www.acfls.org

Spring 2016, No. 2

ACFLS

FAMILY LAW SPECIALIST

JOURNAL OF THE CALIFORNIA ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

ANOTHER WAY OF MAKING SAUSAGE……

THE CALIFORNIA LAW REVISION COMMISSION STUDIES AN EXCEPTION TO "MEDIATION CONFIDENTIALITY."

LYNETTE BERG ROBE, CFLS | IMMEDIATE PAST PRESIDENT | LOS ANGELES COUNTY

LYNETTE@LYNETTEBERGROBELAW.COM

It was Otto von Bismarck who gave us the descriptive quote, "Laws are Like Sausages. It's better not to see them being made." Bismarck was a master of the game of strategic diplomacy, and as Minister President of Prussia, achieved the unification of Germany in 1870. Another gem attributed to him is "Politics is the art of the possible."

One of the missions of ACFLS is to monitor California family law legislation and to comment in favor of, or in opposition to, bills as they pass through the judiciary committees of the Assembly and Senate, other committees, the legislative bodies themselves, and even when a bill reaches the Governor's desk. Currently, there is heightened interest in a proposal to create an exception to "mediation confidentiality," as set forth in the California Evidence Code, section 1119 *et seq.* A study is being made by the California Law Revision Commission ("CLRC") as to whether to create an exception to mediation confidentiality in response to the California Supreme Court case, *Cassel v. Superior Court*, 51 Cal. App. 4th 331 (2011). The CLRC process is different from the usual legislative process and is conducted in relative obscurity.

This article will explain the role of the CLRC and will address its study of mediation confidentiality. At their August 7, 2015 meeting, after two years of study, the CLRC voted to have its staff begin the process of preparing a draft of a tentative recommendation that would propose an exception to the mediation confidentiality statutes in the Evidence Code to address "attorney malpractice and other misconduct." So, it is probable that the CLRC will propose

WHAT'S INSIDE

THIS PAPER CONTAINS 30% POST-CONSUMER WASTE

ACFLS

FAMILY LAW SPECIALIST

SPRING 2016, NO. 2

JOURNAL OF THE CALIFORNIA ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

Family Law Specialist is a publication of the Association of Certified Family Law Specialists.

Send your submissions in Word by email to:
Debra S. Frank, CFLS
Journal Editor
Email: dfrank@debrafranklaw.com

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 Specialists;
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.

ACFLS EXECUTIVE DIRECTOR

For circulation, membership, administrative and event registration requests, contact:

Dee Rolewicz, ACFLS Executive Director
1500 W. El Camino Avenue, Suite 158
Sacramento, CA 95833-1945
(916) 217-4076 • Fax: (916) 930-6122
Email: executive.director@acfls.org

a statute to create an exception to mediation confidentiality, but exactly what the exception will be and what it will encompass has not been fully decided. The CLRC is now in the process of taking testimony and receiving information to formulate its tentative recommendation.

As those who follow California legislation are aware, the usual process for a bill to become law, the usual way to "make sausage," is for a member of the Assembly or the Senate to sponsor it and guide it through the Legislature. Members of the California Legislature may decide to sponsor a bill for many reasons. It may be a bill the legislator generated himself/herself to reform an area of law or to create a new statute to address an area he/she perceives is in need of clarity or regulation, or in reaction to a court decision. Sometimes, bills are proposed to the legislator by a constituent or a special interest group. Sometimes bills come out of the Conference of California Bar Associations, which has a process for vetting bills proposed by its members and, when approved by the Conference, their lobbyists seek sponsors in the Legislature. In the area of family law, both FLEXCOM (Family Law Executive Committee of the State Bar) and ACFLS have in recent years begun to sponsor affirmative legislation, instead of just supporting or opposing what comes down the proverbial pike. They too have to find a legislator to sponsor the bill.

Mediation Confidentiality and the California Law Revision Commission

The CLRC is another way by which bills are proposed. This way of making sausage tends to take longer, is more deliberative, and its proceedings are somewhat inconspicuous. The CLRC has time to go into depth to study issues and public policy. The CLRC is an independent state agency created by statute in 1953. It assists the Legislature and the Governor by examining California decisional and statutory law and making recommendations as to defects, anachronisms, or need for clarity and recommends legislation to make needed reforms. In some cases, the Commission decides that *no new legislation* is needed. When bills are proposed by the CLRC, they have a very high success rate of being enacted into law. **In fact, once the CLRC has made a final recommendation and proposes a statute, over 90% of its recommendations have been enacted into law.**

The Commission performs its work in a series of open public meetings scheduled throughout the year in various locations around the State. Decisions made at Commission meetings are recorded in the official minutes for each meeting, and both the minutes and staff memoranda are available online (*see* http://clrc.ca.gov). The Commission is a body of ten members, with seven members appointed by the Governor with the advice and consent of the Senate, plus one Senator, one Assembly Member, and the Legislative Counsel. The Commission is supported by a small professional staff. On the current CLRC staff is Chief Deputy Counsel Barbara S. Gaal, a Stanford School of Law graduate, who has worked extensively on the study of creating an exception to mediation confidentiality.

AB 2025 in 2012

In 2012, a proposed bill to create an exception to mediation confidentiality emerged from the Conference of California Bar Associations, and it became Assembly Bill 2025. The bill was a response to the California Supreme Court case *Cassel v. Superior Court*, 51 Cal. App. 4th 331 (2011). The California Supreme Court has a long history of upholding the concept of mediation confidentiality, and the *Cassel* case followed precedent. California is one of eighteen states that do not allow *any exception* to mediation confidentiality. Mediation confidentiality is codified in California Evidence Code section 1119, enacted in 1997, which expressly states:

> **No evidence of anything said or any admission made for the purpose of, in**

the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

In the *Cassel* case, the high court held that mediation confidentiality barred Mr. Cassel, the client of an attorney, from introducing mediation-related communications between him and his attorney in the client's malpractice lawsuit against the attorney. Some expressed outrage at that ruling, saying that it "legalized attorney malpractice." Assembly Bill 2025 was the result of that reaction. The bill tried to craft an exception to mediation confidentiality for an action of legal malpractice or breach of fiduciary duty, if the attorney's professional negligence or misconduct formed the basis of the client's allegations against the attorney. The language in the original bill, proposed to add section (b)(4) to Evidence Code section 1120, was a very specific response to the *Cassel* case. Section (b) states, "This chapter does not limit any of the following:"

(4) The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.

There was a swift and powerful opposition to the bill, citing the strong public policy reasons for maintaining mediation confidentiality as essential to the effectiveness of the mediation process. In the end, Assembly Bill 2025 morphed into a bill, which, by a concurrent resolution of both legislative bodies, directed the CLRC to analyze the issue and to make a report to the Legislature regarding an exception to mediation confidentiality. In July 2013, the CLRC entered into the fray and commenced its study as Study K-402, which states:

(a) Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:

(1) Evidence Code Sections 703.5, 958, and 1119 and predecessor provisions.

(2) California court rulings, including, but not limited to, *Cassel v. Superior Court* (2011) 51 Cal.4th 113*, Porter v. Wyner* (2010) 183 .4th 949, and *Wimsatt v. Superior Court* (2007) 152 .4th 137.

(3) The availability and propriety of contractual waivers.

(4) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.

(b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.

The CLRC Process

After the Commission has made a preliminary analysis on how to reform a particular law, it issues a tentative recommendation and then solicits public comment on the proposed reform. The public input on the tentative proposal may take place over a number of months. Typically, the Commission makes a final recommendation, which is delivered to the Legislature and the Governor and then published. The final recommendation includes an explanation of the proposed law, proposed language for a statute, and further comments on other code sections that may be affected by the new statute. Once the recommendation is delivered to the Legislature, it then must go through the same process as any other bill, with hearings, passing through both houses, and then going to the Governor's desk for signature, although, because of the CLRC's record of success, such a bill is likely to receive expedited treatment.

As to the exception to mediation confidentiality, the Commission completed the background work requested by the Legislature and, in the summer of 2015, started drafting a tentative recommendation for an exception to the mediation confidentiality statutes to address "attorney malpractice and other misconduct." Because the CLRC's studies are not greatly publicized, this decision by the CLRC to proceed to propose an exception to mediation confidentiality set off an alarm in the mediation community.

On August 7, 2015, the CLRC issued a number of decisions demonstrating what its tentative recommendation would encompass. Although these have been voted on, they are tentative and may continue to be subject to reconsideration. For example, in August 2015, the minutes showed that the Commission decided that the exception should apply to misconduct in a professional capacity both by an attorney or an "attorney-mediator" during a mediation. Apparently due to a wellspring of opposition, at its October meeting, several motions were made:

- The Commission minutes reflect that at the October meeting, Commissioner Victor King moved to reconsider the CLRC's August 7, 2016 entire decision to prepare a draft tentative recommendation for an exception to mediation confidentiality. His motion failed for lack of a second. Then, the CLRC did vote to reconsider its position that would have the exception apply to "alleged misconduct of an attorney or an attorney-mediator." It voted *not to have* the exception to mediation confidentiality extend to an attorney-mediator, but only to "alleged misconduct of an attorney acting as an advocate." The Commission also voted, however, to add language to the proposed statutory text to show that it did not intend to create "mediator immunity." That language is: "Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law."
- The Commission also reconsidered its August 7th position that the exception "should apply regardless of whether the alleged misconduct by an attorney occurred *during* a mediation or outside of it." In October the CLRC decided that the exception should only apply to evidence of alleged misconduct that occurred in "the context of a mediation." "During a mediation" includes misconduct that allegedly occurred at "any stage of the mediation process." This would include not only the face-to-face sessions, but a mediation brief, a mediation-related phone call, a mediation consultation, or other mediation-related activity. The key consideration is to be that the alleged misconduct occurred in a mediation "context," not the time and date of the alleged misconduct.

Also in October, Commissioner King moved for reconsideration of the Commission's August 7th decision that the exception should apply both in a State Bar disciplinary proceeding and in a legal malpractice case. He moved that the exception should <u>only apply</u> in a State Bar disciplinary proceeding. His motion failed for lack of a second. So, the exception to mediation confidentiality, if created, is crafted to apply to both California State Bar disciplinary proceedings and to legal malpractice proceedings.

Besides exempting attorney-mediators from the exception and having the allegations of misconduct "in a *professional capacity*" to be within "the context of a mediation," the following are other tentative decisions of the CLRC for its proposed tentative recommendation:

- The exception to mediation confidentiality *will not extend* to enforcement of a mediated settlement agreement or to a proceeding to rescind a mediated settlement agreement. The Commission deferred the decision as to whether the exception will apply to disputes as to attorney-client fee agreements.
- The exception should be applied even-handedly for both the defense of a claim of professional malfeasance as well as proof of the charge. In August, the Commission was unsure whether to allow the exception for "reporting" of a violation of a State Bar rule as well as to proving or disproving the violation. At the October meeting, it decided that the reference to "reporting" is not "necessary," without further elaboration. This could be confusing to an attorney who is accused of professional malfeasance as to when to notify his/her malpractice carrier.
- Any proposed statute should have a provision similar to Uniform Mediation Act section 6(d), which limits the disclosure to "only the portion of the communication necessary."
- Mediation confidentiality would apply *to all types of mediation evidence* and not just to a private attorney-client discussion, which appeared to be the issue in the *Cassel* case and to which the original bill, Assembly Bill 2025, limited the exception.
- Evidence Code section 703.5 should be left as it is, making the mediator "incompetent" to testify in any subsequent civil proceeding, but preserving the exceptions already stated in the statute, which includes that a mediator could be competent to testify as to a statement or conduct in a State Bar investigation.
- No sanctions will be imposed against anyone who invokes the exception to mediation confidentiality and then fails to prevail.
- The proposed exception to mediation confidentiality would be *prospective only*, applying to evidence from a mediation that commences after the exception becomes operative in the Evidence Code.

An idea that was introduced at the August meeting is continuing to be explored. That proposal is that once there is a *"claim" of attorney misconduct or malpractice* that occurred during a mediation, the evidence covered by mediation confidentiality as to the misconduct/malpractice would be reviewed by a judicial officer in an *in camera* proceeding before determining whether or not the exception to mediation confidentiality should be allowed and the evidence admitted. The CLRC staff released a memorandum on April 5, 2016, which will be discussed more below, exploring the option of the *in camera* process. It is unclear exactly what constitutes a "claim." Of course, the filing of a complaint in a civil suit for legal malpractice would be a "claim," but it is not clear how else a "claim" would be asserted.

