ACFLS NEWSLETTER

NEWSLETTER EDITOR
LESLIE ELLEN SHEAR, CFLS

ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

SPRING 2003, NO. 1

SPECIAL COLLABORATIVE FAMILY LAW ISSUE

COLLABORATIVE NEGOTIATION: A NEW APPROACH TO FAMILY LAW

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JUDGES, ATTORNEYS AND DIVORCING COUPLES are increasingly dissatisfied with the stress level, high costs and emotional wreckage that too often occur in the adversarial process in family law. The most popular alternative dispute resolution process has been mediation. Now a new approach is sweeping the nation as an alternative to litigation or mediation.

Collaborative law started with Stu Webb, an attorney in Minneapolis, Minnesota, in 1990. Webb, a family law attorney, was frustrated that he was not helping his clients. He thought the adversarial system was tearing his clients

Continued on page 18

COLLABORATIVE FAMILY LAW COMES TO LITIGIOUS LOS ANGELES

They said it couldn't be done, but the Los Angeles Collaborative Family Law Association had more than a hundred members join in its first few months.

Members engage in role-play at LACFLA's two-day recent training. A photo essay showing moments from this program runs throughout this issue.

WHAT'S INSIDE

ACFLS

NEWSLETTER

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ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

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ACFLS MISSION STATEMENT

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

1. Advance the knowledge of Family Law 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.

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FROM THE EDITOR'S DESK

LESLIE ELLEN SHEAR, J.D., CFLS
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"A bad day in collaborative is better than a good day in court," Santa Cruz collaborative lawyer and mediator Chip Rose recently told a roomful of L.A. family lawyers, mental health and financial professionals. Rose was conducting a two-day training sponsored by the newly formed Los Angeles Collaborative Family Law Association (in association with L.A.'s South Bay's A Better Divorce group).

In addition to the usual family law articles, columns and ACFLS announcements, this Collaborative Family Law issue of the ACFLS Newsletter contains the ruminations and reflections of collaborative family lawyers around our state, web links, a review of a collaborative family law video and a photo essay showing litigious Angelenos at their collaborative law training.

The idea of a special collaborative family law issue of this newsletter took fire as soon as I mentioned it to a few individuals. Ordinarily ACFLS newsletter editors have to work hard to recruit contributors. But my email box filled up quickly with articles on collaborative family law practice from contributors all over the state.

If readers become contributors, we will continue the conversation about collaborative family law in a subsequent issue. I'd like to learn from those with greater experience and expertise, and the list of web links in this issue suggests that the experts are among our members. Advanced collaborative family law articles on some or all of the following topics would be fascinating:

- A case study following a couple through the collaborative process, identifying successful techniques, dead ends and roadblocks, break through moments and outcome.
- The nitty gritty of organizing and running a collaborative family law group – dues, administration, training, politics, responding to inquiries, PR, etc.
- Advanced techniques and issues in collaborative practice, for example, how to make sure that the two collaborative attorneys are collaborating, rather than competing for control of the process.
- Marketing collaborative family law.
- Operating a successful collaborative family law practice.
- A review of Pauline Tesler's book on collaborative family law practice.
- Informed consent and identifying the risks of adjudicative v. collaborative approaches.

This issue also marks the debut of ACFLS Director South Heidi Tuffias' column on the human side of family law practice. Heidi's practice combines family law mediation and litigation. Heidi's "Reflections" column will run on the inside back cover of each issue. See if you recognize your professional persona in Heidi's descriptions of kinds of family lawyers.

Also in this issue: Board Member Ron Granberg proposes a new approach to *Moore-Marsden* calculations, CALS Robert Roth explains how to preserve your client's appellate rights with a Statement of Decision, photos of our annual holiday party and Technology Coordinator Alan Tanenbaum's tribute to 2002 Hall of Famer Bill Hilton, program information and registration forms for the ACFLS Spring Seminar and the Council of Community Property States, President Frieda Gordon's message, and my Custody Matters column.

Watch www.acfls.org for the debut of our new, rebuilt web site, which will include back issues of this newsletter on the public access pages, and the current issue in the member's only section, together with a brief bank.

Continued on page 28

From the President

Frieda Gordon, J.D., CFLS
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This year has certainly gotten off to a rollicking start. All of the items on my agenda for the year have taken off and are in the process of being completed. Under the able leadership of Past President, Vivian Holley, a dedicated and talented group of board members have undertaken the daunting task of revising the By-Laws to be more in sync with our common practices and ever-expanding needs. In addition, our President-Elect, Dawn Gray will lead a parallel Elections Committee which will examine the proposals for amending the election procedures of our By-Laws to make the process fairer and more accessible to our membership. If you have comments or suggestions for either work in progress, please contact the chairs of the respective committees. Your input will be quite valuable.

Our Children's Issues Committee has met and worked with the entire board to come up with a brilliant idea for a Fall Seminar. This Seminar will take place during the last few weeks of October and will be held a week apart once near the Oakland Airport in Northern California and once in Southern California. It will be a full-day seminar devoted to the latest issues in realm of custody and visitation law, including a serious look at the use and abuse of minor's counsel in such cases. Sunday morning plans are in the works for a Roundtable Discussion on Minor's Counsel Issues. The plan is to keep the location easily accessible and accommodations reasonably priced.

Plans are being finalized for delegates from our organization to participate in the Council of Community Property States annual seminar which will be held this year March 20-23 in Coeur d'Alene, Idaho at the Coeur d'Alene Resort at the same price that the original conference was held ten years ago. As it has always been the most fun, interesting and convivial of groups, my partner/husband Avery Cooper and I are very much looking forward to attending. There are ample slots available for our delegation from California. By all means contact Linda Pall at 208-882-7255 for more information.

Our beautiful new web site is now almost ready for the world to visit. I am happy to report that we will have a fully operational list serve on line which allows us to be able to chat with each other, ask for referrals, network and get and give invaluable help to our friends. In addition, we have links through the on-line directory to all of our web sites as well as to many, many other useful web sites. Our recent newsletters and *amicus* briefs are on line for members only and, a searchable members' directory is linked to everyone's e-mail address and web site, if appropriate. We also have a form bank and a brief bank that are also be available to members only. Please take a few minutes to browse our web site at www.acfls.org, where our new features will soon replace the old ones. Your comments will be most appreciated.

I am so pleased with the constituency of our board of directors. We have a number of new members, three from the South and one from the North. Everyone on the board has become fully committed to accomplishing our agenda for the year 2003.

Fast approaching is our annual Spring Seminar, to be held in La Jolla, California at the Embassy Suites Hotel. The topics for discussion at that seminar are incredibly timely. This is going to be a spectacular event. Watch for updates on it and block your calendar for the weekend of May 2, 2003. Topics and presenters will be scheduled for 3 hours on Saturday and 3 hours on Sunday. Each session will have two segments for a total of 4 presentations. Dawn and Steve Wagner will present the issues related to FC section 721; Ron Granberg and Tom Woodruff will present the *Bono* case and Moore/Marsden issues; Commissioner Gale Hickman of Orange County will present imputing income issues and hardship deductions; and Greg Ellis will present appellate issues before judgment. A Friday dine around concept is being planned and we will have a bevy of excellent restaurants from which to choose.

Our Technology Seminar for both Northern and Southern California, which has always been a big hit with our members, is being planned for January 2004.

There have been a number of new bills introduced this season. AB 111 is being sponsored by Ellen Corbett of San Leandro. It is an amendment to Family Code Section 3044 to add "emotional abuse" to the rebuttable presumption against an award of physical or legal custody to a parent who has perpetrated domestic violence. "Emotional abuse" is not well-defined. While I am sure we all agree that emotional abuse of a child is detrimental, this would appear to only add more contention to what already can be a contentious process. The bill also adds emotional abuse to Penal Code section 273a, so that a person who "causes, or permits, or inflicts upon a child unjustifiable mental suffering" may be charged with a crime. The Legislation Committee will be meeting soon to decide on which bills to support or oppose. It is likely that we will circulate other bills for your comments. View all the new bills at www.leginfo.ca.gov. Please send your comments as to A.B. 111 to LeRoy Humpal at lhumpal@pacbell.net or fax him at 415-398-8507.

