allows me to print anything from my office computer to a printer at my remote location. This feature is a real bonus. More than once I have prepared and/or printed a pleading from my office computer to the printer at my home, before driving straight to court (and saving myself a trip to the office to pick up the paper).

I must confess though, I do enjoy one superfluous luxury when it comes to remote access. My Internet access at the office and at home is via broadband cable. That means cable modems at both ends, which translates into blazing data transfer rates, when compared to 56K telephone modems. When utilizing GoToMyPC through two cable modems, the transfer rate is meteoric compared to telephone modems. The cable modem offers another advantage: It frees up the telephone modem on my office computer. With that phone line available, I have installed fax software on the computer, and it now serves as my primary fax machine. Incoming faxes arrive right on my desk. No more walking back to the copy room to retrieve a fax. As an added bonus, I can preview incoming faxes on my computer screen, and then print the ones I want, or hit the delete key to get rid of the ones I don't want. This is a nice function, with a cost benefit now that telemarketers and junk mailers have discovered fax machines! Even at home, I can view the faxes received at the office – once again thanks to remote access technology.

Remote software also includes utilities for file sharing – another advantage for the telecommuter. Hard drives nowadays can run 40 gigabytes, 60 gigabytes, and more. For very little extra money I enjoy so much hard drive space that I can actually copy all of my word processing and case management files from my office computer to my home computer, with plenty of storage space to spare. Using the file compression technology of the remote control software, the exchange can be done in a manageable amount of time. This comes in handy when I don't, or won't, have access to a fast Internet connection. With file sharing, I can send all my word processing files to my laptop computer; work on those files in the word processor that is installed on my laptop; then save it for later transmission back to my office machine via the remote control software. As an alternative, my home and office computers have read-write CD-ROM drives. Copying all my word processing and case management files ("burning a CD" in "CD-ROM talk") onto a CD takes maybe ten, fifteen minutes. I take the CD home, write it onto the home machine and voila, full duplication.

Speaking of CD-ROMs, once again the remote software comes in handy. How many of you have subscriptions to CD-ROM-based products? For example, treatises, hornbooks, codes, or case law?

Not a problem for the telecommuting lawyer. Just leave the CD in your office machine and access it remotely via the remote control software.

Fourth: Case Management Software. Now I am sure most of you will agree that one of the essential skills required to maintain your sanity, and avoid malpractice suits, while practicing law, is organization. Again, software makes our lives easier. In particular, I am referring to case management software. There are myriad programs available, including Time Matters, Abacus, Gryphon, Practice Perfect, Case Master, Needles, and Trial De Novo. My brand is Amicus Attorney by Gavel & Gown software. I test drove several of the others, but went with Amicus Attorney for two very important reasons. First, its screens looked the neatest. (I'm not talking straight lines and clean edges here, I'm talking "wow, that's cool looking!") Second, even though it is a Windows program, it drives like it was created for the Macintosh. In other words, it is simple for un-savvy computer users like me to use.

Case management software has come a long way. Now single software products include contact managers (i.e., computerized Rolodexes), conflict of interest checkers, document archiving, calendars, call tracking and notations, time and billing functions, file summaries, file histories, and so on. I had always considered myself to be a fairly efficient practitioner. Case management software has made me even more efficient, and that includes my home life. Merging my work schedule with my personal schedule is now a piece of cake. No longer do my wife and I go back and forth with phone calls and post-it notes for family to-dos and activities. I simply power up the home computer, check my Amicus Attorney calendar, and fill in new family dates with my wife at home. Also gone are the days of maintaining stacks of legal pads filled with notes for the work that I do at home. When I am working from home, I have real time case management and billing records because I am recording all of my efforts into the case management software at the office. Another nice treat: my case management software transfers all my contact names and phone numbers, and calendar information to my PDA cell phone.

Fifth: Document Imaging Software. My practice will always maintain paper files. Now though my files are complimented by a paperless component. Every piece of paper that is received into the office is scanned and saved as an electronic file. Every document that we create is also saved electronically. A bit of extra time is added, but the benefits down the line more than offset the extra time up front.

In my office we utilize Visioneer scanners with automatic document sheet feeders. The Visioneer scanners come factory installed with Paperport software. This software runs the scanner and saves the scanned document in "pdf" format. This pdf format is the creation of Adobe Systems, and has become the industry standard for electronic document images, much like jpeg is for photographs. The pdf documents are, in turn, indexed as part of the particular matter's case file within our case management software. The beauty of this process is that every document in my practice is viewable by computer. For example, if I want to review my client's interrogatory answers I don't have to retrieve the physical file and turn to the document, I just click on the file on the computer, and poof, the document appears on my computer screen! The magic of document imaging really shines through when telecommuting. The entire file cabinet in my office is at my disposal at home.