December 10, 2015 Meeting

I attended the CLRC hearing in Los Angeles on December 10, 2015, as part of a large group of mediators who were in opposition to creating an exception, and I wrote a letter in opposition to creating any exception that was included in the staff memorandum. At that meeting, two new commissioners attended, replacing two whose terms were completed. Accordingly, those two new members will need to study the minutes from the prior meetings and all of the staff memoranda to be able to make an informed vote. Bear in mind as well that the CLRC is usually studying a half-dozen or so proposals at a time. It may be that there will be more changes in the composition of the Commission before the CLRC's final recommendation as to creating an exception to mediation confidentiality.

Numerous members of the mediation and collaborative law community were in attendance at the December 10th meeting to oppose any exception to mediation confidentiality, and there were a large number of letters in the record as well. Those who were present spoke very articulately as to the problems that they perceive will be created by any exception to mediation confidentiality. They believe it will chill the open and frank discussions that take place during mediation because of the assurance of privacy. The issue of the right to contract was also raised, that competent adults should be allowed to contract for the services they want, so long as the person understands the rights that may be waived. Opponents also raised the issue that if the exception is created, it may be that attorneys will decline to participate in mediation, so that many litigants who want to participate in mediation to resolve their case will not have the benefit of counsel. Concern was expressed that this could affect the voluntary settlement officer court programs, as attorneys would be reluctant for their clients to participate. Two people spoke in support of creating the exception, and their arguments reiterated the concern that mediation confidentiality may unjustly shield attorneys who are accused of misconduct or malpractice during mediation proceedings.

Many ideas were floated during the discussion, including having no exception for mediation confidentiality in family law cases and/or in collaborative family law cases. Because the process of collaborative family law is a form of mediation in which each party is represented by an attorney, concern was expressed that an exception to mediation confidentiality would severely impair the collaborative law process as well as deter attorneys from participating as consulting attorneys in mediation. The commissioners engaged with the speakers and asked many questions.

February 4, 2016 Meeting

There was another meeting held in Sacramento on February 4, 2016. There were two staff memoranda submitted to the CLRC, Memoranda 2016-8 and 2016-9, but no action was taken at that meeting.

Memorandum 2016-9 simply indicated that staff was going to do more intensive research into the aforementioned idea of the *in camera* proceedings in which the judge decides if an exception to mediation confidentiality should be made in a particular case.

Memoranda 2016-8 included a summary of a most important letter from Ron Kelly, who helped to draft the 1997 Evidence Code section 1119 that created the mediation privilege. Mr. Kelly made six suggestions in his letter as to how to implement procedures to protect mediation confidentiality.

Among Mr. Kelly's suggestions, two were about limiting any exception to confidentiality only as to communications and/or conduct between the client alleging misconduct and the lawyer defending against the claim, and not allowing anyone else to be subpoenaed or to turn over documents created for mediation.

Another idea is to create a standard for pre-mediation disclosure to ensure that parties fully understand they may be waiving malpractice claims, giving specific examples.

Of these recommendations, the idea of limiting the exception only to the client and his/her attorney will still chill the participation of attorneys in mediation and in collaborative law as well. The more constructive idea is to create standards for pre-mediation disclosure to participants. As long as there is informed consent, the parties fully understand the contract being entered into, they are not entering into the contract under duress or coercion, and the contract is not unconscionable, consenting adults should be allowed to enter into such contracts.

Critical Need for Data As to Complaints

Ron Kelly's letter also questioned the need for any exception to mediation confidentiality, since there have been relatively few cases in which attorney misconduct or malpractice during mediation has been asserted. He calls upon the CLRC to request that the State Bar provide anonymized statistical information or a way to search through the State Bar's data on complaints against lawyers for misconduct during mediation. Over the past five years, Kelly reported that there have been **73,717** complaints against California lawyers for misconduct or malfeasance made to the State Bar. He reported that the Office of the Chief Trial Counsel made an informal email poll in 2014 to State Bar investigators and prosecutors about complaints against attorneys in mediation. That inquiry yielded only four or five cases that identified a problem involving the current mediation confidentiality protections. That is **less than 1%** of all State Bar complaints for attorney misconduct within the context of a mediation!

Kelly searched for the keyword "mediation" in all published State Bar Court appellate level decisions from November 2010 through May 2015. His search did not yield any cases alleging misconduct by lawyers in mediation.

To date, there are three published cases involving attorney misconduct or malfeasance within the context of a mediation. None of the three involves family law mediation or collaborative law. At the December 10, 2016 hearing, there was discussion about exempting family law mediation and collaborative law from the mediation confidentiality exception.

There is a significant question as to whether an exception to mediation confidentiality, that may deprive litigants who want to engage in mediation or in collaborative law of having attorneys to represent them, is truly needed. Ron Kelly states that there have been hundreds of thousands and probably millions of Californians over the past thirty years who have received the benefits of being involved in a less costly and more predictable process of mediation versus only a few cases where clients involved in mediation have sought discipline for their attorneys for misconduct by the State Bar or to sue them for malpractice.

April 14, 2016 and Future Hearings

As of this writing, there are five more CLRC hearings scheduled in 2016: April 14, 2016 (Sacramento), May 26, 2016 (Sacramento), July 22, 2106 (Los Angeles), September 22, 2016 (Davis), and December 1, 2016 (Los Angeles).

On April 5, 2016, the CLRC staff released an extensive memorandum concerning the proposed *in camera* proceedings in which a judicial officer would consider the allegations as to evidence covered by mediation confidentiality and decide as to whether or not to allow an exception for it to be admitted into evidence. There are many questions concerning this idea that must be answered, including the cost to the courts and burden on the judicial officers of such *in camera* proceedings, and whether it would apply in all cases whenever a person alleging misconduct/malpractice would invoke the exception.

In Memorandum 2016-18, the CLRC staff recognized the purpose behind mediation confidentiality and its importance to the mediation process. It stated that there is "broad consensus that confidentiality is essential to effective mediation." It set forth the basic tenets of mediation that are served by mediation confidentiality:

(1) Confidentiality promotes candor in mediation.

(2) Candid discussions lead to successful mediation.

(3) Successful mediation encourages future use of mediation to resolve disputes.

(4) The use of mediation to resolve disputes is beneficial to society.

In considering the use of the *in camera* review by a judicial officer to protect this confidentiality, while at the same time, allowing the litigant an opportunity to seek to use evidence from a mediation to prove his/her claims, the staff goes into extensive discussion of the substantial body of case law concerning the First Amendment rights of citizens to observe their courts in action and obtain access to judicial records. It recognizes that in adjudicating an allegation of mediation misconduct by an attorney, "a court almost certainly will confront a *panoply* of issues relating to use of mediation evidence." Among the issues identified would be the necessity of filing a redacted complaint for attorney malpractice as to allegations regarding the mediation context until the court decides on the admissibility of evidence covered by mediation confidentiality.

After some eighty pages, the staff does not reach a conclusion but cautions the CLRC to "**think hard about whether to continue in this direction, and, if so how to proceed.** The staff is eager for its guidance." The Memorandum also states: "Stakeholders and other persons interested in this study could provide valuable assistance by **reviewing this memorandum carefully, focusing on the substantive issues raised in it, and offering specific insights, comments, suggestions, and other concrete information pertaining to those matters**."

At this juncture, the CLRC is still receiving comments. There is no proposed statute as yet, only the various minutes of the meetings and some tentative provisions for proposed legislation. As the CLRC must first issue a complete tentative recommendation, and then have more hearings to receive comments, before issuing its final recommendation with a proposed statute, it does not appear likely that a bill will emerge this year. The more likely scenario is that the CLRC's Final Recommendation will come out in late summer or fall of 2016 and any proposed legislation will be introduced in 2017.

The legislation to create an exception to the hallowed concept of mediation confidentiality is not sausage yet. Those who are concerned about the impact of any exception to mediation confidentiality on family law mediation and collaborative family law still have an opportunity to provide their comments to the CLRC either in the form of a letter or by appearing at a hearing. Because of publication realities, by the time this article appears, July 22, 2016 in Los Angeles will be the next meeting. **(**http://clrc.ca.gov**)**.

There is still an opportunity to shape the CLRC's proposal before it becomes a bill. It will be more difficult to influence it once it becomes a bill because of CLRC's history of success in gaining passage of its proposals. The purpose of this article is to inform ACLFS members as to the CLRC process and the significance of Study K-402 making an exception to mediation confidentiality. After becoming informed, the public is invited to weigh in on these issues.

There is a lot more grinding to do before this sausage is formed!*

---

*On April 7, 2016, the CLRC staff sent out Memorandum 2016-19 for the April 14, 2016 hearing, which included a letter from the California Judge's Association in opposition to creating an exception to mediation confidentiality. It can be accessed at http://clrc.ca.gov.

Lynette Berg Robe is the Immediate Past President of ACFLS and past Chair of the Los Angeles County Bar Family Law Section. In 2013, she received the award for LACBA Outstanding Section Leader. She served on the board of AFCC California and was a member of FLEXCOM. She has received the AV Preeminent rating by Martindale Hubbell.

PRESIDENT'S MESSAGE

Jill L. Barr, CFLS | ACFLS President | Sacramento County | jill@hemmerbarrlaw.com

We just concluded a very successful Spring Seminar in Rancho Mirage. I am grateful to all of the individuals who assisted in making this past seminar the best one yet. It is not easy to put on an event of this size. Our staff, Dee Rolewicz and Rachelle Santiago, work tirelessly to ensure that the attendees have an enjoyable experience.

The Spring Seminar Committee (comprised of members of the ACFLS Board) spend hundreds of volunteer hours planning and implementing the Spring Seminar. The co-chairs this year, Diane Wasznicky and Seth Kramer, provided excellent leadership. Thanks are due not only to the Spring Seminar Committee, but also to the entire Board. Many Board members missed parts of our program so that attendees could enjoy the experience.

As always, our moderator, Garrett Dailey, and the judicial responder panel of Thomas Trent Lewis, Dianna Gould-Saltman, Mark Millard, and Alice Vilardi added tremendously to the presentations.

We are now working on next year's seminar, under the leadership of co-chairs Karen Freitas and Patricia Rigdon. Every year it becomes a little more challenging to top the prior year, but I believe that we can do it. I am sure the 2017 program will prove to be excellent. Please calendar the dates and plan on attending the 25th Annual Spring Seminar on March 24th-26th.

We are now offering streaming of our CLE programs in our library. Please visit our website (www.acfls.org) and browse our cutting edge CLE programs. Thank you to Sterling Myers for overseeing this improvement to our library.

For those of you attending the state bar convention in the fall in San Diego, ACFLS will be hosting a reception on Saturday, October 1, 2016. We look forward to connecting with members and other family law colleagues at the reception.

As many of you know, many of our colleagues recently passed the exam to become Certified Family Law Specialists. If you know someone who passed the test, please encourage them to join ACFLS!

Jill L. Barr has practiced family law for nearly thirty years. She has served on the ACFLS Board since 2011. Ms. Barr has served on many family law related committees in her career, including the California State Bar Family Law Section for nine years, including Chair of the committee in 2008-2009. She practices in Sacramento County as a partner in the firm Hemmer & Barr LLP.

EDITOR'S COLUMN

Debra S. Frank, CFLS | ACFLS Journal Editor | Los Angeles County | dfrank@debrafranklaw.com

During the last few months, the debate on *Davis* has continued. Sen. John M. W. Moorlach, 37th Senate District introduced legislation on February 18, 2016, SB 1255, to amend the California Family Code to allow a couple to be considered "living separate and apart" while still living under the same roof for purposes of establishing a date of separation as a precursor of divorce. It was referred to the Judiciary Committee on March 3, 2016. The new statutory language specifically states that it is the intent of the Legislature in enacting this section to abrogate the decisions in *In re Marriage of Davis*, 189 Cal. Rptr. 3d 835 (2015) and *In re Marriage of Norviel,* 126 Cal. Rptr. 2d 148 (2002).

SB 1255 defines "date of separation" to mean the date that a complete and final break in the marital relationship has occurred as evidenced by both of the following: the spouse has expressed his or her intent to end the marriage to the other spouse and the conduct of the spouse is consistent with his or her intent to end the marriage. In determining the date of separation, the court shall take into consideration all relevant evidence. As amended May 5 and passed May 9, 2016 by the Senate, the bill's provisions will apply to all cases filed on or after January 1, 2017. ACFLS has participated extensively in the stakeholders' meetings and supports this bill.

As Jill Barr states in her column, this year's co-chairs Diane Wasznicky and Seth Kramer are due our thanks for their leadership and another excellent Spring Seminar. Thanks to the Spring Seminar committee (comprised of members of the ACFLS Board) who spent hundreds of volunteer hours planning and implementing the Spring Seminar.