I look forward to meeting many of you at one of our Dinner Meetings or seminars. Thank you for your support.

A Better Divorce

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Most of the lawyers in the South Bay area of Los Angeles County maintain their offices in the Beach Cities or the Palos Verdes Peninsula and center their practices on the Torrance Courthouse. It is a tight-knit legal community, and the family law bar is no exception. (I always tell clients that, of the 50 local family law attorneys, I would be happy with any of 45 of them as opposing counsel.)

It is a fairly affluent community. Most of the family lawyers are sole practitioners drawn to middle class clients, but also drawn to the South Bay Bar's long tradition of service to the community.

About two and one half years ago, Kim Davidson, who has worked as both a family therapist and a family law attorney, came across an article about Collaborative Divorce. She gathered together two other family law attorneys and two mental health professionals, and, as lawyers are wont to do, we had lunch. That lunch changed our lives.

We decided to form a group. Like astronomers before Galileo, we assumed that the world of family law revolves around lawyers, so we invited primarily lawyers into our group. We also had close ties with two forensic accountants, who eagerly joined our group. We knew nothing about the nationwide Collaborative Divorce debate about whether groups should be open or closed, but instinctively felt that our group should initially be closed. We also felt it should be small. The lawyers had to be experienced and reputable. We settled upon ten attorneys, including ourselves, and thereby offended at least 35 good friends. Our major criterion was that the attorneys be nice, non-controversial personalities, thus assuring ourselves of a group that gets along together.

At least here in the South Bay, there was something about this Collaborative Divorce business that rang a bell. Every single person we called was thrilled to be a part of it.

It was at least a year before we got our first case. We spent that year learning the process of Collaborative Divorce and investing endless hours in meetings discussing everything from the nuts and bolts of creating forms to the endless ethical and legal permutations of Collaborative Divorce.

We also learned that there is a semantic distinction between Collaborative Law and Collaborative Divorce. Generally speaking, Collaborative Law is limited to using lawyers, while Collaborative Divorce (a service-marked concept started up by Stu Webb in Minnesota and maintained by the terrific training provided through www.CollaborativeDivorce.com) is more of an interdisciplinary team approach. We chose Collaborative Divorce.

So, using the same vague criterion of niceness, we selected a group of eight more mental health professionals to join our group, making the group ten lawyers, ten mental health professionals and two forensic accountants.

We lost two or three of the mental health professionals for personal reasons, but the others heard the same call and joined right in.

Integrating the lawyers with mental health professionals took several more months of thoughtful discussion. But eventually we had 20 people with 20 points of view dancing angels on the head of a pin, and attendance started to slip.

We applied the rules of collaboration to our own group and spent several meetings dealing with the simple problem of attendance. The solution: we streamlined our meetings, created committees, created a mission statement and a set of goals with timelines, and we were off and running. The result: we have had no attendance problems for over a year. We have at the same time managed to preserve the Quaker model of consensus decision-making. We have also added a few more members to the group, but only by consensus.

It is too early to say whether this will remain a closed group or eventually become an open group. There may not be much of a distinction: anyone who does the full Collaborative Divorce basic training and who brings a reasonably collaborative atti-

Continued on page 16

LACFLA Training...

David Kuroda, MFT (former director of L.A.'s Family Court Services) is one of the organizing members of the program's cosponsor, the South Bay's "A Better Divorce."

Hello, My Name Is Alan... An Update*

Alan L. Nobler, J.D., CFLS, San Jose

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Alan Nobler is the Chair of the Association of Collaborative Law Attorneys and a member of the Collaborative Law Association and the American Institute of Collaborative Professionals. He is an active member of ACFLS and served on our board for many years in various capacities. He has been chairman of the Family Law Section of the Santa Clara County Bar Association. In connection with the Santa Clara County Bar Association, Alan chaired the Santa Clara Family Court Local Rules Committee through the first two revisions of those local rules. This committee was composed of local attorneys and Superior Court Judges. He was also instrumental in creating a settlement conference procedure in family law cases. Alan has also been on the boards of the Santa Clara County Trial Lawyer's Association and the American Psychology-Law Society. He is a certified mediator.

Hello, my name is Alan and I am a recovering litigator.

Although I learned everything I ever needed to know in Miss Elsie's kindergarten class, I went on to law school and began practicing law in 1969. I became a Certified Family Law Specialist in 1980. So I certainly know about taking positions and filing motions. I've spent years in the gutter fighting the demons of depositions and documents; support motions and discovery motions. Custody trials, too. There was something special for me about bringing home a thick file to review nights before a big motion or trial.

There was also something special about forgoing my family to go through those depositions, interrogatories, documents and disclosures. I could then lay awake nights thinking of arguments to persuade a judge to accept what was by then my position and explaining my client's entitlements. What a rush to turn on the light at 3 a.m. to make some notes so my "brilliant" thought would still be there for me with the morning alarm.

My gradual recovery started about 1995. It was a shaky beginning; I started attending Collaborative Law (CL) meetings about every other month. But I wasn't really committed to a change. I'd heard about CL a year or so before I actually attended a meeting and it was difficult to conceptualize the steps I'd have to take on the road to recovery.

I gradually escalated to the point where I attended a drying out session for four days at the Friedman clinic in Marin County. But I quickly fell off the wagon again, litigating "significant" cases and feeling important.

Then I started doing some actual CL. The results were as intoxicating as the litigation; I even stayed high just as long, without the hangover. I started attending CL meetings more and more often, then attended a real five-day drying out class in January, 1999. I even missed the NFL playoffs on TV! I began to actually visualize a life without litigation, although it still seemed like a pipe dream.

Then I found myself in a non-collaborative case that had been negotiating smoothly before the other side changed lawyers; I was sure I was going to lapse into full scale litigation. But the smoke cleared and I had a vision: I could associate an outside firm to do the litigation and I could retain the settlement negotiations. What a change in dynamic! It was difficult for the client at first, but we agreed to try the process and see how it went. The opposing litigator was uncomfortable with the concept of dealing with two completely separate firms with two completely separate functions. The surprise was the change in my client's spouse as a result of the changed dynamic: the idea of more lawyers on the other side, one an unabashed litigator and one avoiding litigation recovery, brought about an attitude change in him. The parties made a trip to a local mediator who was then able to resolve what could have been an incredibly lengthy and complex trial.

The experience was, in many ways, liberating. It gave me the confidence to say I can handle my life, day by day, case by case, controlling the need to litigate.

Now I can safely say I know of a CL meeting virtually every week. I've stayed clean and sober with no contested hearings (since April 1999) thanks to the good people in CL.

Oh, I still think back to the courthouse with its manic energy and all-pervasive depression so palpable you bounce off of it at every turn. But for now, I'm keeping it under control and only attend court to *pro tem.*

I still find myself lapsing into positional bargaining, but those lapses seem to be more controllable and have not thrown me off the wagon. Besides, there's always a CL meeting to attend and render aid against the demons.

Thank you for allowing me to share.

For more information, visit www.Nocourt.com.

** "Hello" was first published in the ACFLS newsletter Summer, 2000. It has since been reprinted by several other publications and has generated more "buzz" than anything I have ever written.*

Continued on page 10

Collaborative Divorce: Six Stages to Resolution

Ronald Supancic, J.D., CFLS

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Divorce is not an event. Divorce is a process. It is the process by which we make the transition from being part of a couple to being single. It is a journey during the course of which one unit of two divides into two units of one. The goal of divorce, or dissolution as it is now known, should be to begin as two, end as one, and still feel whole.

This journey through dissolution leads the parties through a maze of transitions: legal, physical, emotional, financial and spiritual. Unfortunately, these changes usually come through litigation, the courtroom process that challenges and saps psyches, relationships and any vestige of family unity that might have been.