Sixth: The Internet. Thanks to the Internet, my home office can be anywhere that I can find Internet access. I have already extolled certain of the virtues of the Internet while discussing GoToMyPC and cable modems. There's more. Frequently I find myself waiting in airports, or sitting in hotel rooms. With the internet and remote assess technology I can log onto the office computer and make productive use of this time (plus the blackjack software that I have on my laptop can make that $9 dollar airport burger just a bit more palatable.). There is still more that the World Wide Web has more to offer. The latest and greatest online phenomenon is ASPs, or "application service providers." Essentially, ASPs are remote computers hosting software that you pay to use. Rather than installing, say, a word processing program on your own computer, you access the program on the ASP's machines, and pay them for the time that you use. The ASP provides the software application and stores your work product created with the application. The thinking is that this method will (1) be more affordable, because you are not buying software programs and updates, and (2) more efficient, because you don't have to spend time administering the software, dealing with crashes, etc. Because the application is accessed over the Internet, it is available to you at the home, at the office, or at any other Internet access point.

I utilize Jurisearch.com as an ASP, and as the source for all my California codes and case law. My one account number allows me access the Jurisearch system from any Internet browser. Once online, I can then type in "jurisearch.com," plug in my user name and password, and research away. When I am working at the office or at home and I need to pull cases or statutes, or run some cite checks, Jurisearch.com is just a mouse click away. No longer do I need to lug a trunk load of law books home. Speaking of books, because of Jurisearch I no longer pay for expensive paper code and case subscriptions.

Bringing It Home So I Can Be At Home. I became a lawyer because I love the work. I work for myself in a small firm because it allows me greater flexibility than I could ever expect in a large firm. I didn't go to law school so that I could be a slave to my desk at the office. I became a lawyer to help people, do work that I find rewarding, and make enough money to buy a home and support my family. Computers and telecommuting help me to enjoy the more comfortable parts of life, and let me feel like I got just little bit more than I had originally hoped for (or perhaps allows me to suffer a little bit less). ■

more than the basics: what vocational evaluations can do for you

by
Betty Kohlenberg, M.S.[1]

Vocational evaluations in California family law cases accomplish two basic functions, but their influence on successful case conclusions can be much broader than envisioned in the Family Law Code sections that establish them as a useful part of resolving marital dissolutions. Vocational evaluations can make the attorney s job much easier, can reduce conflicts between the parties and can improve the emotional and financial health of the evaluated party.

A vocational evaluation client said it best:

> The work we did together was the first time I ever got to think about what I wanted to do. You really pushed me to go for what I wanted; our talks were the best part of the divorce. Thank you for your help and support.

The Two Basic Functions of Vocational Evaluations

The first outcome of a vocational evaluation is the determination of the evaluated party s wage earning capacity. The vocational evaluator concludes that a particular range of earnings reflects the best fit between the individual s traits - skills, abilities, aptitudes, physical and psychological capacities, interests and values – and the offerings available – jobs and their salaries – of the current local labor market for specified vocational alternatives. This earning capacity can be used instead of actual income for support determination, according to Family Code Section 4058 (b), for an imputation of income.

A number of Family Code sections indicate a second important intended outcome of a vocational evaluation: providing vocational planning when it is necessary. Section 4320(1) calls for the consideration of the possible need for retraining or education of the supported spouse. Section 4331(d) requires that the evaluator be expert in "interviewing, administering, and interpreting tests for analysis of marketable skills, formulating career goals and planning courses of training and study." The evaluator must have knowledge of education and training programs in the area with costs and time plans for these programs. The supporting spouse may be required to pay for the costs of such a plan.

In accord with these Code sections and standard counseling practice, a vocational plan

- outlines the steps needed to achieve a vocational goal,
- compares sources of training and specific programs, if needed, and
- includes costs, duration and identification of potential barriers to success.

The Family Code and Beyond: More Benefits of Vocational Evaluations

Bringing a vocational evaluator into the divorce case from either side can help the attorneys, especially in communicating with difficult clients. A vocational evaluation will help in each of these familiar examples.

- The husband whose wife hasn t worked in 20 years but who insists that she s able to earn well above the median wage in his county and wants you to make sure his support levels reflect his feelings. Are they realistic? The evaluator can tell you and him whether his assessment of her earning capacity is confirmed by the employers in the area. The answer isn t speculation, but is based on labor market research.