In our lead article, Lynette Berg Robe examines the California Law Revision Commission's (CLRC) current study to create an exception for mediation confidentiality for attorney malpractice and other misconduct. She summarizes the issues and concerns that are being raised at the CLRC. Since many of our members are involved in consensual dispute resolution through the mediation process, the ACFLS Board distributed via email the article prior to publication in the Family Law Specialist. Many negative consequences of the exception are being discussed, including the view that the exception will have a chilling effect on mediation, as well as possibly increasing malpractice premiums. The California Judge's Association, the professional association representing the interests of the judiciary of the State of California, wrote the CLRC:

> [I]t is the confidentiality of the mediation process that, in large part, allows it to be successful in the settlement of cases as the comfort of candor, by counsel, disputing parties and the mediator is a major component of that process and its success. [¶] Private mediation also plays a significant part in controlling the trial case load of the Superior Courts of our state. It lessens the burdens of the terribly underfunded civil trial courtrooms, civil trial judges and staff by resolving cases with no economic cost to the court or the justice system. … [The members of CJA] believe that dynamic will substantially change for the worse if mediation confidentiality is abrogated.

Again and again we are reminded that the practice of family law requires knowledge from many different areas of law and other disciplines. The quote currently on the ACFLS home page by David G. Sills, former Presiding Justice of the Court of Appeal in the Fourth Appellate District of California, eloquently sums it up: "Family lawyers do not get the respect they deserve. In terms of the potential breadth and complexity of issues which they face, family practitioners work in one of the most, and perhaps the most, exacting and demanding areas of concentration in the law."

The articles in this issue of the Specialist are representative of the breadth of knowledge required by the practice of

Debra S. Frank is past Chair of the Family Law Sections of the Beverly Hills and Los Angeles County Bar Associations. She served on the Board of Legal Specialization, Family Law Advisory Commission and on Flexcom. Rated AV Preeminent by Martindale Hubbell, Ms. Frank was named by Super Lawyers magazine as one of the top attorneys in Southern California for 2009-2015, and received the Spirit of CEB Award, October 2012, for generous contributions to the Continuing Education of the Bar California and service to the profession.

family law. Jason M. Schwartz, CFLS and Drew Hunt, CPA, WZWLH discuss the factors that should be included in a defensible reasonable compensation analysis. Kevin Koloff, Esq. and Warren Shiell, CFLS, provide us with an overview of how to identify music-related intellectual property and royalty issues in divorce. And Louise Nixon, Esq. summarizes the basics of QDROs and highlights specific significant issues that family law practitioners regularly raise with her and need to know.

In this edition of the Specialist, John Hodson describes the newly created non-profit ACFLS Charitable Foundation, Inc., encouraging us to contribute. The Foundation will make "monetary grants to persons and/or entities who are working to enhance access to justice, to provide family law-related education, and/or to improve the California family law process for affected persons, families, or groups in need, and to carry on other charitable activities associated with these goals as determined by the Board of Directors and allowed by law."

Dawn Gray's (Nevada) article, "Hot off the Press," includes the holdings of the most significant recent cases—the complete summaries can be found on the ACFLS website.

As seen in this edition's listing, the chapter programs cover varied and interesting topics, and if you are lucky enough to live/work close by, I hope you take advantage of those programs. If you practice in more remote areas or underserved counties, I hope that you will consider the Outreach Committee's call for volunteers to join the committee and to be a part of the leadership team that presents continuing education programs in your county.

The views and opinions expressed in our journal are those of the authors and do not necessarily reflect the views and opinions of ACFLS.

UPCOMING CHAPTER PROGRAMS

Bay Area

June 14, 2016

Brian Boone, CFA, CVA, CPA-ABV, M.B.A. and Brigeda Bank, CFLS

Phantom Income from Pass Through Entities– How to Identify It and How to Treat It in Determining Support

Orange County

2016 Speakers Series "Complex Family Law Trial Issues"

The experts will demonstrate "how to put into practice" legal principles.

June 13, 2016

Judge Lon Hurwitz and Christopher Melcher, CFLS

Part Two - "Simple Answers To Complex Tax Issues in Practice and At Trial"

September 19, 2016

Drew Hunt, CPA and William Scott Mowrey, Jr., CPA

Part Three - "Advanced Support Calculations and Property Division"

November 14, 2016

Judge Michael Naughton (Ret.), Philip Seastrom, Robert Watts, CPA

Part Four – "Understanding Complex Property and Tracing Issues, Business Valuations"

Sacramento Chapter:

May 24, 2016

Cecilia Tsang, Esq.

The Effect of Marital Status and the Characterization of Property on Post-Death Transfers

August 23, 2016

Christopher C. Melcher CFLS

Bias - The Enemy of Persuasion

September 27, 2016

Mike Jonsson, Esq.

Screening for Power Imbalances and Danger in Our Cases

October 25, 2016

Jerry White, Esq.

Bankruptcy and Family Law Crossover Issues

UNDERSTANDING AND WINNING REASONABLE COMPENSATION ISSUES

JASON SCHWARTZ, CFLS | ACFLS MEMBERSHIP & BENEFITS DIRECTOR | ORANGE COUNTY
JSCHWARTZ@STEGMEIERANDGELBART.COM

DREW HUNT, CPA | WHITE, ZUCKERMAN, WARSAVSKY, LUNA & HUNT | DHUNT@WZWLH.COM

You Need to Know! The practice of family law arguably requires more skill sets of the family law practitioner than any other area of specialty. Business valuation is replete with an unusual combination of technical and subjective analyses proffered by the expert. Rightfully so, business valuation is viewed as part science and part art. To be a successful practitioner, you need to be mindful and conversant in the issues. Although it is natural to simply rely upon your expert on a "need to know basis," that will invariably result in missed issues, failed discovery, and a tortured courtroom experience. When it comes to smaller business appraisals, perhaps the issue most affecting the valuation opinion, particularly in professional practices, is the determination of reasonable compensation applicable to the business owner(s).

Where Do Reasonable Compensation Issues Arise in Family Law Matters? The application of reasonable compensation crosses over various areas and is not limited solely to business valuation. In an equitable apportionment argument, a *Van Camp* analysis requires the determination of reasonable compensation during the marriage. That application is carried forward after separation when a *Van Camp* analysis is applied in reverse.[1] Finally, reasonable compensation can be an issue during the post-separation and post-judgment management and control of a community property business interest.

The Reasonable Compensation Dilemma! In reality, the biggest problem in making a determination of reasonable compensation is assessing a rational apportionment of available profits of the company before reasonable compensation, between a return on investment to the owner and compensation that is payable for the market value of services rendered by that owner. This is an issue largely ignored by experts and attorneys alike. While distributions by a company to the owner generally reflect a "return on investment" to the owners, wage compensation to the owner (and discretionary expenses paid on behalf of the owner) is in exchange of services provided to that entity by the owner. Exacerbating the difficulty of the analysis is that the analysis is made as a hypothetical analysis as if the owner and the company were acting at arms' length to one another. In most family law cases that is not the case. In fact, in the majority of family law cases, the parties typically own all, or the vast majority, of the business interest. This concept is further addressed later in this article.

Jason M. Schwartz is a Partner in the law firm Stegmeier, Gelbart, Schwartz & Benavente, LLP, in Newport Beach. He is a member of the ACFLS Board of Directors and serves on the ACFLS Family Law Specialist Editorial Board, the Membership Benefits Committee, the Legislative Advisory Committee and is the Membership & Benefits Director of ACFLS.

Mr. Hunt is a partner with the accounting firm of White, Zuckerman, Warsavsky, Luna & Hunt. He is a CPA and ASA in business valuation with the American Society of Appraisers and holds an MBA in finance and accounting. He has testified in family law matters throughout the state. He regularly lectures to various Bar Associations and family law groups. He is a member of A Better Divorce, an interdisciplinary group of professionals, who are committed to the collaborative divorce process.

So, What is Reasonable Compensation? In closely held entities, owners control their own amount and form of compensation. Personal agendas and the company's ability to pay compensation are overriding factors in the amount of compensation paid rather than the market value of the services performed by the owners. As a result, "reported" business earnings are usually not reflective of true or "economic" profits.[2] According to Dr. Shannon Pratt (a widely respected authority on business valuation issues), "the compensation adjustment is to substitute for the compensation actually paid the cost of hiring a non-owner outsider to perform the same function…for performing similar services." [3] This principle is also well ensconced in California family law. Family Code section 4058 (a)(2) states, in pertinent part, that income from a business is determined after consideration of "... expenditures *required* [italics added] for the operation of the business." This language is a mirror image of Treasury Regulation § 162(a)(1),[4] which addresses reasonable compensation issues. As such, compensation that is paid merely based upon the self-interest of the owner is not necessarily reflective of a "required" expenditure of the business. If owner compensation is too low or too high relative to what would be paid in the labor marketplace for similar services, then the business income will not reflect an arms'-length depiction of the entity's income.

Business owners' behavior is dictated by outside factors. As such, a reasonable compensation adjustment is made to reflect the "Principle of Substitution." The Principle of Substitution in economic and appraisal theory stands for the notion that a rational or prudent person would pay no more for an item than the cost of acquiring an equally desirable substitute good or service available in the marketplace. That concept is similarly viewed by the IRS, and U.S. Treasury Regulations look at the appropriateness of the paid owner compensation from a tax viewpoint. Treasury Regulation § 1.162-7(b) sets the baseline and states that "the compensation paid [to the owner] may not exceed what is reasonable under all the circumstances. It is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for *like services by like enterprises under like circumstances* [italics added]."

The inclusion of the phrase "under all the circumstances" infers that reasonable compensation analysis is a fact-based endeavor. That is, to truly understand whether compensation paid to an owner of a business is "reasonable" requires gathering substantial information from a variety of sources. Even after gathering all of the available information and a detailed understanding of the owner's job duties and responsibilities, it may be difficult, if not impossible, to arrive at a definitive "point estimate" of that compensation in any given period. This is an area requiring a significant amount of subjectivity and available data to narrow the opinion, which may be less than optimal. According to the IRS publication *IRS Job Aid for IRS Valuation Professionals, October 29, 2014*,[5] "[w]hat amount constitutes Reasonable Compensation might best be viewed as a range because of the interpretive nature of the issue." Although family law practitioners working with any of the issues noted above will ultimately require a "point estimate," it is helpful to understand that reasonable compensation may be measured by a range of values. As such, understanding those factors that are relevant in establishing the potential range and supporting the conclusion of value is important in prevailing on the issue in settlement discussions or at trial.

Different Facts, Different Motivations! Not surprisingly, owners are often motivated by tax considerations when considering the amount and form of compensation they choose to pay themselves. These motivations are often diametrically opposed to positions taken by the IRS on reasonable compensation issues. On the one hand, regular corporations (often referred to as "C" corporations) are tax-paying entities. In C corporations, the income that is retained after owner's compensation and business expenses are taxed at corporate rates. In order to distribute those retained profits in the future, they are typically paid as dividends and subject to a second tax at the shareholder level. Therefore, it is not unusual for owners of C corporations to be motivated to minimize corporate income through the payment of owner wages (or payment of discretionary personal expenses) that eliminates corporate income and avoids the double taxation issue. On the other hand, owners of Subchapter S corporations,[6] may have an opposite motivation to the shareholders of C corporations. In S corporations, owners are motivated to minimize "wage compensation" in order to reduce business payroll contributions paid for FICA, Medicare, and Affordable Care Act taxes.

How Important is the Issue in Your Case? The extent to which a client's resources are dedicated to this issue depends, in part, upon how important the issue is to the overall valuation conclusion or how important reasonable compensation is to the attendant family law issue at hand. Obviously, if reasonable compensation represents the single largest influencer of value, as it often may, particularly in smaller professional practice valuations, it may be appropriate to consider the retention of a reasonable compensation expert to evaluate the issues rather than have your forensic accountant complete the analysis. However, if this is just one of many issues at hand, reliance upon your forensic accountant and available industry data, may be appropriate and cost effective.

However, whether the issue is relevant may also depend upon an often-overlooked principle. When considering a reasonable compensation adjustment, it must first be determined if the parties in the matter retain a controlling interest in the company being valued. If they have the ability to change the owner compensation, then it is appropriate to consider such adjustments. If they do not have such power, the issue is likely moot. Very often such distinction of control is blurred by other factors and the analysis is necessary and part of a larger legal issue.[7]

Authoritative Guidance to the Reasonable Compensation Issues Is Out There! Family law and tax court cases provide authoritative guidance that is often not utilized as often as it can or should be. There are a few key principles to be mindful of in the body of case law and tax court rulings.