A seasoned mediator has suggested that there is no dispute until there is a dispute. There may be misunderstanding, failed communication, confusion and chaos, but these can be clarified and eliminated with effective communication. The advantage of open collaborative communication is that many of the potentially painful issues of divorce can be eliminated when litigation costs are realistically evaluated. And here I speak of emotional and psychic costs as well as financial ones. If one is to successfully navigate the treacherous and painful path of divorce, one should be willing to enlist the services of those who have expertise in specific areas of the process. I encourage those with whom I consult to turn to lawyers, mediators, psychotherapists, accountants and other professionals trained to help the family reorganize with thought for that family's future relationship. These helpers may serve as guides along the path, so that at the end of the journey the parties remain whole. When this is done something new and extraordinary occurs called Collaborative Divorce.

Collaborative Divorce is a process that can move the parties involved from dissonance to consonance. It is a new paradigm for the new millennium. It is no panacea, but a process that follows a series of orderly steps to completion. And "completion" is a key word. The collaborative process can provide divorcing families with psychological completion, or closure, that the traditional method of dissolution, litigation, can never match.

Do all those who decide to divorce qualify as collaborative clients? Anyone who is willing to put the emotional wholeness of the family before personal ill will, vendetta, and one-upmanship will qualify for the collaborative process.

There are six simple steps to a Collaborative Divorce: Assessment, Intervention, Issue Identification, Process Selection, Initiation of the Legal Procedure, and finally, Closure.

In the Assessment Phase, the divorcing parties work with an attorney or attorneys to identify the emotional profile of the family, and discuss all available interventions, with the express goal of designing a strategy that will facilitate the family's reorganization, rather than leave the family destroyed by dissolving all family ties.

In Step Two, Intervention, the attorney(s) and parties choose the Interventions appropriate for their case. These may include, but are not limited to, separation therapy, parenting classes, rage manage-

Continued on page 17

LACFLA Training...

LACFLA's first two-day Collaborative Family Law training was a sellout. Another two-day training is scheduled for April 4-5. Information and registration materials are available at www.lacfla.com.

Collaborative Law: There Is a Better Way

Pamela Canter, J.D., CFLS

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Pamela R. Canter's practice includes litigation, collaborative law and mediation. She is a member of ACFLS, California Women Lawyers, and the state and local Bar Associations' sections on Family Law. Her involvement with the San Mateo County Bar Association includes serving as the Chair of the Family Law Section, as a member of the Bench and Bar Committee, and as a Director of the Legal Education Foundation. She practices in Burlingame as the Law Offices of Canter•Moorhead.

When I first began practicing family law, I really enjoyed doing litigation, the thrill of victory, the agony of defeat, the whole drama. And when I would come away with a "win," I felt on top of the world. As you might guess, however, very quickly those feelings began to fade, and even when I felt we had won, my client often still felt a loss. Let's face it, as much as we might enjoy the adrenaline rush of going to court, arguing our client's position, and, hopefully, coming away with a victory, we all know how often we come away from court feeling something else. Maybe there was no available courtroom, maybe the other side wouldn't stip to the *Pro Tem,* maybe we are facing another continuance, maybe the judge didn't seem to know what he/she was doing, maybe our client felt like he/she wasn't heard, or maybe the children seem to be being pulled apart by the very people who are supposed to protect them.

I soon came to realize that my bottom line goal, a satisfied client, seemed to be met less and less often. And I wasn't having very much fun anymore either. I began to think that there must be a better way to practice family law, to actually help the clients and their families avoid the emotionally crushing, psychologically damaging, incredibly expensive, and extremely frustrating process of maneuvering through the court-based legal system.

Once I thought about doing something besides litigation, I immediately decided mediation was the answer. Soon thereafter, I attended an intensive, four-day mediation training. While at the training, I met a practitioner who was involved in something called Collaborative Law. I had heard the term before, but never really understood what it meant. In truth, I thought it was some little known, little used, and certainly ineffective way of practicing law that couldn't possibly allow attorneys to advocate for their clients. What I came to find out, however, is that it is an incredibly structured, well thought out, and extremely efficient and effective way to handle a family law case.

LACFLA Training...

Santa Cruz Collaborative Lawyer Chip Rose, CFLS, conducted the LACFLA training.

What is Collaborative Law? Dispelling the Myths

Collaborative Law is an alternative dispute resolution process whereby the attorneys for both of the parties work together in a cooperative, rather than adversarial, environment. It is a unique and innovative process for resolving a case that presents an alternative to going to court, and an alternative to mediation. The key distinction to Collaborative Law is that both parties and their attorneys commit to resolving all of the issues of their case without going to court. The objective in Collaborative Law is to resolve the case by formulating options and creating solutions that meet the actual needs of the individual clients as well as their families.

The way it works is that both parties choose an attorney who is specially trained in the collaborative process. At the very outset, all of the participants – the lawyers and their clients – sign a binding agreement to work towards settlement without resorting to going to court. This agreement specifically provides that if settlement is not reached, then both attorneys are disqualified from representing their client in court, and both clients must hire new counsel. This is really the key element that distinguishes Collaborative Law from simply saying that the parties and attorneys are going to try to work towards a negotiated settlement. There is an actual commitment not to litigate that is joined in by everyone involved. It is my firm belief that this disincentive to litigate, and the removal of the threat of litigation as the impetus for settlement are the cornerstones of the effectiveness of Collaborative Law.

In a series of four-way meetings together, the two clients and two attorneys address and work to resolve all of the

Continued on page 22

Video Review
"Divorce ~ Collaborative Style"

Donna Beck Weaver, J.D., CFLS
Los Angeles

Donna Beck Weaver has practiced law for 25 years. She is a Certified Family Law Specialist and a Fellow of the American Academy of Matrimonial Lawyers. She is one of the founders of the Los Angeles Collaborative Family Law Association, an open, interdisciplinary organization. She practices with Trope and Trope in Los Angeles.

"Divorce Court" makes for popular television drama, but not in real life, says Tony Seton, the journalist and moderator of this half-hour program exploring the collaborative law option for divorcing couples. The program thoroughly examines the myths and the reality of divorce court, and concludes that the majority of divorcing couples would be better served by the collaborative process.

It may seem difficult to portray on film a divorce that gets sorted out calmly in an ordinary office instead of dramatically in a courtroom. No doubt that is why most material on the collaborative law process to date has been in print. But we have become a visual culture and fortunately Seton has found a way to show the choices people must make about their divorce. He does this by utilizing interviews with real life judges, clients and lawyers who speak compellingly about their experiences in both litigated divorces and collaborative divorces. The difference is like night and day, all agree.

Try CL first, because you can always go to court later if you must, advises Judge Ross Foote of Louisiana. But if you start with a bloodbath in court, you can never go back. Judge Foote frankly discusses what he sees in his divorce court – people throwing as much "mud" as they can in hopes of persuading him to rule their way. As he speaks, his facial expression conveys that "mud" is not as persuasive to judges as people might think. But it does have the predictable effect of infuriating the other party, and a vicious cycle has begun.

Litigation exacerbates the family's problems instead of helping, says Judge Donna Hitchens of San Francisco. It escalates the conflict instead of reducing it. She describes that couples spend fortunes trying to persuade her that their story is the true one, so that she might rule their way. But a judge can never really be sure what the true story is because people experience things differently.

The Making of
"Divorce ~ Collaborative Style"

Tony Seton is a veteran broadcast journalist who covered Watergate, six elections, and five space shots, produced Barbara Walters' news interviews, and earned several national awards for his coverage of business/economics issues.

When I met my wife Linda Seinturier five years ago, she was a successful family law attorney practicing in Shasta County. Upon our marriage, I moved up from the Bay Area to join her. As I worked out of our house and she went to her office in town, I took it upon myself to have dinner on the table for her every night when she came home. That's when I learned about family law. I got an earful of the horrors as Linda would decompress from her day by telling me about her cases.

Though I had been through several divorces myself – two amicable, one not – I had never imagined how awfully people behaved when it came to ending a marriage. Even my unpleasant dissolution didn't compare to the sordid behavior that played out before my dear wife on a regular basis. The stories she told made me cringe, not just for the facts and how they turned my stomach, but for what Linda endured every day.