- The wife whose anxiety about her life is expressed in 20 calls each week to your office. Want her to calm down? Send her to talk about her prospects with a vocational counselor who will expect her to put some effort into jointly creating a vocational plan. Being active in deciding about her future will give her a clearer sense of who is controlling her life

- The mother who tells you, "I have to be at home when the children get home from school so they will be properly supervised. That was the arrangement we made when we got married and that s how I m raising our children. I can t work till they are 18." Will her children suffer if she works? Vocational counseling, a professional assessment of any special needs of the children in accord with Section 4320(2)(g), and some reality testing about finances will help this mother make her decision based on whether she can afford to stay at home and what her options are. Statements like these are often based on old feelings, current fears and the uncertainty of her future, rather than on immutable values. Let a counselor help her and you.

1. Ms. Betty Kohlenberg is the principle of Kohlenberg & Associates Vocational Counceling Services in San Francisco.

4320(2)(g), and some reality testing about finances will help this mother make her decision based on whether she can afford to stay at home and what her options are. Statements like these are often based on old feelings, current fears and the uncertainty of her future, rather than on immutable values. Let a counselor help her and you.

¥The spouse who says, "I m too depressed [or too sick, too old] to work. And there s nothing out there I can do anyway with my limitations." Is this health issue large enough to have an impact on earning capacity? The same illness may interfere with earnings at different levels for dissimilar jobs. Someone with mobility impairment may not be able to work as a plumber but could be a paralegal. A vocational evaluation can include an assessment of the impact of physical or mental health factors on earnings, and should address the issue if either spouse brings it into the support determination process.

¥The spouse whose earnings have never matched the educational background or who reports earning far less than in prior years. Is it the economy or is it willful suppression of income? You ll be able to explain it to your client and plan for appropriate support levels if you ask a vocational evaluator both to look at the economy of a job and an industry, and to assess the adequacy of the job search efforts, using Section 3558 to require "good faith attempts at job training and placement."

Standards for vocational evaluations now exist for your use in appraising the evaluations you see. A small group of Northern California vocational evaluators formed Bay Area Vocational Experts (BAVE) in 2003 and have written VOCATIONAL EVALUATION: STANDARDS of PRACTICE in California Family Law.[2]

The chart below is provided to give you an easy way to explain what will happen in a vocational evaluation to your client.

VOCATIONAL EVALUATION PROCESS for DETERMINATION of WAGE EARNING CAPACITY In California Family Law Cases

ACTIVITY	PURPOSE	RESULTS
DIAGNOSTIC INTERVIEW	¥Explain vocational process ¥Collect basic information ¥Diagnose vocational assets and deficits and motivational factors ¥Identify transferable skills	¥Diagnostic knowledge ¥Client involvement in evaluation process ¥Client assignments for self-assessment and information
VOCATIONAL TESTING	¥Obtain objective measurements of interests, skills, aptitudes, achievements and work values	¥Confirmed transferable skills ¥Potential vocational alternatives
IDENTIFICATION of VOCATIONAL OPTIONS	¥Interpret test results and consider client feedback ¥Consolidate subjective and objective findings to identify viable vocational options	¥Specific job titles for vocational exploration ¥Increased client self-awareness and self-confidence ¥Assignments for client research activites
LABOR MARKET RESEARCH	¥Explore job availability, current and potential wages, entry methods for selected jobs in appropriate geographic area	¥Current data used to determine wage earning capacity
WAGE EARNING CAPACITY ANALYSIS and REPORT	¥Summarize individual earning capacity, integrating client background and labor market conditions	¥Objective, verifiable expert opinion of wage earning capacity
VOCATIONAL RECOMMENDATIONS	¥Outline specific activities, resources, costs and timing to achieve vocational objective	¥Clear, concise individual plan to reach maximal employment

' Betty Kohlenberg, 2005 ESTIMATED TIME: 10-15 hours

2 Contact Betty Kohlenberg, Kohlenberg & Associates in San Francisco, at 415-665-6902 or w w w.bkohlenberg.com for a copy of the Vocational EVALUATION: STANDARD of PRACTICE.

AB 19 (continued from page 11)

Both SCA 1 and ACA 3, beyond being on the wrong side of history, are to be rejected unworthy and insupportable attempts to shamefully clamp intolerance, denial of due process, discrimination and unequal treatment under the law into our precious California Constitution.