What is the "Standard of Value" as to Owner's(s') Wages? Perhaps the seminal case on the issue is *In re Marriage of Garrity & Bishton*, 226 Cal. Rptr. 485, 490 (1986). In *Bishton*, the court established the value of the company by adjusting owner's compensation to the "salary of the average salaried person." As it pertains to reasonable compensation, *In re Marriage of Rosen*, 130 Cal. Rptr. 2d 1 (2002) and *In re Marriage of Iredale & Cates*, 16 Cal. Rptr. 3d 505 (2004), established a "standard of value" other than the "average salaried person." In particular, as it relates to professional practices, *Iredale* addressed a further definition to adjust owner's compensation. In *Iredale*, the court reiterated the findings in *Marriage of Rosen*, 130 Cal. Rptr. 2d 1(2002), that the "average salaried person" standard was not the only basis from which a compensation adjustment may be made. In *Iredale*, the court further developed the notion of a "similarly situated professional" standard that relied upon comparative compensation, not as quantified by an "averaged salaried" worker, but based upon metrics measured by a similarly skilled person, in a similar industry, in a proximate geographic location, exerting similar efforts. This newly defined standard would relate particularly to professional practices (medical, legal, architecture, financial advisors, accounting, etc.). In general, the "peer group" which forms the comparative data should be one of non-owner professionals[8] who are comparable in terms of all factors excluding ownership. However, many experts may still use comparative compensation data from owner-practitioners in making a final determination of reasonable compensation. The basis of that reliance and the assumptions made in such reliance, if any, should be explored.

Mining Data! As with any technical analysis, finding relevant data is a challenge. In *Marriage of Ackerman,* 52 Cal. Rptr. 3d 744 (2006), the appellate court noted that "[a] lthough not binding, professional compensation surveys may be used by experts and trial courts as guidelines for determining reasonable compensation of a practitioner's peers. To be relevant, however, the surveys must account for similarly-situated professional practices and practitioners." The appellate court in *Ackerman* also did not exclude the use of "private surveys."

However, caution must be used as to whether such privately prepared surveys are statistically accurate, replicable, and supportable. Since the trial court is the "gatekeeper" of evidence[9] and may easily keep out such surveys, use of private surveys should be used with caution and by no means in isolation. Since market compensation surveys are essentially a "market approach" in determining reasonable compensation, care must also be taken to demonstrate that the market compensation information is truly comparable and meaningful under the circumstances. In *Marriage of Rosen*, 130 Cal. Rptr. 2d 1 (2002), the court specifically cautioned experts on the use of surveys that provided little value to the issues before the court and that were not supported by a detailed understanding of the job description, duties, hours, and tasks of the owner in question. Therefore, it is important to understand the fundamental issues pertaining to the determination of the compensation. For a further understanding and discussion on the admissibility and use of market surveys and whether surveys in general are dispositive, see *B&D Foundations v. Commissioner,* T.C.M., 2001-262.

What Factors Supplement the Market Surveys? What the precedent cases discussed above make clear is that the fundamental issues surrounding the compensation issue are the true drivers of a reasonable compensation conclusion. In further development of these factors, in the *B&D Foundations* case, the tax court established a multiple-factor test to develop a basis for determination of a supportable reasonable compensation opinion. The factors that should be developed and considered include:

1. The employee/owner's qualifications. In this regard, job experience, education, and training;
2. The nature, extent, and scope of the employee's/owner's work. In this regard, consideration to the type of work, the number of hours/efforts exerted, responsibilities, and complexity of the positions;
3. The size and complexity of the business. In this regard, if all things are equal, there is an assumption that reasonable compensation will be higher in larger businesses[10] that are more complex;
4. A comparison of salaries paid as measured against various levels of business income. In this regard, this may measure if there is an adequate rate of return on investment available to the owners after payment of the concluded reasonable compensation (more on this in the next section);
5. The prevailing economic conditions. In this regard, considerations include the state of the economy (robust or depressed, for example), and its impact on the performance of the company, as well as reflecting the true performance of the employee/owner and the determination of compensation;
6. A summary and comparison of the salary paid to the owner and the distributions (as applicable) paid to the owner by the company. In this regard, this will also address whether the company is generating an adequate return on investment to its owners after payment of the owner salary;
7. A comparison of salaries paid to others in the marketplace. In this regard, this would include use of private and public surveys, market information, and a range of potential compensation;
8. The salary of the employee/owner as compared to compensation paid to all other employees. In this regard, this may address the reasonableness of the owner compensation vis-à-vis the compensation and contributions of key non-owner employees;
9. Compensation paid to the employee/owner in the years in questions relative to compensation paid in prior years. In this regard, this may test the reasonableness of the compensation based upon known changes in compensation vis-à-vis historical payments and performance.

In *Elliotts, Inc. v. Commissioner*, 716 F.2d 1241, 1243 (9th Cir. 1983), additional guidance is offered to family law practitioners as this case provides a further understanding of the fundamental issues driving reasonable compensation conclusions. Those factors and sub-factors as relevant to family law are as follows:

1. The hours worked;
2. Duties performed;
3. Compensation paid by similar companies for similar services;

4. The size and complexity of the company;
5. Whether payments to the owner are internally consistent with compensation paid to non-owners given consideration to the other factors.

As to the last factor, the IRS specifically looks at this metric. In its *Job Aid for IRS Valuation Professionals*, the IRS notes that "subordinates" comparative pay for the "second in command" where compensation is independently set is typically about "50% to 80% of the CEO's total compensation." The IRS notes that if the compensation ratio of the subordinates is materially lower than this, "an issue may exist on the CEO's compensation." This "acid" test might be viewed in each family law case as a starting point for a test of reasonableness of any compensation conclusions.

The Missing Link! In *Exacto Spring Corp. v. Commissioner*, 196 F.3d 833, 834 (7th Cir. 1999), perhaps the most overlooked factor is addressed. This is one of the most important cases as to reasonable compensation as it established an objective test for the appropriateness of the reasonable compensation conclusion. In *Exacto*, the court held that although having a multiple-prong or factor test is, in and of itself, not inappropriate, such analysis is too vague, subject to bias, and is still too narrow as it ignores the imposition of an adequate rate of return to the shareholders or owners based upon the compensation paid to the company's owner. So, the court in *Exacto* imposed an "independent investor test."

The independent investor test is viewed as a simple and dispositive test that may limit reasonable compensation to an amount that results in an adequate return on investment to the investors/owners of the company. Such an analysis allows for higher reasonable compensation in case of superior financial performance and may limit reasonable compensation when the company or professional practice is a poor financial performer. The omission of this analysis in family law cases seems to be a common flaw where conclusions often result in no, or negative, adjusted business income of the company, with no further support or explanation. The required rate of return to the shareholders may be measured by profits, a return on revenue, return on assets, or a return on owner's equity. The former measure of returns is of particular importance in the determination of reasonable compensation in professional practices since professional practices are not generally capital intensive.

Conclusion

A defensible reasonable compensation analysis will address all of the relevant factors as noted herein. It is de rigueur that such analysis includes a detailed interview of the owner and relevant officers of the business. The attorney should consider special interrogatories, request for admissions, and depositions, as needed, to insure that the expert has appropriate information to evaluate compensation in light of the owner's role and the operations of the business. The expert and the attorney must use a broad base of information, including market and industry compensation data/surveys and detailed internal business compensation data. Making a determination as to the appropriate measure of compensation ("average salaried worker" or "similarly situated professional") must be assessed as neither is precluded from presentation to the trier-of-fact.

At the end of the day, the conclusion as to the reasonable compensation data must be reconciled and supported by the resulting return on investment then inuring to the shareholder/owners after the payment of the reasonable compensation under an "independent investor test." If the return on investment to the owners is unusually low or high vis-à-vis industry information, the expert needs to be in a position to defend their opinion. Like valuation assignments, the analysis of reasonable compensation involves a substantial amount of analysis and subjective determinations. When this issue is material to the issues in your case, preparation is the only pathway to successful resolution.

---

1 *See, e.g., In re Marriage of Imperato*,119 Cal. Rptr. 590 (1975)
2 Economic profits here refer to reported revenue less the necessary costs to generate those revenues.
3 Shannon P. Pratt, VALUING SMALL BUSINESSES AND PROFESSIONAL PRACTICES 59 (1986).
4 § 162(a)(1) states, in pertinent part, that the taxpayer may deduct "all the ordinary and necessary expenses paid or incurred during the taxable years in carrying on any trade or business."
5 This publication is noted to be non-authoritative.
6 Subchapter S elections allow corporations to pass corporate income, losses, deductions, and credits to their shareholders for federal tax purposes.
7 Such as a continued need in a *Van Camp* analysis.
8 In *Marriage of Rosen*, the California Society of Certified Public Accountants amicus brief explained that reasonable compensation can be measured by "the cost of hiring a *nonowner* outsider…" (italics added).
9 *Sargon Enterprises, Inc. v. USC*, 55 Cal. 4th 747 (2012).
10 Size can be measured in terms of revenue, assets, employees, etc.

FACING THE MUSIC IN DIVORCE

Kevin Koloff | Law Offices of Kevin Koloff | kkoloff@kevinkoloff.com
Warren Shiell, CFLS | Law Offices of Warren Shiell | wshiell@la-familylaw.com

This article provides the family law practitioner with a basic overview of how to identify music-related intellectual property and royalty issues in divorce. Unlike business or pension valuation and division, there is little case law on how music rights and income should be characterized, valued, and divided in a divorce. It would be routine to hire a forensic accountant to value a community business, but too often family lawyers resort to poorly drafted agreements that split music royalties. A music lawyer faced with an agreement that read, "All marital royalties shall be equally divided between the spouses" would immediately ask questions like, "Which royalties are we talking about"; "What about the ownership and administration of copyrights?"; "What about possible future interests such as copyright reversions?"; and "What do we do with income that is attributable to some copyrights created during the marriage and some that were not?" Some of these issues are unique to music and usually not familiar to non-music lawyers. Faced with similar questions, even the Court of Appeal's discussion started, "Preliminarily, we undertake a brief odyssey into the somewhat arcane domain of copyright law."[1]

In order to characterize the community's interest in music catalogs and to identify income available for support, it is important to understand the numerous ways in which musicians earn income and acquire contractual and intellectual property rights in their music.

First, while music copyright holders grant licenses or assignments of their copyright in music in exchange for royalties, ownership of the music copyright should be viewed as distinct from the right to receive royalties. Royalties usually flow from publishing and other contractual agreements, which will be discussed below. The Copyright Act protects musical works when a musical work is "fixed" in a tangible medium of expression, e.g. when a composition is reduced to a written score or recorded in a studio onto tape or hard drive.[2] Rights under copyright are not conditioned on the filing of a copyright registration with the U.S Copyright Office, although such registration is necessary to sue for copyright infringement and obtain attorney fees. *In Re Marriage of Worth*[3] established that copyright should be treated as a community property asset subject to equal division in a marital dissolution. In that case, husband and wife agreed to split *royalties* in the divorce decree but failed to address the *underlying copyright.* The court rejected husband's argument that only he should be entitled to proceeds from a copyright infringement suit because the decree only dealt with royalties. The court held that copyright was a divisible community asset and since the interlocutory decree failed to dispose of such assets, husband and wife remained co-owners of an undivided interest in the copyright.[4] A settlement that only deals with the division of royalties is omitting an important community asset. The

Kevin Koloff has over 30 years of experience representing clients in all aspects of the music, film and television industries, including 12 years as Senior Vice President of Music Business Affairs at Paramount Pictures (where he put together complex music deals for movies such as Forrest Gump, Save The Last Dance, Runaway Bride and the all-time soundtrack champion, Titanic). Mr. Koloff represents major film and TV production companies (including Netflix and Lucasfilm), record labels and stage productions, as well as all kinds of talent in the entertainment industry (composers, screenwriters, actors, recording artists, directors, etc.)

Warren Shiell has practiced law since 1988. He has experience in family, corporate finance and copyright law and has also worked in the television industry. He has been admitted to practice in California, New York and the United Kingdom. He is a Certified Family Law Specialist and practices exclusively family law in Century City. He has sat on the Los Angeles Bar Family Law Executive Committee. He was the author of "Viral Online Copyright Infringement In The United States And The United Kingdom" for Entertainment Law Review.

issue is even further complicated by rights of termination which give the writer of a song the ability to terminate a grant of copyright thirty-five years after the initial grant was made.

Second, because a musician usually receives royalties and other income in exchange for granting licenses and assignments of their copyright, it is important to have a basic understanding of the different types of copyright because they generate different income streams. The two main distinctions are between the copyright in *recordings* (sometimes referred to in the industry as "masters," short for "master recordings"), and in *compositions*. The word "song" is sometimes used to refer to a composition that includes lyrics; however, be careful in using terminology, because colloquially, the word "song" is often used to refer to a recording (as in, "I really don't like that new Justin Bieber song").

The term "composition" refers to the music and words themselves, as opposed to the recording of the composition. For example, when Pearl Jam recorded Lennon and McCartney's Beatles classic, "You've Got To Hide Your Love Away," there were two copyrights involved: the copyright in the composition (owned by the music publisher, Sony ATV Music), and the copyright in the master, or recording (owned by Pearl Jam's record label). They are very different kinds of copyrights. Copyrights in songs have existed in this country since the ratification of the Constitution, whereas copyrights in recordings only came into being in the Copyright Act of 1976.