It was at that time that I saw a cover story in the Marin County news-weekly Pacific Sun about a Bay Area lawyer, Pauline Tesler, who was practicing collaborative law. I pushed Linda to contact Pauline, and soon a dialogue was started. Linda got the bit between her teeth and organized a group of colleagues into the Collaborative Lawyers of Northern California (collaborativeattorneys.com). She was also invited to join the board of the International Academy of Collaborative Professionals (collabgroup.com). Now she pushes for as many of her cases as possible to be resolved through the collaborative process.

Collaborative divorce is a practical, compassionate way to end a marriage, especially compared to the barbarism of a court divorce. The collaborative approach costs a fraction of the money, takes weeks instead of years to complete, and actually moves to end the rancor, rather than inciting anger and hatred that in the litigation process can poison a family for generations to come. Those are the facts.

Let me add that when Linda comes home after handling a collaborative case, her spirits are high. She feels that she's accomplished something, not just won a case. She's had a more rewarding interaction with the other attorney. She hasn't had to roll dice before a judge, nor

So that doesn't help resolve the problem. Court is the last place that families should go for help in resolving their problems.

The two judges in the video are clearly experienced, compassionate, practical and concerned. They take pains to de-mystify the court's role in divorce and urge clients and attorneys to consider court a poor last resort only. Their presence in the program lends a strong credibility and dignity to the collaborative law process, which both judges endorse as a humane and effective process for resolving divorce matters.

The program also features thoughtful discussions with family law attorneys, several of whom are members of ACFLS. This highlights the interesting fact that it is family law attorneys, many of them specialists and excellent litigators, who saw the need and have been leading the way in developing Collaborative Family Law and working to make it broadly available to divorcing couples.

The attorneys describe how the collaborative law process works to protect legal rights and at the same time achieve a better outcome than is possible in litigation. Everyone in the film underscores the cost savings. The cost of an entire collaborative case is described as about the same as an initial hearing for temporary orders in a conventional case. In other words, collaborative law is far less costly in dollar terms. Several participants note that it is far less costly in emotional damage also.

A frequent observation is that attorneys who have learned about collaborative family law are as enthusiastic about it as if it were the cure for cancer. The lawyers depicted here are very grounded: it is still a divorce, after all. But clearly the clients who tell their stories say it is a whole different experience when professionals with problem-solving skills and a team approach are involved. They say they were satisfied with what happened and how it happened. When did you last have a client report that they found the whole divorce satisfactory? We saw and heard them here. So perhaps we can forgive a little enthusiasm. Maybe it's not the cure for cancer. Maybe it's just laparoscopy instead of open surgery. But there is no doubt – clients like it, and that is something to which all family law attorneys should pay attention.

Pauline Tesler, a California family law specialist who has written the leading legal text on collaborative law, *Collaborative Law, Achieving Effective Resolution in Divorce Without Litigation,* (2001) ABA, observes that legal professionals have an ethical responsibility to inform clients of their options, now that there are some. In other words, just as we want our doctors to inform us of our options and discuss with us risks and benefits (and not just schedule surgery), so lawyers should inform their clients of the availability of a sound, reliable alternative to litigation (and not just file an OSC).

The film does not mention mediation as an option or compare it to collaborative law. The film is geared toward those who want attorney representation and would otherwise be electing litigation. It does not get bogged down in the detail of describing variations on the collaborative law theme, such as the attorneys-only model and the interdisciplinary team model.

An interesting aside is that Seton is married to a family law specialist, one of the attorneys in the film. He observed how she felt at the end of a work day; it wasn't good. A research journalist, he located an article about collaborative family law and shared it with her. "It only took a nudge," he says.

The video is suitable for viewing by clients, attorneys, mental health professionals and judges. The production values are good and it represents a worthy offering as an introduction to collaborative family law.

waste hours in the courthouse hallways waiting for that opportunity. Both clients are in better shape, in the moment and for the future.

Last spring, I flew Linda down to the Bay Area for a meeting with Judge Donna Hitchens and Hon. Ross Foote, a pioneering family court judge from Louisiana. Ross was anxious to get the word out, and Linda told him that her broadcast journalist husband was just the person for the job. Ross and I got to talking, and he got us some money from a local foundation whose focus was on helping people in need.

And with it, this past fall, I shot six interviews in Redding and four in the Bay Area with the two judges, four attorneys, three clients, and a therapist who works in collaborative cases as a divorce coach. The interviews elicited some of the most compelling statements I've heard in more than three decades of this work. My videographer, also a hard-bitten veteran, was equally impressed.

The purpose of the interviewing was to produce a tape for lawyers to give to prospective divorce clients with an eye toward moving them in the direction of collaboration. I went through all of the interviews, and picked the best cuts, arranging them so that with a little bridging by me, the story could be told by the collaborative participants themselves.

From the start it was my intention to reach out further to a national mainstream audience, so I cut the program to a PBS half-hour length (26:46), and titled it Divorce ~ Collaborative Style. I am hoping that the network or local stations will recognize the significance of this movement, and will choose to present the program to their viewers. I have also just sent out tapes to former colleagues at ABC, to Larry King, and to the Canadian Broadcasting Company. Perhaps they will find peace as exciting as war.

During the course of the production, I flew out to Alexandria, Louisiana and shot a series of on-camera pieces by Judge Foote which were fashioned into a package, using a cut-down version of my own report, on collaboration from "A Judge's Perspective." These tapes will be used to train judges on the subject, and get the word spread to the bench community nationwide.

The collaborative approach is a sea change in family law, and thank goodness. Not only will it benefit the couples and their families and friends, and the lawyers who handle the cases, but also the judges who won't have to try them but can better apply their time and talents to matters that truly require intervention. And in this time of state budget crunches, it means that fewer family law matters will wind up in court, reducing gridlock and saving tens of millions of taxpayer dollars a year.

This final note. After the first use of the atomic bomb in 1945, Albert Einstein commented that with this power to destroy itself, mankind needed "a new way of thinking." Collaboration may just be that ticket. Collaboration works in other areas as well as family law, further reducing the burdens on the legal system and making for a healthier society all the way around. Not only does it diffuse conflict in a rational manner, but it also brings otherwise warring factions face-to-face with themselves and the choice of fighting or resolving issues in a more productive, less expensive, more evolved manner. I don't think Saddam Hussein or Kim Il Jong are prime candidates for collaboration, at least not yet, but perhaps down the road, we can use more heart and mind and less muscle in all of our relations.

For more information on "Divorce ~ Collaborative Style," please visit the web site at www.collaborativedivorce.tv.

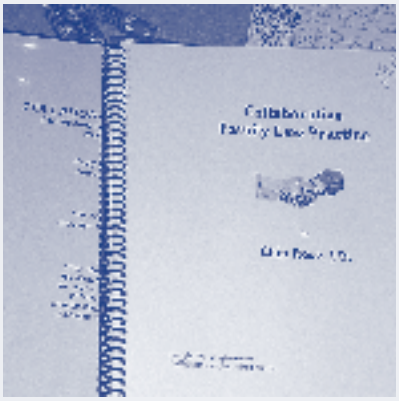
Hello, My Name Is Alan

Continued from page 5

A Follow-up to "Hello"

I retain my evangelical commitment to CL and mediation. This is reinforced by the people I have worked with – my collaborative counterparts (not opposing counsel) and the parties with whom we have worked. A few brief examples:

LACFLA Training...



Chip provided extensive written materials about the theory and practice of collaborative family law, and forms and practice tools.

The H, making $70,000 per year who, after seeing what the schedule provided as support for W and 2 children said, "They can't live on that!" He volunteered to pay several hundred dollars more. This type of reaction has happened many times and has led to the support explanation described later in this article.

The many parties who volunteer property as the separate property of the other spouse because the property originated in the other spouse's family.