In 1948, the California Supreme Court in Perez v. Sharp (1948) 32 Cal.2d 711 courageously and farsightedly led the nation in striking down our state s then existing (and now unthinkable) law banning interracial marriage.

In retrospect, it is discomforting in the extreme to note that California **Civil Code** Section 69 at that time actually provided that: All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.

It was not for another 19 years that California s vanguard position became the law of the land: in 1967, the United States Supreme Court, in Loving v. Virginia (1967) 388 U.S. 1 struck down all such repugnant state anti-miscegenation laws as violative of the equal protection clause of the United States Constitution.

Following in that same trailblazing leadership spirit, AB 19 once again extends to California the opportunity to lead the nation in doing the right thing in embracing tolerance and inclusiveness by affording due process and equal treatment under the law to all persons.

Just this month, in an historic decision, San Francisco Superior Court Judge Richard A. Kramer, in holding that California s ban on same-sex marriage is not rationally related to any legitimate state purpose and that it violates the Equal Protection Clause of California s Constitution, wrote:

> Simple put, same-sex marriage cannot be prohibited solely because California has always done so.

With AB 205 (effective January 1, 2005, amending **Family Code** Section 297.5, California Domestic Partner Rights and Responsibilities Act of 2003), our state legislature has rightfully extended to same-sex couples many of the state rights attached to marriage; however, no matter how good, AB 205 is not the same as marriage.

As Judge Kramer vividly further Constitutionally underscored in his ruling:

> The idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal. In Brown v. Board of Education of Topeka ... the Court recognized that the provision of separate but equal educational opportunities to racial minorities generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone. . . . This is a further indication that there is no rational basis for denying marriage to same-sex couples.

The Family Law Bar is particularly interested in the development of laws that ensure the safety and well-being of California s families and children.

With our unique view of the societal changes that have been taking place within our families, Family Law attorneys well understand that the typical family is no longer one mother, one father, and two or three children of the marriage.

Throughout California, in the largest cities to the smallest hamlet, thousands of single mothers and fathers (gay and straight) are raising children in one-parent families.

In Los Angeles County alone, close to 50% of all family law proceedings are paternity actions where the parents never married at all, as opposed to dissolution of marriage or legal separation proceedings.

There are thousands of blended families where parents are raising children together from previous marriages.

Thousands of grandparents are raising their grandchildren.

Add to that mix the approximately 70,000 children in California alone who are being raised by same-sex couples.

As a society, we owe it to all of these so-called non-traditionally raised children to ensure as best we can that the households in which they are raised are as stable as possible.

We ask that there be no further delay in having AB 19 heard by the Assembly Judiciary Committee and that the Committee take the lead in bringing the bill to a vote before the entire Assembly and in defeating both SCA 1 and ACA 3.

As Justice Louis Brandeis presciently heralded in his dissent in New York Ice Co. v. Liebmann (1932) 285 U.S. 262.311:

> It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social experiments without risk to the rest of the country . . . If we would guide by the light of reason we must let our minds be bold.

We trust that you will find these thoughts useful and constructive and we thank you for considering same and for registering our support of AB 19 and opposition to SCA 1 and ACA 3.

We genuinely look forward to cooperatively working with you in aid of our mutually desired goal of enlightened, effective, and fair Family Law legislation, and your consideration and interest in Family Law is sincerely appreciated. . . .

Thank You

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Code §2640

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laws. Therefore, arguably the court could order reimbursement from all downstream properties to which the original contribution can be traced — even if that property is the "enriched" spouse s solely-owned separate property. Does this give the court jurisdiction over both spouse s separate estates by implication? The answer to these questions is unclear, and nothing in the legislative history of /1407 addresses the issue.

Also, the amendment s language differs from its "community reimbursement" counterpart in /2640(b). In particular, it omits the phrase that reimbursement is mandatory "unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver". Instead, it says that reimbursement must be ordered "unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement."

Reimbursement of a separate property contribution to a community asset is mandatory even if the means by which the property became community is a transmutation; unless there is a clear and specific waiver of the /2640 reimbursement right, a purported transmutation of the reimbursable separate property "component" of a community asset remains reimbursable. Under the language of new subdivision (c), however, a separate property contribution to the other spouse s separate property is arguably effective as a waiver of reimbursement even if a writing does not specifically refer to the section but otherwise constitutes a valid transmutation of property. For example, a deed transferring property from one spouse s separate estate to the other spouse s separate estate would probably result in no reimbursement under this language, whereas such a deed transferring property into community property does not relinquish the separate property reimbursement right. This interpretation seems consistent with the way the sentence is phrased: that reimbursement shall be ordered "unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement." The words "the right to reimbursement" limit only the "written waiver" and not the "transmutation" language.