1. Income from *compositions* falls mostly into one of these five categories:
    a. Money paid for services rendered, as when a composer is paid to write a movie score, or a songwriter is paid to write a song.
    b. Performance royalties, for the public performance of music over the radio, television, Internet, or in live concert venues or clubs.
    c. Fees paid for the use of songs in movies, TV, and other productions, or in advertising (typically called "synch" fees).
    d. Royalties paid for sales of sheet music.
    e. Mechanical royalties, which are the royalties paid by the distributor of recordings in the physical (e.g., CDs), digital (e.g., iTunes) or streaming (e.g., Spotify) realms, to the publisher of the music (the publisher is the owner or administrator of the copyright in the composition).

In all but one of the above cases, the publisher collects the money, and pays the writer her/his share (typically 50% of net sums). The exception is public performance monies (item b. above), which are typically collected by Performing Rights Organizations (PRO's) such as ASCAP and BMI in this country, which pay one-half of the royalties to the publisher and the other half directly to the writer.

2. Income from *recordings* falls mostly into one of *these* four categories:
    a. Money paid for services rendered, as when a singer is paid to perform the lead vocal on a recording.
    b. There are limited performance royalties payable in respect of master recordings. In the U.S., no performances over radio or TV generate royalties, but on the Internet, performances generate royalties when the recording is streamed.
    c. Sales royalties paid by the distributor of recordings in the physical, digital, and streaming realms. Unlike mechanical royalties, described in 1.e. above, these are payable to the owner of the *recording* (typically a record label), which in turn distributes some of the royalties to the artist and producer of the recording. These royalties are computed *very* differently from mechanical royalties.
    d. Fees payable for using the recording in audio-visual productions (e.g., TV, movies, webisodes).

If all of this makes your head spin, don't worry. This article is intended to give you a starting point only; if substantial sums are involved, you'll need an expert (a lawyer or accountant familiar with all of these sources of income) to help you know where to look. Finding the source(s) of all of the types of income is a complicated process that may involve discovery directed at multiple third parties such as music publishers, PRO's, record labels, production companies, and agencies.

One of the interesting consequences of the composition-recording distinction is that, for a single recording of a song, it is possible for the sources of income to have two very different dates of creation. If a writer composes a song in Year 1, gets married in Year 3, and then records the song in Year 5 before the marriage ends in Year 6, the income from the composition has its origin in pre-marriage activity, whereas the income from the recording can be traced to the period during the marriage.

Sometimes it may be difficult to ascertain even when music compositions were first created. Take the case of a musician who composes for television. The creation date could be supported by any of the following categories of evidence: (i) the "fixing" of the music, as evidenced by a score, a tape, or hard drive of a recording session; (ii) the "contractual" origin of the music, as evidenced by contracts, deal memos, license agreements, etc.; (iii) the date of "delivery," as evidenced by composer delivery schedules, payment letters, etc.; (iv) the dates of "performance" evidenced by music cue sheets submitted to PRO's like ASCAP or BMI, Edit Decision Lists (EDL's), or other editing related documents, air date schedules and listings; or (v) copyright registration. Frequently, spouses will cherry pick those documents that bolster their positions, leading to a "tracing" hell. A recent unpublished case of *Douthit v. Jones* (2015) contains an interesting analysis regarding characterization of a TV development contract that could equally apply in the music context. Where one spouse is in control of such evidence, the courts should give wide latitude to discovery requests, especially ESI evidence since music these days is frequently first "fixed" in a tangible medium of expression on a hard drive. Concerns about privacy and contractual rights can be addressed in appropriately drafted confidentiality agreements or, if necessary, by motions for protective orders.

Another important issue is the fact that, whenever royalties are payable, there is often the possibility of advances against those royalties. Almost always, depending on the terms of the contract, advances are recoupable (meaning the payer can withhold the advance from subsequent royalties) but not returnable (meaning that even if there are not enough royalties generated to cover the advance, the recipient need not pay it back). Often musician spouses seek to characterize such advances as loans and not income available for support,[5] even though the language of the contract awarding the advance does not characterize the payments as loans[6] and the musician's tax returns reflect that such advance payments were treated as taxable income. The court may characterize such advances as an asset or income, as long as there is no "double dipping." There is no logical reason why the receipt of a large cash advance should be treated any differently than the receipt of cash from the sale of a house simply because it is generated by an intangible intellectual asset instead of bricks and mortar. While a dissolution is still pending, the court, driven by practical considerations, may make pendente orders directing that the funds be placed in a joint frozen account subject to characterization and re-allocation at trial. If at the pendente level the court treats advances as income available for child support, the court can presumptively rely on the tax return treatment of such advances.[7] The court has a far wider discretion to characterize such advances as income for spousal support.[8]

Another argument often made by the musician spouse is that such advances should only be treated as income to the extent that they are recouped from post separation earnings. This is similar to the arguments put forward and rejected in *In re Marriage of Finby*, 222 Cal. App. 4th 977 (2013). In *Finby,* certain *"*transitional*"* bonuses were paid to wife and were arranged as loans to be forgiven over time. The trial court in *Finby* treated the bonuses as assets and not income. The trial court also accepted wife's argument that the only a portion of the transitional bonus "earned" during the marriage should be characterized as community. The Court of Appeal reversed. Applying an analysis based on "*Brown"* pension rights and other contractually created contingent interests,[9] the court concluded that the contractual right to the transitional bonus arose during marriage and created a community interest in the bonus even though the loan was subject to post-separation contingencies which could trigger repayment of the unearned balances. The Court of Appeal remanded the case back to the trial court to calculate the community interest in the bonuses taking into account the contingent liabilities. Since spousal support was also awarded using the bonus income, on remand the trial court was directed to adjust its support and community property calculations to avoid double dipping.[10]

Going back to our original question, how best to divide musical assets? Is it better to retain a music appraiser to value the marital catalog and to award it to one spouse with an equalizing payment or award of other assets to the other spouse, divide the music catalog, sell the catalog, or divide marital royalties and copyright?

If the matter goes to trial, the court has a broad discretion to determine the manner of division to accomplish a net equal division,[11] and to "make any orders" it considers necessary to carry out the purpose of Family Code section 2500 et seq. There is little case law on the correct approach to dividing music catalogs. They are not really fungible, so in-kind division is rarely appropriate.[12] Sale and division of the catalog may not be possible for a number of reasons. For one thing, the musician spouse may not be the full owner of all of the copyrights in the catalog, as he or she may share the catalog with various co-writers, and the disposition of the catalog may be limited by the terms of a contract between or among the owners. For another, the catalog may be owned by the musician spouse, but subject to administration by a third party under a publishing administration agreement—a common arrangement whereby a music publisher uses its contacts and expertise to maximize and collect income on behalf of the copyright owner.

In deciding on an approach to the division of music catalogs, comparisons to other assets such as a family business[13] are not particularly helpful because the value of a music catalog is inherently unpredictable. Most catalogs owned by a single spouse/writer usually are smaller than those of even a medium-size music publisher, which are usually easier to value. The court in *Worth* considered that the books in that case had a present value based upon the "ascertainable value of the underlying artistic work" and not on post-marital efforts.[14] Cases in other states have found that future royalties were largely attributable to one spouse's post-separation efforts and awarded all or a larger share of royalties to the spouse who enhanced the post-separation royalties.[15] Whereas historic income for a family business is often (but not always) a good predictor of future income, revolutions in technology (CDs, streaming, downloads, videogames) as well as the multiple ways that music rights can be exploited means that a music catalog that has little value today may be worth a fortune tomorrow. For example, the value in the Righteous Brothers "Unchained Melody" shot up when it was used in the movie *Ghost*. The same is true across the board. 2015 marked the first time in U.S history that new releases were outsold by music catalogs.[16] Also while there may be only a few things you can do with a manufactured widget, music can be exploited in multiple ways. For example, a composition may come into existence during the marriage, but its value may be negligible unless, and until, the musician spouse records the composition, or licenses it for use in a motion picture or TV show. If that activity happens after the separation, a court may allocate most or all of the royalties generated to the musician spouse.

Where the parties are negotiating a settlement there are pros and cons to each approach. If the parties can agree on a valuation methodology and the NPS multiple (i.e., the amount by which a single year of NPS, or Net Publisher's Share, of income, is to be multiplied to determine the present value of a copyright or group of copyrights), awarding the music catalog and copyright to one spouse after a valuation always has the benefit of finality and certainty.[17] However, splitting future royalties saves the costs of hiring a music appraiser and also allows the non-managing spouse to reap the rewards of any royalty or other monetary windfalls attributable to new developments and licensing opportunities in the music industry and damages from infringement actions. If the parties are uncooperative, however, it can create a lifetime of legal and accounting conflict. Consider the unpublished case in 2009 involving Jose and Janna Feliciano, who co-wrote and produced *Feliz Navidad.* After a negotiated Judgment was entered in 1978, the parties spent the next thirty years embroiled in a contentious court battle over community property royalties.

If the parties settle by dividing royalties, any agreement on copyright should contain provisions that govern future exploitation of copyrights including the power to grant exclusive licenses. A copyright holder has rights to copy, perform, display, distribute for sale, prepare derivative works,[18] and grant licenses.[19] Absent a contractual agreement, co-owners of copyright have the right to grant licenses of all kinds, provided that (a) the income is shared with co-owners, and (b) no *exclusive* license is granted. This can be changed by agreement. Either party can agree to allow the other the exclusive right to administer a copyright, or provide that neither of them can grant a license without the other's permission. All of this must be considered, and dealt with clearly, in a divorce settlement. For example, it is one thing to grant the non-musician spouse the right to receive income from a composition or a recording. It is another to grant that spouse co-ownership or control over the disposition of the copyright. [20] An agreement might deal with issues such as: Does the recording artist or songwriter spouse have to get their ex-spouse's permission to license a song for use in a movie? Or is he or she obligated only to share the income from that license? Does the musician spouse collect royalties, and pay the other spouse his/her share, or can some of the royalties be collected directly from a third party, e.g. performance royalties from a PRO?

A different set of questions can arise if both spouses are involved in the music business, but handling different functions. Real-life examples include: (1) the spouse who writes and the spouse who sings and records (how to allocate value, especially if they continue to work together post-separation?), and (2) the spouse who makes the music, and the spouse who handles all the business matters, including the deal making, overseeing accountants and lawyers, etc.

There are many considerations that come into play when deciding whether to take the cash now, and value the catalog, or to keep some skin in the game and divide royalties and copyright. Parties have to consider their present need for assets and cash, the catalog's earnings history and future potential for growth against the "Jose and Janna Feliciano" type of problems where one spouse is always chasing the money.

A royalty share always creates an incentive for one ex-spouse to manipulate business deals to minimize the allocation of income to the other spouse. Consider the case of Jerry Lewis and Patti Lewis who divorced after thirty-five years. In the divorce, Patti reached a settlement under which she was entitled to a one-half interest in royalties from "Community Titles" over which Jerry retained control. This included *The Nutty Professor,* which was remade by Universal with Eddie Murphy. In a subsequent lawsuit, Patti alleged that Jerry structured the deal with Universal in such a way that minimized the "remake rights" (to which she was entitled to 50%) but paid him substantial personal service fees as writer and producer (which she did not share in). A good music lawyer can minimize such risks with a well-crafted agreement.

Consider a music example, where the settlement agreement grants the non-musician spouse a share of publishing royalties but omits income from the recordings. Then a motion picture studio wants to use the recording (and therefore, of course, the composition) in a movie. If the musician spouse controls the licensing, he or she could easily make the deals so that the bulk of the license fees are payable for the recording, leaving the other spouse sharing a much smaller amount.

The author dealt with a case where a musician spouse performed services as a music supervisor and composer on a motion picture. The musician was finalizing his divorce settlement, and asked if the studio would allocate a substantial amount of his fee to the rental of his studio equipment—because the bulk of the equipment had been acquired before the marriage, and so the rental fees would not have to be shared.

A music lawyer is better equipped to spot these types of shenanigans and assist with identifying issues and reaching a fair settlement.

---

1 *In re Marriage of Worth*, 195 Cal App. 3d 768 (1987).
2 17 U.S.C.A § 101.
3 *Worth*, 195 Cal App. 3d 768..
4 *Id.* at 776.
5 *In re Marriage of Rocha*, 68 Cal. App. 4th 514 (1998).
6 Civil Code section 1912 provides that "[a] loan of money is a contract by which one delivers a sum of money to

another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." *See Southwest Concrete Prods. v. Gosh Constr. Corp.*, 51 Cal.3d 701, 705 (1990) ("A loan of money is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount."); *cf. In re Marriage of Williamson*, 226 Cal. App. 4th 1303, 1315 (2014).