A Contemporary Problem

The support schedule now creates one of the greatest conflicts we face in CL and mediation. I now generally approach the topic with the following:

"You have a right to see what the support schedule provides. But first, I'd like to explain what the schedule is and what it is not. The schedule first came into place in 1982. Five members of the Santa Clara County Family Law Executive Committee (Alan Nobler, George Norton, Karl Nigg, Hugh Thompson and Paul Jacobs) adopted, on a 3-2 vote, a schedule proposed by George Norton as opposed to a competing proposal. We believed it was the slightly better division of income assets at the time. It was reduced to a multi-page chart with columns proposing support based on the number of children and income of the parties. It did not have the capacity to vary support to provide for minute differences in visitation. In fact, there was no provision for variance based on any percentage of visitation – that came later.

"The Santa Clara County judges adopted the schedule based on the following argument: 'Adopting the schedule will provide some sense of predictability and uniformity in decisions. This will, in turn, give parties' attorneys a basis on which to settle cases. Settled cases mean less backlog for the family court motions judge.' At no time then, or now, has anybody provided empirical evidence that the schedule provides a fair way to divide a family's income. No studies have proven anything about the schedule's fairness or application to a particular family, whether intact or operating in two separate households.

"I/we will be happy to run numbers for you. Before we do that, would you like to see if you can work out your own division of family income? If you like, we can then use the computerized support program to demonstrate what you might have as after tax disposable income based on your proposed division."

In the 10 or so cases in which I have had this discussion, nobody has asked to see what the schedule provides. I have "sneaked a peek" at what the schedule would have provided and have found in each case that the agreed support was higher than "schedule" based on the same assumptions. Parties have found their own ways to work out "ability to earn" issues and the timing of a review based on proposed increases in ability to earn. In one CL case the parties came back to have support reviewed when the H, payor, lost his job. They resolved the problem in two hours.

Organizations

I belong to two local organizations: the Collaborative Law Association (CLA) and the Association of Collaborative Law Attorneys (ACLA). I also belong to the International Association of Collaborative Professionals (IACP), the Northern California Mediation Association, and the ADR section of the Santa Clara County Bar Association.

The CLA is an open practice group that anybody with an interest in CL may join. We have several financial planners, CPAs and therapists in our membership. At our meetings, we discuss topics that affect our work in CL – the approaches we use and topics that cause concern in our practice of CL. The CLA is the group that does the training for attorneys and related professionals to enhance their ability to practice CL. There are 26 members of the CLA; 20 attorneys, four financial planners/accountants, and two mental health professionals.

The CLA hosts an open house each year where all members of the legal community are invited to socialize and broaden their exposure to CL and its principals. Members of the Bench are also invited and frequently attend. The open house is usually in the October time frame. (If you are interested in attending, please send me an email and I will inform you of the time and place when our publicity goes out.)

There are two membership categories, I and II. Group II members are more experienced and have more training than Group I members. Group II members must have completed a 36-hour mediation training in addition to their collaborative training. Group II members are on the list which is given out to clients for referrals. With more training a less experienced attorney can get on the refer-

LACFLA Training...

Chip answers a question for Pasadena attorney Kathryn Fitzgerald, CFLS.

ence list. Although members will accept cases with non-members who will sign the stipulation, our experience is that such cases almost always are significantly more difficult.

LACFLA Training...

Collaborative Professional Alice Oksman, PhD, is a forensic and clinical psychologist, specializing in child custody matters in L.A.

Bang for the Buck – Promoting Your Practice Group

The ACLA is comprised of members of the CLA who have joined together to promote their practice group through advertising and other efforts. Level II members of the CLA may join the ACLA with the payment of an initiation fee ($750) and agree to pay the annual fees of $250. We have a website (www.nocourt.org) and have advertised in the Pacific Bell Yellow Pages and Bay Area Parent magazine. We have an 800 number, 877-3nocourt, and a secretary who will answer and provide informational packets to interested persons. So far, the only promotion that seems to be having much impact is the website. No "action" was noted as a result of the magazine advertising. The Yellow Page ads have been placed in three separate area books and refer people to our website. We do not believe the Y.P. expense has been justified. We will be reducing our Y.P. advertising to a simple reference to our phone number and website in the "Collaborative Law" section. We have recently decided to revise our website to make it more consumer friendly. The comment was that the site was "written by lawyers for lawyers" so we are going to make a change.

Statistical Insights

The CLA has been gathering statistics on our cases for seven years. While we have not had the number of cases that professional statisticians require, we have enough to demonstrate trends that we feel are significant.

	CL	Traditional (est.)
Fees:	$8,756	$15,000
Time:	12 months	18 months
Meetings:	5	unknown
C P:	$1 mil	$1.4 mil
Satisfaction:	Very high	You all know

Our group is in the process of compiling more statistics. We have been asked to analyze our information on our last ten "traditional" cases. Our resident statistician, Mike Lowy, CFLS, Anthropologist, has contributed mightily to the effort: the "traditional" column above is from his practice and he has provided much of the information in this section of my article and the organizations section. If you would like to discuss the statistics or add to them, please contact him – he is in our directory.

Trainings

Our CLA has member attorneys who have traveled the country to provide CL training to interested attorneys. While I have had the opportunity to act as a trainer twice, several other members of ACFLS have done many more trainings: Mike Lowy, George Richardson and David Weinberg. CLA has done beginning, intermediate and advanced trainings.

Making a Living

Aha! The $64,000 question. Can you make a living in CL? Well, I'm still a lawyer so I can give you a definite "maybe." As we all know, it takes two hands to clap. So too it takes two collaborative lawyers to make a collaborative case. None of the lawyers in my practice group have been able to limit their practices to CL and maintain their previous levels of income. Several of us have limited our practices to CL and mediation and gush, sometimes too loudly, how much happier we are than in traditional FL practice. Others in our group accept the need to earn more and continue with hybrid practices – maintaining an inventory of litigation cases while they transition their practices toward CL and mediation.

Speaking only for myself, I have found that I can reduce expenses by an extraordinary amount. I no longer require a full-time assistant and have obtained office space where I do not even maintain a secretarial station. I am not attorney of record anywhere. This means I create my own schedule.

What You Can Do

I have come to believe that the only way CL will become the default system for family dispute resolution is through education of attorneys and the courts. When the courts promote CL and mediation, parties will become educated and demand access to trained attorneys. I believe that most parties would prefer to resolve their dispute without going to court. Some, of course, will always want to punish the other side – either emotionally or economically or both – but experienced lawyers know those parties wind up punishing us and the court system as much as each other.

LACFLA Training...

Financial Planner Ranier Lang was among the Collaborative Professionals who offer economic coaching and consultation.

Litigation As ADR

This article is not intended to demean all litigators and litigation. Nor do we expect all of ACFLS' members to lay down their pleadings, link arms and sing kumbaya. Litigation remains an important alternative in the dispute resolution spectrum. We simply believe it should be the last alternative, not the default. Even when cases are settled during the litigation process, the toll on the participants, including the attorneys, is far greater than in mediation or CL.

GARBAGE IN, GARBAGE OUT...

USE AND MISUSE OF THE STATEMENT OF DECISION PROCESS IN SEEKING EFFECTIVE APPELLATE REVIEW FROM BENCH TRIALS

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When the result of a bench trial goes up on appeal, the factor most influential on the appellate outcome is the trial court's Statement of Decision. Yet, otherwise sophisticated trial attorneys routinely miss opportunities to use the Statement of Decision process to influence decision-making, buttress victories, or isolate appealable errors. Properly obtaining a Statement of Decision is a meticulous process fraught with pitfalls, and appellate specialists frequently see both procedural and tactical errors in this phase of the trial court 'endgame.' The Statement of Decision you get from the trial court may be only as good as your request. This article provides guidance to trial counsel on how – offensively and defensively – to use the Statement of Decision process to put their client in the strongest position possible for an impending appeal.

Why Request a Statement of Decision?