The only other possible interpretation of the transmutation language in /2640(c) is that the "transmutation" has to be of the specific amount or property subject to reimbursement, and not the entire asset. If a party wrote down that "I give Husband $20,000 of my separate funds as his separate property and intend to change its character," this would be a valid transmutation but not a waiver. If there was a comma in the sentence following "waiver," then "of the right to reimbursement" would limit both the "transmutation" and the "waiver" language. But there isn t, making it more arguable that the first interpretation is correct, absent some legislative clarification. In any event, the new subdivision is much less protective of the reimbursement right it creates than /2640(b) is. We will be watching for the appellate court s application of the amendment in upcoming cases. ■

Heidi Tuffias has been a Certified Family Law Specialist since 1995. She practices in Brentwood. Heidi enjoys all aspects of family law and intends to be a family lawyer for a long time.

Reflections on the Human Side of Family Law Practice

One Family Lawyer's Perspective on Judges

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The relationship between Judges and lawyers is certainly a bizarre and complicated world. If I described the lawyer/Judge relationship to someone from another planet or another time, it would sound a little like this

Relationship Rules

1. The Judge decides when and if the lawyer can speak.
2. The lawyer is supposed to only present things to the Judge which fall within the rules stated in a book called the California Evidence Code which uses phrases such as "the truth of the matter stated".
3. The Judge has the power to put the lawyer in jail.
4. The lawyer may or may not agree with the things that he or she is saying to the Judge but that will not affect what the lawyer says to the Judge.
5. The Judge expects to hear "many different truths" regarding any one set of circumstances.
6. The lawyer may only see the Judge from 8:30 a.m. to 12:00 p.m. or 1:30 p.m. to 4:30 when the Judge is also scheduled to see between forty and one hundred and twenty other people.
7. Nearly everything the lawyer and Judge say to each other will be available for review in perpetuity in the court reporter s transcript.
8. Judges and lawyers will not always say what they mean, for instance:
   a. If the lawyer says, "Your Honor, with all due respect " he or she means "Your Honor, you re wrong."
   b. If the lawyer says, "As you ve read in our papers " he or she means, "Clearly you have not read or not understood our papers."
   c. If the lawyer says, "I have an appointment this afternoon," he or she means, "I can t possibly spend the lunch hour listening to my client."
   d. If a Judge says, "Please, come to side bar .." he or she means, "I don t want to embarrass you in front of your client but . . ."
   e. If a Judge says, "I am going to take this matter under submission," he or she means, "I am a little afraid of what your client is going to do if I rule from the bench."
   f. If a Judge says, "Counsel, you have done an excellent job . . ." he or she means, "I am about to rule against you."

Judges. We love them, we hate them, we fear them, we gossip about them. We all have our own relationships and ideas about Judges. Our feelings towards them, often, relate to everything but them. Some of us use them to exorcise our issues with authority and power. Some of us have a love-hate relationship with Judges – we love them when they go our way; we hate them when they rule against us. Some of us attempt to please them, to be the Judge s Pet. We all try to outsmart them. Some of us are deferential to them. Some of us rebel against them. Some of us actually believe that they are just regular people.

Whatever we think of Judges, how we deal with them (in reality and the Judges that live within ourselves) makes a difference in our and our clients lives. I find it very difficult and artificial to communicate with Judges within the rules. I have spent my professional life learning. I think that the rules of evidence make no sense. We want our Judges to use their experience and wisdom to make good decisions. Shouldn t we trust them to decide what information is reliable without a litany of arcane rules designed to help a jury of lay people distinguish between the guilty and innocent? I would like to come into court (at a more decent hour than 8:30 a.m.) and sit around a table, with the Judge, counsel, the clients and cups of coffee and have a chance to explain my version of reality. A place where everyone is imperfect and scared, no one is bad or good. There is just a family with problems and a bunch of different ways to solve them.

You knew if you read this column long enough you would finally see a plug for ADR. Here it is. I cannot help it. I think that coffee and a round table where everyone sits at the same level (literally and figuratively) is the way to go. ■

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Patricia A. Parson, ACFLS Administrator ¥ 1884 Knox Street, Castro Valley, California 94546

Membership applications should be mailed to the ACFLS Administrator at the above address.
Please complete the following information and enclose your check payable to ACFLS as follows:
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