7 *In re Marriage of Loh*, 93 Cal. App. 4th 325, 332 (2001); *In re Marriage of Schulze*, 60 Cal. App. 4th 519, 529 (1997).

8 *In re Marriage of Blazer*, 176 Cal. App. 4th 1438, 1445 (2009).

9 *Finby*, 222 Cal. App. 4th at 989 (citing *In re Marriage of Brown*, 15 Cal. 3d 838, 842, 846 & n.8 (1976); *In re Marriage of Skaden*, 19 Cal. 3d 679, 687 (1977)).

10 *Id.* at 991.

11 *Marriage of Connolly*, 23 Cal. 3d 590 (1979).

12 *Marriage of Cream*, 13 Cal. App. 4th 81 (1993).

13 *Marriage of Brigden*, 80 Cal. App. 3d 380 (1978); *Marriage of Greaux & Mermin*, 223 Cal. App. 4th 1242 (2014).

14 *In re Marriage of Worth*, 195 Cal App. 3d 768, 773 (1987).

15 *E.g. Zander v. Zander*, 1999 WL 711503 (Conn. Super. Ct.); *In re Marriage of Heinze*, 257 Ill. App. 3d 782 (1994) (citing *Worth, Dunn v. Dunn*, 802 P.2d 1314 (Utah Ct. App. 1990)).

16 Nielson, 2015 U.S. Music Report.

17 Music catalogs are often valued as a multiple of the Net Publisher's Share (NPS). NPS are the amount of royalties received by the music publisher less the amount of royalties paid to writers, performers, and others who participate in the share of royalties earned. Such an income-based approach, which values the present value of a future income stream, or its expected benefits divided by risk, is the most common approach used in valuing music catalogs. Asset based and market based approaches are less common. However, developments in new media and licensing opportunities can make agreeing on an appropriate multiple difficult in the music context.

18 17 U.S.C. § 106 *et seq.*

19 *Id.* § 201 *et seq.*

20 A leading treatise warns against granting spouses co-management rights. NIMMER ON COPYRIGHT, ch. 6A Community Property ¶6.A. 04.

DEATH ISSUES & QDROS

Louise Nixon | QDRO Counsel, Inc. | Louise@QDROCounsel.com

What happens when one of the parties in a divorce dies before a pension is divided? Is it possible to divide a pension pre-judgment with a qualified domestic relations order? What about post-judgment? Does it matter whether the plan at issue is a public or private plan? Does it matter if the plan is a defined benefit plan or a defined contribution plan? These questions have been presented to me as a QDRO attorney on a regular basis in my twenty-plus-year practice. My intent in this article is to help the family law attorney navigate and issue-spot through this complex area of law. I will focus on plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA") but I will touch on some critical public plan death issues.

A quick overview of the basics

The code section in ERISA that deals with the division of retirement benefits in a divorce with a qualified domestic relations order ("QDRO") is 29 U.S.C. § 1056(d)(3). The section is also identified as ERISA § 206(d)(3). A reciprocal cite can be found at IRC § 414(p). The anti-alienation section of ERISA, as established by P.L. 98-397, the Retirement Equity Act of 1984 ("REA"), spells out the exception to the anti-alienation of retirement benefits. Under federal law, a retirement plan can only pay benefits to the plan's participants or beneficiaries (in the event of death) except when there is a QDRO payable to a spouse, former spouse, child, or dependent ("alternate payee") of a participant for marital property or support. In simple terms, no creditors can collect from O.J. Simpson's NFL pension—this ERISA anti-alienation section is the reason why.

Generally, there are two types of retirement plans offered by employers: defined contribution plans and defined benefit plans. Defined contribution plans are 401(k) plans, profit sharing plans, money purchase pension plans, employee stock ownership plans, and savings plans. A defined contribution plan is generally pretax employee-funded, often with matching contributions or profit sharing from an employer. Defined benefit plans are pension plans, retirement plans, and cash balance plans. A defined benefit plan does not have any value until the date of retirement, at which time a participant's interest is actuarially calculated based on the plan rules. Except for cash balance plans, most defined benefit plans only pay benefits monthly over a participant's lifetime.

What happens to surviving spouse under an ERISA plan?

ERISA went to great lengths to protect certain rights of spouses and surviving spouses. The surviving spouse ERISA sections are found in ERISA § 205(a)(2), 29 U.S.C. § 1055(a)(2) which describes the Qualified Preretirement Survivor Annuity (QPSA) and ERISA § 205(a)(1), 29 U.S.C. § 1055(a)(1) which describes the Qualified Joint and Survivor Annuity (QJSA).

For a defined benefit plan, ERISA requires a QPSA award payable to a surviving spouse to be 50% of the monthly benefit that would otherwise be payable to a participant. Likewise, at the time a participant retires, unless a spouse waives *before a notary* his or her interest in a QJSA, the form of benefit must be taken as a QJSA. ERISA also requires that the QJSA award payable to a surviving spouse shall be 50% of the monthly benefit otherwise payable to a participant. For a defined contribution plan, depending on the plan and its interpretation of ERISA, in most cases, the spouse will always be the surviving spouse beneficiary for the participant's entire account. In general, a spouse will always be the beneficiary regardless of who the participant has named as beneficiary, although there are a few exceptions for some defined contribution plans.

Louise Nixon specializes in retirement benefits, specifically determining the community or marital interest in pension benefits earned through employment and in consulting and/or drafting appropriate orders for the division and disposition of those interests. She is founder and president of QDRO Counsel Inc., APC. She is a frequent speaker for family law groups and Bar Associations, employee benefit groups, and local to national continuing legal education (CLE) organizations. She is frequently quoted in publications including the NY Times and WSJ. She has been a multiple recipient of California's Top Attorneys for Pension Benefits (as published in Pasadena Magazine).

Accordingly, to obtain spousal rights for former spouses, a QDRO is needed. ERISA § 206(d)(3)(F)(i), 29 U.S.C. § 1056(d)(3)(F). Federal law permits a QDRO to designate a former spouse as the surviving spouse to the extent of the community interest and the actual spouse shall then not be treated as the surviving spouse. For a good overview of how ERISA protects a surviving spouse against other beneficiaries, I recommend reading the case *Hamilton v. Plumbers & Pipefitters Nat'l Pension Fund*, 433 F.3d 1091 (9th Cir. 2006).

Where should a QDRO post-death be filed?

Most QDROs that are post-death and post-judgment are before the family law court. Death of one spouse does not deprive the court of its retained jurisdiction to determine collateral property rights if the court has previously rendered judgment dissolving the marriage. FC § 2337(f) & (g). Even though ERISA plans do not pass through probate, there is also statutory authority to file a QDRO post-death in probate court if before dissolution. *In re Marriage of Hilke*, 4 Cal. 4th 215, 220 (1992); *McClenny v. Superior Court*, 62 Cal. 2d 140 (1964); and *Kinsler v. Superior Court*, 175 Cal. Rptr. 564 (1981). In addition, a QDRO can be filed in federal court. *Trustees of The Dirs. Guild of America-Producer Pension Benefits Plan v. Tise*, 234 F.3d 415 (9th Cir. 2000).

Should a post-death QDRO be filed Nunc Pro Tunc?

There is authority in California that a QDR0 may be entered nunc pro tunc. *In re Marriage of Padgett*, 172 Cal. App. 4th 830, 854 (2009). In *Padgett,* the court discussed entering a QDRO nunc pro tunc because it was "akin to the correction of clerical error, which is acceptable use for nunc pro tunc orders." There is also Ninth Circuit authority in *Mack v. Kuckenmeister*, 619 F.3d 1010 (9th Cir. 2010) discussed below. Some plans will require the QDRO to be entered nunc pro tunc in the event of death, but most will not. Whether nunc pro tunc is a viable option depends on the facts of the case and how a plan interprets ERISA.

What happens if a participant dies before retirement?

If a participant dies before retirement and before dissolution, benefits will vest in the spouse unless the spouse has clearly waived his or her interest in the survivor benefits. *Carmona v. Carmona,* 603 F.3d 1041 (9th Cir. 2010); *Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, 555 U.S. 285 (2009). Note that for most defined benefit plans, if a participant dies preretirement, benefits are ONLY payable to a surviving spouse (or a former spouse who is treated as a surviving spouse in a QDRO). Since the participant cannot leave that monthly benefit to a beneficiary, the ERISA plan keeps the funds that would have been payable on a participant's account if no spouse or former spouse with a QDRO exists.

If a participant dies before retirement *but after dissolution* and a QDRO has not been entered, there could be problems. There is a limit on the ability to obtain survivor benefits for a former spouse after death or retirement if the judgment does not specifically award survivor benefits and the participant died or retired with a second spouse. In California, many plans will not allow payment to a former spouse with a post-death QDRO due to both state and federal law described hereinbelow. *In re Marriage of Padgett*, 172 Cal. App. 4th 830 (2009) and *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010).

In *Padgett*, the judgment only reserved jurisdiction over retirement benefits. Participant remarried and died preretirement. The former spouse obtained a QDRO post-death for her interest in the survivor benefits. The current surviving spouse appealed. The court held that the entire QPSA benefit vested in the current spouse at date of participant's death.

In *Carmona*, the participant retired with a joint and survivor annuity with his fourth spouse. Participant subsequently divorced that spouse who clearly waived all survivor benefits in the divorce. Participant remarried to a fifth spouse, and then died. The fifth spouse sought to have the survivor benefits paid to her rather than the fourth spouse because the fourth spouse waived her interest in survivor benefits in the dissolution. The Ninth Circuit held that survivor benefits can only be paid to the fourth former spouse "[b]ecause ordinarily at retirement the surviving spouse's interest irrevocably vests." *Carmona*, 603 F.3d at 1060. The Ninth Circuit followed a landmark case called *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997). It did not matter that the fourth spouse waived her interest in the survivor benefit in the divorce. Federal law preempts state law on this issue.

However, in *Carmona* footnote 13, the court discussed the exceptions for when a QDRO post-death can be obtained. Footnote 13 states "[w]e say 'ordinarily' because we recognize that there may be other situations, not present in this case, in which a contrary result may be appropriate. For example, it is possible that a former spouse could obtain a DRO prior to the annuity start date and present it to the plan… [B]ut the actual determination of whether the DRO is a QDRO might not be finalized prior to the date on which the benefit would normally become payable. See e.g., 29 U.S.C. § 1056 (d)(3)(H)." *Carmona*, 603 F.3d at 1060.

The Ninth Circuit has also dealt with a post-death QDRO for support in *Trustees of The Dirs. Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415 (9th Cir. 2000). The court held that a post-death QDRO for support was enforceable where there was no surviving spouse involved, citing *Hopkins. Tise* held that a domestic relations order or "DRO" for support existed before participant's death sufficient to be perfected into a QDRO post-judgment. (Note also *Tise* awarded attorney's fees to the former spouse that related to the support division as part of the QDRO.)

California Family Code section 2610, Division of retirement plan benefits, states in part as follows:

"(a) Except as provided in subdivision (b), the court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits…."

Notwithstanding the foregoing, unless a Judgment of Dissolution specifically protects survivor benefits for the nonmember spouse, it is VERY difficult for a post death QDRO to be effective in California due to *Carmona* and *Padgett*. However, under *Carmona* footnote 13, we know that it is possible to perfect a DRO awarding survivor benefits into a QDRO post-judgment and post-participant's death. *Every time I speak to family law attorneys, no matter how small or the type of retirement plan, my mantra is to ALWAYS include one sentence awarding survivor benefits payable on the community interest to the nonparticipant spouse.* I often recommend that family law attorneys utilize the survivor benefit language outlined in JC Form 348, *Pension Benefits- Attachment to Judgment.*

What happens if the Nonparticipant Spouse dies before the QDRO is filed?

The Ninth Circuit has treated the death of a nonparticipant spouse (aka alternate payee) in a defined contribution differently from an alternate payee in a defined benefit plan.

Defined Contribution Plan

In *Mack v. Kuckenmeister*, 619 F.3d 1010 (9th Cir. 2010), the court ordered the division of a defined contribution plan in which husband was a participant. However, before the QDRO was filed, the alternate payee was murdered by the participant. The estate substituted into the family law case and the court filed a QDRO nunc pro tunc which provided for benefits payable to the alternate payee's estate in the event of alternate payee's death.

There is also additional authority in federal regulations to allow for a post-death QDRO if the alternate payee dies before a QDRO has been entered for a defined contribution plan. *See* 29 CFR § 1.401(a)(9)-8: Section A-6(b) allows payment to an alternate payee's beneficiary with a post-death QDRO. See also Department of Labor Handbook Q3-6, which states that the alternate payee is entitled to the same rights as a participant.