Without a Statement of Decision, a reviewing appellate court will construe all factual conflicts in favor of the Judgment, and will additionally indulge any favorable inference that can reasonably be derived from the record. *In re Marriage of Jeffries* (1991) 228 Cal.App.3d 548, 553 fn. 4; *In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1159. The result can be a highly fictional version of the facts that doesn't reflect the trial court's actual reasoning. Even findings and reasoning stated by the court on the record are routinely ignored, unless confirmed in a formal Statement of Decision. *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 551-552. See also *Arrela v. County of Monterey* (2002) 99 Cal.App.4th 722, 750.

Why do appellate courts ignore the trial court's tentative rationale, just because it is not reduced to a Statement of Decision? Two reasons are stated for this approach. The first is a fiction that the court might have changed its reasoning, but not the result, between the time of a tentative decision and the time Judgment is entered. *In Re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646-647; *Canal-Randolph Anaheim, Inc. v. Moore* (1978) 78 Cal.App.3d 477, 494; *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1756. The second reason is out of a sense of fairness to the court – that the Statement of Decision process gives the trial judge an opportunity, prior to any appeal, to address ambiguities and omissions that are brought to its attention, and reconsider the merits in light of those factors. *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140-141.

In contrast, when a Statement of Decision is issued, it is regarded as the trial court's formal record of the factual and legal basis for its decision. *In re Marriage of Benjamin S.* (1985) 171 Cal.App.3d 738, 747; *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 126-127. The 'any legitimate reason will do' approach to appellate review is discarded. Instead, through its Statement of Decision, the court provides formal findings "explaining the factual and legal basis for its decision as to each of the principal controverted issues," and is ordinarily held to those reasons on appeal. Code of Civil Procedure section 632; *Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 565; *Morris v. Thogmartin* (1973) 29 Cal.App.3d 922, 927-930. Generally speaking, if the rationale of a Statement of Decision is flawed, the Judgment will be reversed. *Pacific Hospital of Long Beach v. Lackner* (1979) 90 Cal.App.3d 294, 299; *In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 360-361. Moreover, the Judgment may be subject to reversal for failure to make findings on the principal controverted issues, if such findings are properly requested. *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 127; *Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 181; *Triple A Management Co., Inc. v. Frisone* (1999) 69 Cal.App.4th 520, 536; *Guardianship of Brown* (1976) 16 Cal.3d 326, 332-333; *In re Marriage of Hardin* (1995) 38 Cal.App.4th 488, 453; *In re Marriage of Reilley* (1987) 196 Cal.App.3d 1119, 1125-1126.

Under certain circumstances, a request for a Statement of Decision should be considered even when an appeal is not contemplated. For example, when a Judgment is subject to future modification, a Statement of Decision documenting the original factors relied on by the court may be essential to determining a subsequent modification request. *In re Marriage of Laube* (1988) 204 Cal.App.3d 1222, 1226; *In re Marriage of Reilley* (1987) 196 Cal.App.3d 1119, 1126; Hogoboom & King, California Practice Guide: Family Law (2002) section 15:93-94.

When Is a Statement of Decision Available?

Under Code of Civil Procedure section 632, a Statement of Decision may be requested "upon the trial of a question of fact by the court." While this standard could be broadly interpreted, case law has significantly narrowed the circumstances under which litigants are entitled to a Statement of Decision as a matter of right. Most fundamentally, the case law

distinguishes between a trial and the proceedings on a motion. In most instances, no Statement of Decision is required to support an Order following a motion, even if the motion involves an evidentiary hearing and is itself appealable. *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040; *Grundl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660. Note, however, that it never hurts to ask – courts may issue a Statement of Decision even where it is not required. *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1173 fn. 4. See also *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 476 fn. 7 [regardless of whether it is timely requested, the court is authorized to issue a Statement of Decision *sua sponte*].

Even where there has been no trial, a Statement of Decision may nonetheless be required under limited circumstances. The exception is based on a balancing of (1) the importance of the issues at stake, and (2) whether effective appellate review can be accomplished without findings. *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040. Thus, for example, Statements of Decisions have been required where child custody rights are implicated (*In re Rose G.* (1976) 57 Cal.App.3d 406, 418; *In re Marriage of Benjamin S.* (1985) 171 Cal.App.3d 738, 747) or where a Judgment against a corporation is amended to include an individual, under estoppel and 'alter ego' theories. (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 659-661). Upon request, a Statement of Decision is also mandated by statute or court rule for certain proceedings short of a full trial. See, e.g., California Rules of Court, rule 232.5 [ruling on bifurcated issue]; Code of Civil Procedure sections 631.8 [nonsuit motion]; 663 [motion to vacate]; Family Code sections 2127 [motion for post-judgment relief]; 3654 [motion modifying support]. Certain statutes similarly require a "statement of reasons," which may be similar but not equivalent to a Statement of Decision. See, e.g., Code of Civil Procedure sections 437c(g) [summary judgment], 639(d)(1) [appointment of referee]; Family Code sections 3087 [modification of joint custody], 3190 [order requiring counseling], 4056 [order varying from guideline child support]; 4332 [findings re marital standard of living]; Penal Code section 1272.1 [bail on appeal].

Remember that a Statement of Decision is only required "upon the trial of a question of fact by the court." Code of Civil Procedure section 632. Therefore, courts have held that no Statement of Decision is required where there are no disputed facts, the legal posture of the case does not require deciding questions of disputed fact, or only pure questions of law are presented. *Angelier v. State Board of Pharmacy* (1997) 58 Cal.App.4th 592, 598 fn. 5; *Earp v. Earp* (1991) 231 Cal.App.3d 1008, 1012; *Healdsburg Police Officers Association v. City of Healdsburg* (1976) 57 Cal.App.3d 444, 456; *Kroupa v. Sunrise Ford* (1999) 77 Cal.App.4th 835, 842.

A Tentative Decision Must Precede the Statement of Decision

Under California Rules of Court, rule 232(a), the court is required to announce a non-binding tentative decision before rendering a Judgment or a Statement of Decision. Courts sometimes ignore this requirement, as when submission is followed by a minute order entitled "Statement of Decision" before the time for requesting a Statement of Decision has expired. This practice deprives the requesting party of the opportunity to make proposals and objections (discussed below), and is error *per se*. *Miramar Hotel Corp. v. Frank B. Hall & Co. of California* (1985) 163 Cal.App.3d 1126, 1129.

Procedural Stage One: Timely Requesting a Statement of Decision

Many counsel feel they've fulfilled their responsibilities by timely informing the court, without further elaboration, that they want a Statement of Decision. While a timely request is essential, the request is in fact only the beginning of a multi-stage process (see discussion, *infra.*). Taking action during some or all of these stages may be essential to preserving your clients' rights.

The precise deadline for requesting a Statement of Decision is determined under two alternative standards, depending on the length of the trial. If a trial is completed within a calendar day or takes less than eight hours over multiple days, a Statement of Decision must be requested before submission. Code of Civil Procedure section 632; *In re Marriage of Katz* (1991) 234 Cal.App.3d 1711, 1717. Otherwise, the right to a Statement of Decision is waived. *R.E. Folcka Construction, Inc. v. Medallion Home Loan Co., Inc.* (1987) 191 Cal.App.3d 50, 55-57. But see *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 166 [statement of decision required, in part, where "[r]egardless of the number of hours counsel actually spent in court, this trial was conducted over more than one calendar day"].

For purposes of calculating the deadline for requesting a Statement of Decision, trial begins when the first witness is sworn or evidence is admitted. *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 166. Note, however, that where documents or other exhibits are admitted into evidence, time spent by the court in reading and considering such evidence counts in measuring the length of trial. *Bevli v. Brisco* (1985) 165 Cal.App.3d 812, 821; *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 166. Trial is not complete until (1) the court orders the matter submitted; or (2) either the final paper (e.g., post-trial brief) is filed or final arguments are heard (whichever is later). California Rules of Court, rule 825; *Social Service Union v. County of Monterey* (1989) 208 Cal.App.2d 676, 680.

For trials of more than one calendar day and over eight hours, a more forgiving deadline applies. A request for a Statement of Decision must be made within ten days after the court announces its tentative decision. Code of Civil Procedure section 632. The ten-day period runs from service of a written tentative decision, and the deadline for filing the request is extended for mailing or other forms of service pursuant to Code of Civil Procedure section 1013. *Hutchins v. Galanda* (1990) 216 Cal.App.3d 1529, 1530-1531; *In re Marriage of McDole* (1985) 176 Cal.App.3d 214, 219; *Injectronics, Inc. v. Commodore Business Machines, Inc.* (1979) 100 Cal.App.3d 185, 187-188. Failure to timely request a Statement of Decision within the ten-day period (or as extended by service) is a waiver, and the daunting inferred findings doctrine will govern appellate review. *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; *In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1274.

As with most legal principles, there are limited exceptions to the general rule that failure to request findings is a waiver. See, e.g., *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 476 fn. 7; *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1149; *In re Marriage of Ramer* (1986) 187Cal.App.3d 263, 271.

Continued on page 32

Moore/Marsden: When Cash Should Be King

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Introduction

If the community has made payments reducing the principal balance of a mortgage secured against property owned by one spouse ("the Separatizer"), upon divorce the Separatizer owes the community reimbursements pursuant to *In re Marriage of Moore* (1980) 28 Cal.3d 366 and *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426.

The *Moore/Marsden* formula credits the Separatizer with the entire mortgage. This article contends that the credit is unfair to the community because a mortgage is not an asset. Because the community is credited only with cash payments, the Separatizer should be credited only with cash payments.[1]

The legislature should replace the *Moore/Marsden* formula ("the Current Formula") with a modified formula ("the Proposed Formula"), based only on the community's and Separatizer's respective cash contributions to the property.

The Current Formula

Under existing law, a *Moore/Marsden* reimbursement is calculated as follows:

Step 1:

The community is reimbursed the payments ("the Community Principal Payments") that it has made which have reduced the mortgage principal.

Step 2:

The community receives a percentage (calculated by "the Community Fraction") of the property's post-marital appreciation.

The Community Fraction's numerator is the Community Principal Payments.

The Community Fraction's denominator is the price the Separatizer originally paid for the property. The purchase price includes the mortgage.

The Separatizer retains as separate property the remainder of the post-martial appreciation, calculated by "the Separatizer Fraction."

The Separatizer Fraction's numerator is the down payment the Separatizer paid against the property, plus the mortgage, minus the Community Principal Payments. The denominator of the Separatizer Fraction (like the denominator of the Community Fraction) is the purchase price.

The Fractions' purpose is to fairly apportion the post-martial appreciation between Separatizer and community. The Fractions would achieve that purpose if they ignored the mortgage and, instead, included only the cash payments of the Separatizer and the community.

The Proposed Formula

The Community Fraction's numerator properly credits the community with the Community Principal Payments. This element of the *Moore/Marsden* calculation should remain unchanged.

The Separatizer Fraction's numerator properly credits the Separatizer with the down payment (a cash payment). Unfortunately, however, the numerator improperly credits the Separatizer with the mortgage (not a cash payment) and improperly ignores the Separatizer's premarital and post-separation cash payments (collectively, "the Separatizer Principal Payments") which reduced the mortgage principal. The Separatizer Fraction's numerator should consist wholly of the down payment and the Separatizer Principal Payments.

The Fractions' denominators should not be the purchase price, but should be the cash payments made by the community (i.e., the Community Principal Payments) and by the Separatizer (i.e., the down payment and the Separatizer Principal Payments).

A Hypothetical Case

Under the hypothetical facts described below, the Separatizer has purchased property shortly before marriage with an minimal down payment.

Before marriage: H purchases property for $500,000 ($500 down payment, $499,500 mortgage); and H pays down the mortgage by $300. (No increase in property value between purchase and marriage.)

During coverture: Community pays down the mortgage by $50,000.

After separation: H pays down the mortgage by $200. (Property experienced post-marital appreciation of $400,000.)

Analysis Under the Current Formula

Community Fraction:

Community Principal Payments ÷ Purchase Price
$50,000 ÷ $500,000 =
10% Community Percentage

Separatizer Fraction:

[Down Payment + (Mortgage − Community Principal Payments)] ÷ Purchase Price
[$500 + ($499,500 − $50,000)] ÷ $500,000
[$500 + $449,500] ÷ $500,000
$450,000 ÷ $500,000 =
90% Separatizer Percentage

Community Interest:

	Community Principal Payments	$50,000
+	10% of post-marital apprec.	40,000
=	Community Interest	$90,000

Separatizer Interest:

	HSP down payment	$500
+	HSP premarital loan reduction	300
+	HSP post-sep. loan reduction	200
+	90% of post-marital apprec.	360,000
=	Separatizer Interest	$361,000

To W:

Half of Community Interest	$45,000

To H:

Half of Community Interest	$45,000
Separatizer Interest	361,000
Total	$406,000

Analysis Under the Proposed Formula

Community Fraction:

Community Principal Payments ÷ [Community Principal Payments + Down Payment + Separatizer Principal Payments]
$50,000 ÷ [$50,000 + $500 + $300 + $200]
$50,000 ÷ $51,000 =
98% Community Percentage

Separatizer Fraction:

[Down Payment + Separatizer Principal Payments] ÷ [Community Principal Payments + Down Payment + Separatizer Principal Payments]
[$500 + $300 + $200] ÷ [$50,000 + 500 + $300 + $200]
$1,000 ÷ $51,000 =
2% Separatizer Percentage

Community Interest:

	Community Principal Payments	$50,000
+	98% of post-marital apprec.	392,000
=	Community Interest	$442,000

Separatizer Interest:

	HSP down payment	$ 500
+	HSP premarital loan reduction	300
+	HSP post-sep. loan reduction	200
+	2% of post-marital apprec.	8,000
=	Separatizer Interest	$ 9,000

To W:

Half of Community Interest	$ 221,000

To H:

Half of Community Interest	$ 221,000
Separatizer Interest	9,000
Total	$ 230,000

Comparison of Formulae Results

Current Formula:

To Separatizer	$406,000 (90%)
To Non-Separatizer	$ 45,000 (10%)
Equity	$451,000 (100%)

Proposed Formula:

To Separatizer	$230,000 (51%)
To Non-Separatizer	$221,000 (49%)
Equity	$451,000 (100%)

Difference:

To Separatizer	− 176,000 (39%)
To Non-Separatizer	+ 176,000 (39%)

Refinanced Mortgages

Two cases (unfortunately, neither case a model of clarity) have discussed what happens if the community refinances the Separatizer's mortgage: *In re Marriage of Stoner* (1983) 147 Cal.App.3d 858, and *In re Marriage of Branco* (1996) 47 Cal. App.4th 1621.

Branco held that a community-refinanced mortgage is properly included in the Community Fraction's numerator to the extent that it paid off the Separatizer's existing mortgage. "We can discern no meaningful difference, for purposes of determining whether the community acquires an interest in real property, between the use of community funds to make payments on one spouse's preexisting loan and the use of proceeds from a community property loan to pay off the preexisting separate loan." (*In re Marriage of Branco,* supra, at p. 1627) "Applied to the present case, the community property interest in the home would be computed by dividing the community's contribution to the purchase price of the home (payments reducing principal made with community funds on the original loan, if any, plus the principal balance of the loan paid off with proceeds of the Bank of America loan) by the purchase price." (Id, at p. 1629)

Two problems arise under the Current Formula when the Separatizer's mortgage is refinanced. The first problem is to characterize the refinanced loan as community or separate under the "intent of the lender" test of *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179. The characterization is important under the Current Formula, but irrelevant under the Proposed Formula. The second problem is that, for reasons beyond the scope of this article,[2] a *Moore/Marsden* calculation fails under certain circumstances if the refinanced loan is characterized as a community obligation.