As stated above, it is not always necessary to obtain a post-death QDRO as nunc pro tunc; however, nunc pro tunc before the participant's death would always be preferred by any plan. Whether a plan accepts a post-death QDRO due to an alternate payee's death depends on the defined contribution plan's interpretation of ERISA and plan rules.

Defined Benefit Plan

However, if an alternate payee dies before a QDRO is filed with an interest in a defined benefit plan, the case *Branco v. UFCW-N. Cal Employers Joint Pension Plan*, 279 F.3d 1154 (9th Cir. 2002) applies. In *Branco*, the judgment awarded the former spouse the right to a participant's monthly benefit "for so long as they are payable to or on behalf of [participant]." Before the participant commenced benefits and the QDRO was filed, the former spouse died. The court found that the judgment language conflicted with ERISA's anti-alienation provision and therefore was preempted, and was not a QDRO. The alternate payee could not devise her interest. The entire benefit was awarded to the participant.

What happens if a Participant fails to change his or her beneficiary after divorce?

The U.S. Supreme Court finally dealt with this issue in *Kennedy v. Plan Administrator for Dupont Savings & Investment Plan*, 555 U.S. 285 (2009). In *Kennedy*, there was a clear waiver in a dissolution by the former spouse of any interest in a retirement benefit. However, the participant failed to change his beneficiary form from his former spouse. The Plan was not sure whether it had an obligation to follow its beneficiary form or the judgment of dissolution.

The Supreme Court held that designation of a former spouse as beneficiary remains valid even if the judgment revokes the beneficiary designation and awards all benefits to participant. The same law also applies to life insurance. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

I always like to point out *Kennedy* to family law attorneys to make sure to let their clients know to change their beneficiary form after the QDROs have been filed. (Note: Depending on the facts of the case it may be appropriate for a participant to modify his or her beneficiary form post–judgment, but pre-QDRO, so long as the former spouse remains the beneficiary on the form to the extent of the community interest awarded in the judgment until a QDRO is filed. The participant should seek permission for this modification on his or her beneficiary form so as not to violate the ATROs in effect until a QDRO is filed.)

Under what circumstances might a participant's heirs have a state law claim against the former spouse for the distribution proceeds?

The Ninth Circuit in *Carmona* reconvened after its initial determination for the sole purpose of reconciling the holding in *Kennedy* with its holding. In the revised *Carmona* opinion after *Kennedy*, the Ninth Circuit added the following footnote 15 to express an opinion on *Kennedy* stating that "[i]n *Kennedy*, the Court explicitly declined to express a view on whether an action could have been brought to obtain benefits from the former spouse after they had been distributed to her. 129 S. Ct. at 875 n.10." *Carmona*, 603 F.3d at 1062. However, the *Carmona* court held that in the case before them when a state court creates a constructive trust with the explicit purpose of avoiding ERISA rules it must be preempted. *Id.*

Accordingly, at least in California, it would currently be difficult for the heirs to prevail in a state court claim to the distribution proceeds against a former spouse, based on *Carmona.* We are, however, starting to see recent cases outside of California where participants' heirs have prevailed in state law claims against former spouses for the distribution proceeds received. *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131 (3d Cir. 2012). *Andochick v. Byrd*, 709 F.3d 296 (4th Cir. 2013). Also, there is some movement in California in a district court case that discussed whether complete ERISA preemption exists with a state court cause of action. *Hohu v. Hatch*, 940 F. Supp. 2d 1161 (ND Cal. 2013). I predict this issue will ultimately be before the U.S. Supreme Court.

What is the impact of death on some of the public plans?

I wanted also to touch on some public plans where significant issues exist in ensuring survivor benefits go to a nonparticipant spouse.

For military retirement benefits, a Survivor Benefit Plan (SBP) is offered to participants to provide survivor benefits to a spouse or former spouse with a DRO. There is a draconian effect for failure to award the SBP in a judgment if the participant retires or dies before a DRO is served. Note that only one spouse (or former spouse) can be the beneficiary for the SBP. Also proper forms must be timely (within twelve months of the initial order) served for the SBP to be effective regardless of any court order.

Federal employees are offered a defined benefit plan called either the Federal Employee Retirement System ("FERS") or the Civil Service Retirement System ("CSRS"). Under either of these plans, a former spouse survivor annuity ("FSSA") is offered to ensure survivor benefits to a former spouse. Again, there is a draconian effect for failure to award the survivor benefit in the judgment (or the first court order if earlier) under the "First Order Rule." If a participant retires or dies before a DRO is filed that clearly awards the FSSA, it will likely NOT be possible for that former spouse to obtain survivor benefits. In fact, there is a regulation that the first order (often the judgment) cannot be amended nunc pro tunc to provide for survivor benefits. Note that federal plans do, however, allow survivor benefits to be paid to multiple spouses.

Lastly, there are no survivor benefits payable for some county public plans. For public plans that follow the County Employees' Retirement Law of 1937, if a participant retires before divorce, these county plans will NOT pay a survivor benefit. *In re Marriage of Cramer*, 24 Cal. Rptr. 2d 372 (1993).

For long-term marriages with older spouses, the parties may want to consider a legal separation when this situation arises. Most county plans will allow a survivor continuance with a legal separation. However, note that some county plans have recently taken the position that legal separation does NOT allow survivor benefits.

Conclusion

ERISA states that "the term 'qualified domestic relations order' -- means a domestic relations order which creates or *recognizes the existence of* an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan . . ." 29 USC § 1056(d)(3)(B(i)(I) [emphasis added]. The term "domestic relations order" means "any judgment, decree, or order" which "relates to the provision of marital property or support under state domestic relations law, including community property law." 29 USC § 1056(d)(3)(B(ii).

When a DRO is received by a plan, the plan administrator is supposed to promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of a DRO and within a reasonable time determine whether the DRO is a QDRO and notify the participant and alternate payee of such determination. 29 USC § 1056(d)(3)(G). When a plan is determining whether a DRO is a qualified order, withholding and segregation of plan benefits are triggered. ERISA requires the following:

> (H) (i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order. (ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

29 USC § 1056(d)(3)(H).

So back to my mantra…. To the extent possible to protect survivorship rights, it is ALWAYS a good idea to include one sentence in the judgment awarding the nonparticipant spouse his or her interest in survivor benefits to the extent of the community interest. And then serve a copy of that judgment on the Plan! An ERISA plan has an obligation to withhold for the alternate payee based on 29 USC § 1056(d)(3)(H) when served with a DRO [judgment] sufficient to be reviewed as to whether it is qualified. By serving the judgment, if one of the parties die, there may at least be a chance to perfect the DRO with a post-death QDRO.

ACFLS CHARITABLE FOUNDATION COMES TO LIFE

John Hodson, CFLS | Solano County | Hodsonesq@aol.com

As most readers know, the Association of Certified Family Law Specialists (ACFLS) has been around for more than thirty-five years. The association has grown to about 650 members and has built a solid reputation for its work in the family law arena. ACFLS honors outstanding family law bench officers and practitioners. We provide top-notch educational programs through each of our chapters (Bay Area, Sacramento, and Orange County), as well as through our outreach programs to less populated counties, and of course our annual Spring Seminar, touted as among the very best family law continuing education programs in the state.

We address family law legislation and, in fact, we have been very successful stepping in to remedy bad law and make good law better, sometimes when other venerable institutions cannot, because we have the advantage of being a private association. We have gotten important cases published or depublished. Our amici committee keeps a close watch on family law cases up for review and when appropriate, submits persuasive briefs on behalf of our members.

We publish the *Family Law Specialist*, a quarterly scholarly journal to address important and timely issues relevant to our practice. We maintain a video library so members and bench officers can access high quality educational presentations at their convenience. The ACFLS Listserv is a busy exchange among Certified Family Law Specialists who share interesting articles and use one another as sounding boards when faced with thorny issues or unusual questions in a case. Our website is good, and getting better, as a resource for our members.

Over the years, ACFLS has been led by some luminaries in family law. To start the list is to omit and offend most of them, but we have been led by the likes of such great family law lawyers and educators as Steve Adams, Garrett Dailey, and Ron Granberg. We've benefitted from the brilliance of Leslie Ellen Shear, the steady counsel of Joe Bell, and more recently, the legislative mastery of Diane Wasznicky, the cohesive team building of Lynette Berg Robe, and the "get-things-done" effectiveness of President Jill Barr. Sterling Myers has served so long and so well, we've named an award in his honor.

As the years roll by, we all do our part to improve family law practice for our members, and to improve the law for California families who likely do not even know we exist. In time, we are replaced by new leaders who carry on the work, improving our association and the things we do. But should there be more to our legacy?

John D. Hodson, CFLS, AAML, is managing partner of Hodson & Mullin, Attorneys at Law, a six-lawyer firm with two locations in Solano County. He is a retired Air Force JAG officer, past Chair of Flexcom, and current Secretary of the ACFLS Board of Directors.

Honorable Thomas Trent Lewis is among our association's most ardent supporters. A CFLS and AAML Fellow himself, he is an outstanding family law judge in Los Angeles County, and known throughout the state for his expertise and excellent communication skills as he teaches us and works with us through all manner of associations and enterprises. In 2014, Judge Lewis suggested that ACFLS should be thinking about a larger legacy and doing something to positively impact not just our own members, but all those who come in contact with California family law. He pledged his own money to the cause, and we took up the challenge.

ACFLS made grants to family law-related nonprofits in 2014 and 2015. Then, under the direction of President Jill Barr and the Board of Directors, Past President Joe Bell spearheaded the effort to create what is now the ACFLS Charitable Foundation, Inc., an entirely separate entity from ACFLS, but with the full support and cooperation of ACFLS. Our articles of incorporation are completed, first officers and directors chosen, by-laws written, and we are awaiting IRS approval of our 501(c)(3) status so that donations to the foundation will be tax deductible.

The foundation's mission is "…to solicit donations and to raise funds for the purpose of making monetary grants to persons and/or entities who are working to enhance access to justice, to provide family law-related education, and/or to improve the California family law process for affected persons, families, or groups in need, and to carry on other charitable activities associated with these goals as determined by the Board of Directors and allowed by law."

So we now have a non-profit foundation supported by ACFLS! And we want you to be a part of it! Our initial effort is to encourage you to donate an annual amount equal to one billable hour of your time. ACFLS has granted $5,000 in seed money to the foundation, and the ACFLS Charitable Foundation Board of Directors (not the ACFLS Board) has agreed that we will pitch in to match that amount. The foundation hopes to begin giving grants to deserving persons and entities this year, but we want to do bigger and better things. A special announcement about our new foundation was made at the Spring Seminar, and you should expect fun fund-raising activities in the coming months and years.

The ACFLS Charitable Foundation Board of Directors includes President Joe Bell, Vice President Mary Molinaro, Secretary Lynette Berg Robe, CFO JB Rizzo, and the following Directors: Jill Barr, Dianne Fetzer, John Hodson, Seth Kramer, and Sherry Peterson. Please contact any of us for further information or to donate. And as you already so often do, open your hearts and your wallets, and lend us your best ideas. Charity begins at home, and if the family of Certified Family Law Specialists will pitch in, we expect to make a real difference in California family law, and in people's lives. Thank you for your support of this exciting new venture!

Volunteer for the ACFLS Outreach Committee

ACFLS is seeking volunteers for its Outreach Committee, tasked with helping to bring high-quality family law continuing education programs to remote and underserved counties in the state. These programs are presented to all family law attorneys, and are not limited to certified specialists or members of ACFLS.

We are looking for volunteers in remote and/or otherwise underserved counties to join the committee and to be a part of the leadership team that presents continuing education programs.

If you would like to join the Outreach Committee or can help introduce people who might have an interest, please contact:

Outreach Director/Outreach Committee Co-Chair **Rick Cohen** at rick.cohen@familylawlitigators.com; or

Outreach Committee Co-Chair **Linda Seinturier** at L4linda@aol.com.

ONLY YOU can help present regular continuing education programs to counties that need it most!

HOT OFF THE PRESS! JOURNAL EDITION

Dawn Gray, CFLS | Nevada County | dawn _ gray@earthlink.net

Editor's Note:
The holdings from various cases are below. Dawn Gray's extensive summaries of these cases, as well as summaries of other cases of interest, too lengthy to publish in the Journal, are on the ACFLS website on the ACFLS Family Law Specialist Current Newsletters page.

Cite: *In re Marriage of Drake*, 194 Cal. Rptr. 3d 252 (2015).

Holding: In this case, the Fourth District reversed a trial court that ordered adult child support for the parties' incapacitated adult son payable to the other party, who did not work, to provide her with the financial means to be involved in the child's care. The court held that the trial court was required to consider and decide the best means for paying the child support directly to the child.

Cite: *In re Marriage of Cecilia and David W.*, 194 Cal. Rptr. 3d 559 (2015).

Holding: In this case, the Fourth District reversed a postjudgment order establishing a duty of parental support to Wife for the parties' adult child. It held that the trial court applied the wrong standards to determine that the adult child was incapacitated from earning a living and without sufficient means under Family Code Section 3910.

Cite: *In re Marriage of Bonvino*, 194 Cal. Rptr. 3d 754 (2015).

Holding: In this case, the Second District reversed a trial court's holding that the parties' family residence was community property, holding that Husband's separate property down payment and community property loan proceeds resulted in co-ownership between the community estate and Husband's separate estate. It held that as a matter of law, the transmutation requirements of Family Code §852(a) must be satisfied before the court can hold that a title asset to which one spouse takes title as their separate property during marriage is community property even if the spouse obtains a quitclaim deed from the other spouse by undue influence.

Cite: *In re Marriage of Smith*, 195 Cal. Rptr. 3d 162 (2015).

Holding: In this case, the third appellate decision in the case (although the first published one), the Fourth District affirmed a trial court's award of attorney fees against Kiersten and in favor of Mark and his current wife, Cindy, under Family Code Sections 2030 and 271. The court held that the trial court did not err in failing to state how much of the fees were awarded under which statute or in considering the fact that wife's father is funding her attorney fees in making the order against her.

Dawn Gray is a Past President of ACFLS. She is a solo practitioner whose practice is devoted to contract research and writing on family law issues. She is a frequent presenter on fiduciary duty and other issues throughout California.

Cite: *In re Marriage of Eustice*, 195 Cal. Rptr. 3d 876 (2015).

Holding: In this case, the Fourth District affirmed a trial court's entry of a default judgment on reserved issues against Joseph, holding that the default judgment did not exceed the relief requested in the petition because Annette provided information regarding all assets and debts in her Preliminary Disclosure Declaration, and holding that the trial court did not err in striking Joseph's response and entering a default judgment as a sanction for his failure to comply with the court's discovery orders.

Cite: *Schneer v. Llaurado*, 195 Cal. Rptr. 3d 858 (2015).

Holding: In this case, the Fourth District reversed a San Bernardino trial court's holding that the California court lacked jurisdiction over Child under the UCCJEA to make an initial child custody determination. It held that "(t)he child's absence from California for almost four months before father filed his petition is not determinative because father continued to reside in California. Under these facts, the family court erred by finding California lacked jurisdiction under section 3421, subdivision (a)(1)."

Cite: *Marriage of Peterson*, 197 Cal. Rptr. 3d 588 (2016).

Holding: In this case, the Second District considered the "legal question that has divided states across the country: When one spouse contributes to Social Security, which according to federal law is a spouse's separate property, and the other spouse participates in a state or local pension plan in lieu of Social Security, which according to state law is community property, how should a state court divide the parties' retirement benefits?" It affirmed Los Angeles Superior Court Judge Scott Silverman's holding "that because the husband's Social Security benefits are separate property and the wife's county retirement benefits are community property, the

Social Security benefits may not be considered and the county benefits must be divided equally between the parties."

Cite: *Stuard v. Stuard*, 199 Cal. Rptr. 3d 821 (2016).

Holding: In this case, the Third District affirmed a Sacramento trial court's order granting a petition by grandparents for visitation with their granddaughter over their divorced son's and his ex-wife's objections. It held that the court properly applied Family Code section 3404, concluding that the section:

> permissibly reflects a legitimate state interest in preserving an already existing grandparent-grandchild relationship that is threatened but in the best interest of the grandchild to safeguard. Here, the grandparent visitation order permissibly safeguards a strong bond between Riley and her paternal grandparents that Matthew and Rebekah fostered over the years and Riley's best interest in preserving her relationship with Jeffrey and Cindy after her parents' relationship ended in divorce. United States and California Supreme Court decisions have rejected the contention that the right to parent is absolute except after a finding of parental unfitness.

Cite: *In re Marriage of Shimkus*, 198 Cal. Rptr. 3d 799 (2016).

Holding: In this case, the Fourth District reversed a trial court's post-judgment termination of spousal support, holding that its failure to issue a statement of decision made it impossible to determine whether it considered all of the section 4320 factors. However, it affirmed the trial court's refusal to admit certain declarations, stating that Wife failed to explain how she was harmed by the omission, and in any event she had the opportunity to present oral evidence, which she did not do. It held that "the declarations were not automatically in evidence nor did the court err in not admitting them under the circumstances of this case."

Cite: *In re the Marriage of Obrecht,* 199 Cal. Rptr. 3d 438 (2016).

Holding: In this case, the Sixth District reversed the entry of a default and default judgment against Husband, holding that the trial court erred in entering the default judgment while the appeal was pending. However, it also held that the absence of a transcript of the proceedings required it to infer that the court made all findings required to support its determination that he had made a general appearance, rather than a special appearance, in the case, and that it had in rem jurisdiction over the action.

Cite: *In re Marriage of Murchison*, 199 Cal. Rptr. 3d 800 (2016).

Holding: In this case, the Second District reversed a trial court's order disqualifying Wife's divorce attorney from representing her. Wife apparently sold her attorney the former family residence that she received in the dissolution judgment. The trial court granted Husband's disqualification motion but the Second District held that he had no standing to bring a motion to disqualify Wife's counsel on the basis that he allegedly violated RPC 3-300. It held that "no precedent supports a court otherwise disqualifying a lawyer for potential ethical violations when the client wishes to continue being represented and the moving party cannot demonstrate it would be harmed by the continued representation."

Cite: *Mooney v. Superior Court (Mooney)* 199 Cal. Rptr. 3d 647 (2016).

Holding: In this case, another one dealing with problems resulting from the lack of court reporters in courtrooms, the Sixth District issued a writ of mandate compelling the Santa Cruz County trial court to rule on Wife's motion to accept a settled statement under Rule of Court 8.137 and to vacate its order compelling Wife to pay Husband's attorney fees and costs in connection with his attorney's work on opposing Wife's settled statement.

Other cases of interest:

V.L. v. E.L., 16 DJDAR 2273 (2016), decided by the U.S. Supreme Court on March 7, 2016.

Costello v. Buckley, 199 Cal. Rptr. 3d 891 (2016).

2016 ACFLS BOARD OF DIRECTORS

President
Jill L. Barr
Hemmer & Barr, Attorneys at Law
555 University Avenue, Suite 125
(916) 922-8500
jill@hemmerbarrlaw.com

Vice-President
Seth D. Kramer
4223 Glencoe Avenue, Suite A215
Marina Del Rey, CA 90292
(310) 474-3030
sdkramer2@aol.com

Treasurer
Karen C. Freitas
Parker, Milliken, Clark, O'Hara
and Samuelian
555 South Flower Street, 30th Floor
Los Angeles, CA 90071
(213) 683-6503
kfreitas@pmcos.com

Secretary
John D. Hodson
Hodson & Mullin, Attorneys at Law
601 Buck Avenue
Vacaville, CA 95688
(707) 452-9606
hodsonesq@aol.com

Immediate Past President
Lynette Berg Robe
Law and Mediation Offices of
Lynette Berg Robe
16133 Ventura Blvd., #855
Encino, CA 91436-2419
(818) 980-9964
lynette@lynettebergrobelaw.com

Journal Editor
Debra S. Frank
Debra S. Frank, APLC
1875 Century Park East, Suite 700
Los Angeles, CA 90067
(310) 277-5121
dfrank@debrafranklaw.com

Associate Journal Editor
Christine Gille
Goldberg & Gille
131 North El Molino Avenue, Suite 310
Pasadena, CA 91101
(626) 584-6700
cdgille@mac.com

Legislative Director
Dianne Fetzer
Law Office of Dianne M. Fetzer
455 University Avenue, Suite 201
Sacramento, CA 95825
(916) 565-1200
dfetzer@fetzerlaw.com

Associate Legislative Director
Michele Brown
Procopio, Cory, Hargreaves & Savitch, LLP
525 B Street, Suite 2200
San Diego, CA 92101
(619) 906-5745
michele.brown@procopio.com

Technology Director
David M. Lederman
Law Offices of David M. Lederman
3432 Hillcrest Ave., Suite 100
Antioch, CA 94531
(925) 522-8889
david@ledermanlaw.net

Associate Technology Director
Avi Levy
Trabolsi & Levy, LLP
2530 Wilshire Blvd., Suite 200
Santa Monica, CA 90403
(310) 453-6226
avi@tlfamlaw.com

Education Director
Sherry Peterson
Law Office of Sherry Peterson
7950 Dublin Blvd., Suite 203
Dublin, CA 94568
(925) 833-6990
sherry@famlaw.com

Membership and Benefits Director
Jason M. Schwartz
Stegmeier, Gelbart, Schwartz & Benavente LLP
20320 SW Birch St., 3rd Floor
Newport Beach, CA 92660
(949) 337-4050
jschwartz@sgsblaw.com

Outreach Director
Fredrick S. (Rick) Cohen
Law Offices of Fredrick S. Cohen
2020 Hurley Way, Suite 200
Sacramento, CA 95825
(916) 925-7177
rick.cohen@familylawlitigators.com

Chapter Director (1)
Anne Davies
Blum, Gibbs, & Davies, LLP
1939 Harrison St., Suite 818
Oakland, CA 94612
(510) 465-3927
anne@bgdfamilylaw.com

Associate Chapter Director (1)
Kimberly Campbell
Whiting, Fallon, Ross & Abel, LLP
101 Ygnacio Valley Rd., Suite 250
Walnut Creek, CA 94596
(925) 296-6000
kcampbell@disso.com

Chapter Director (2)
Stephanie L. Williams
Law Office of Stephanie L. Williams
1722 Professional Drive
Sacramento, CA 95825
(916) 927-8112
stephanie@divorceoptions.net

Associate Chapter Director (2)
Mary Molinaro
Bartholomew &Wasznicky LLP
4740 Folsom Blvd.
Sacramento, CA. 95819
(916) 455-5200
mary@divorcewithrespect.com

Chapter Director (3)
Dorie A. Rogers
Law Offices of Dorie A. Rogers, APC
790 The City Drive South, Suite 120
Orange, CA 92868
(714) 740-1160
drogers@drfamilylaw.com

Associate Chapter Director (3)
Catherine Goodrow
Law Offices of Presley & Goodrow
333 City Boulevard West, Suite 1420
Orange, CA 92868
(714) 939-1420
cgoodrow@presleylaw.com

Regional Director
Patricia A. Rigdon
Law Offices of Patricia A. Rigdon
301 East Colorado Blvd., Suite 706
Pasadena, CA 91101
(626) 405-0006
par@pasadenalaw.la

Coordinating Director (1)
Joseph J. Bell
Law Office of Joseph J. Bell
350 Crown Point Circle, Suite 250
Grass Valley, CA 95945
(530) 272-7477 or (800) 576-7477
attorney@bellslaw.com

Coordinating Director (2)
Sterling E. Myers
Helms & Myers
150 North Santa Anita Avenue, Suite 685
Arcadia, CA, 91006
(626) 445-1177
stermyers@aol.com

Coordinating Director (3)
Diane Wasznicky
Bartholomew & Wasznicky LLP
4740 Folsom Blvd.
Sacramento, CA 95819
(916) 455-5200
diane@divorcewithrespect.com

ACFLS JOURNAL

Dee Rolewicz, ACFLS Executive Director
1500 W. El Camino Avenue, Suite 158
Sacramento, CA 95833-1945

PRSRT
STANDARD
U.S. POSTAGE
PAID
MSI

ACFLS MEMBERSHIP APPLICATION

Eligibility for ACFLS membership is limited to attorneys certified as family law specialists by the State Bar of California, Board of Legal Specialization.*

Applicant name ________________________ State bar no. ____________ Date certified as CFLS by BLS ________

Firm name ____

Address ________________________ City/State/Zip ________________________

Telephone ________________________ Fax ________________________

Email ________________________ Website ________________________

If more than one member of the firm is joining, please attach additional page with information about each applicant.

Dues for first member in firm: $250 Dues for ____ additional members from same firm: $175 each. Total amount of payment $__________

*Retired member who is no longer practicing, or judicial officer who was a member at the time he/she went on the bench: $150

❏ Check enclosed Charge to ❏ Mastercard ❏ Visa Credit card account no. ________________________ Expiration date ______

Name as it appears on credit card ________________________ Authorized signature ________________________

Credit card billing address ❏ Same as above ❏ Different billing address ________________________

Join online at www.acfls.org or send your application and payment by mail to: Dee Rolewicz, ACFLS Executive Director, 1500 W. El Camino Avenue, Suite 158, Sacramento, CA 95833-1945 or fax: (916) 930-6122 or scan and email to Executive.Director@acfls.org