Arguments Supporting the Current Formula

Proponents of the Current Formula contend that the *Moore/Marsden* calculation should continue to credit the Separatizer with the mortgage because:

1. But for the mortgage, the Separatizer could not have bought the property and the community would have had no investment opportunity at all.
2. The mortgage has disadvantaged the Separatizer by increasing his or her debt-to-income ratio and thereby reducing his or her borrowing ability.
3. The mortgage has disadvantaged the Separatizer by imposing liability on him or her (this contention is weakened, however, by the Separatizer's anti-deficiency protections under Code of Civil Procedure section 580, subdivisions (b) and (d)).

Continued on page 31

A Better Divorce

Continued from page 4

tude to the divorce process is likely to be welcomed with open arms. Our ultimate goal, after all, is hardly a modest one: we want to take over the family law world. (Stu Webb tells the story of the town of Medicine Hat in Canada, where every lawyer went collaborative and the family law courts shut down.)

Having integrated the mental health professionals into our process, early in our second year the ice broke, the penny dropped, our lawyer hearts melted, and the notion of creating a team that includes the divorcing couple, the children, a child custody specialist, our coaches, our lawyers, and our financial professionals simply clicked. And just like that, cases started coming in the door.

It is now a year later, and we have in the range of 20 Collaborative Divorce cases with Collaborative Divorce stipulations signed, some of them with full judgments completed. The start of our caseload was a long time coming, but the growth is becoming exponential, as each of us, especially the lawyers, is learning how to present the Collaborative Divorce process to new clients in a persuasive way.

We continue to meet monthly, and also have five or six committees which meet monthly.

We primarily sell the process as individuals, and each professional in the group is separately and privately retained by the party or parties. We do not advertise as a group, lest we violate any ethical standards against interdisciplinary law practice.

We do offer a considerable education service. We speak at least once a month at the Beach Cities Health District, a local community-based health organization, to prospective divorcees. We have also spoken to countless service clubs and professional groups, including physicians and therapists, as well as lawyers and accountants. We plan to make presentations before church groups.

Training is of course a continuous function for a group like ours. Most of our members have trained in Scottsdale through Collaborative Divorce.com, and our entire group attended a Chip Rose seminar in Los Angeles in January, which our group co-sponsored. The Los Angeles Collaborative Family Law Association will be organizing Southern California trainings on a continuing basis. Our own group will be doing in-house trainings, including formal collaborative divorce trainings and an upcoming weekend retreat.

Thus far, our only absolute training requirement is the basic Collaborative Divorce two-day seminar. However, most of our members have done extensive mediation training and attend continuing trainings as they become available.

The International Association of Collaborative Professionals (www.collabgroup.com) meets annually (we Southern Californians want to be sure to have a presence at these meetings). Last year the meeting was in Galveston. The year before the meeting was held in Oakland. It is interesting to see how the other 30 or 40 groups in attendance handle group formation questions, such as open versus closed, membership requirements, and training requirements.

Having integrated both lawyers and mental health professionals into the group, we are now in the process of forming a pool of financial advisors to join our group. Our two forensic accountants have been and will continue to be a great help, but the true collaborative divorce model incorporates financial advisors, and that's going to be the next transformational process for us.

We have found that working with professionals outside our group is always an option to consider. The process goes very smoothly when clients retain two lawyers and related professionals from within our group, but we have also had success in bringing in outside counsel, even though not collaboratively trained, into the process. We also look forward to integrating our services with other Collaborative Divorce groups when the parties are geographically distant from each other.

For all of us, this group has become a second family. By meeting continuously, studying continuously, and never varying from the consensus model, we have drawn closer and closer together and have learned to trust each other implicitly. The benefit, as you can imagine, to our clients is immeasurable. The benefit to ourselves: priceless.

You can find us at our website www.abetterdivorce.com and can always leave a message for us at our voice mail phone number, 310-767-9898.

LACFLA Training...

Visitation monitor Loretta Warabow volunteered to help staff the program. Here she helps attendees sign up for role play assignments.

LACFLA Training...

Fern Salka, CFLS, one of the LACFLA organizers, signs up for a role play.

Six Stages to Resolution

Continued from page 6

ment, personal coaching, and individual psychotherapy. It may be decided that the children will benefit by joining a group for children of divorcing families. Though multiple interventions may sound expensive, such costs are nothing when compared to a litigated divorce. The average litigated divorce will cost a minimum of $60,000. A great deal more will be spent if child custody is an issue. A collaborative divorce will cost a fraction of this, even with all parties in therapy.

In Step Three, Issue Identification, the parties learn to apportion income streams and material assets, and with the assistance of a specialist design an overall tax plan to facilitate a reorganization that contributes to the family's long term welfare. Insurance provisions may be addressed and a parenting plan designed.

Next comes Process Selection, the Fourth Step, during which the parties examine the options of Negotiation, Mediation, Arbitration, and Case Management. Important to this process is an understanding of the Collaborative Law model, which invokes the use of attorneys who have signed Stipulated Disqualification Retainers that eliminate them from the equation if the Parties choose to litigate. This helps the lawyers maintain a total commitment to a cooperative approach. Naturally, the best method of settling any dispute is with negotiation. If both parties have willingly and honestly participated in Issue Identification then negotiation is a strong possibility. If, however, either party has a preponderance of power and the other feels even slightly coerced, negotiation cannot take place and mediation is then preferred.

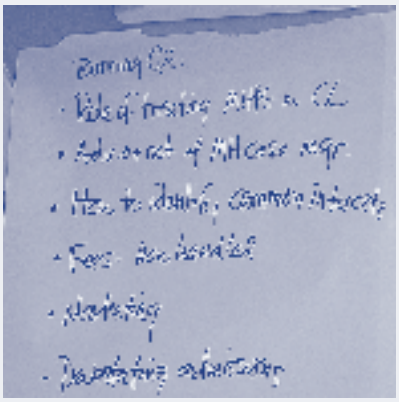
In the collaborative divorce paradigm (one variant of collaborative law), resolution is accomplished with the assistance of a trained mediator/coach and a collaborative lawyer representing each party. In another variant, the lawyers facilitate the process without coaches. This is inexpensive when compared to the cost of two lawyers, on the clock, sitting for days in a crowded courthouse, awaiting a backlogged judge and an available courtroom. While we lawyers wait with the parties to the action, we are not working on other cases. We must be responsible to the court, on hand and available, and our time adds up, even with the best of intentions. With mediation the time is strictly allocated, and if matters cannot be settled, arbitration is available, or the program instituted by the Los Angeles Superior Court Family Law Department's presiding judge, which allows the hiring of a retired judge or family law attorney to hear a case.

Initiation, the Fifth Step, is normally where the typical courtroom divorce begins. In a collaborative divorce this step and the sixth are generally the swiftest to navigate. Initiation begins when the parties decide it is time to file the Petition for Dissolution. Frequently a joint petition is filed. This reinforces the collaborative nature of the dissolution, eliminates an "I'm up – you're down" mind set, and helps forestall adversarial tendencies. At this time, temporary orders, responses, and case management stipulations are filed, a Voluntary Settlement Conference may take place, and the parties participate in a joint resolution based on consensus. When the parties make their own collaborative decisions, they are generally much happier with the results.

The process enters the final, Sixth Stage, Closure, or completion, when the judgment is prepared and entered. The final tax analysis is in order, insurance provisions are put in place and, if desired, a ceremony may take place to commemorate the conclusion of the dissolution and reinforce the vision of the still viable, though restructured, family unit.

A CPA with whom I work told me the wise advice he gives his divorcing clients: "It is as important to have a good divorce as it is to have a good a marriage. You may have to live longer with the divorce than you lived with the marriage." Those who, best efforts aside, find themselves walking the path of dissolution would be wise to heed his words. Collaborative divorce provides healthier restructured families, stronger support for the children, and may serve to mend and embellish co-parenting relationships for years to come.

LACFLA Training...



Chip used high tech (Powerpoint™) and low tech (handwritten) visual aids.

LACFLA Training...

LACFLA members get intense during role play.

LACFLA Training...

Glendale attorney Gina Tanner takes careful notes.

Collaborative Negotiation

Continued from page 1

apart and he did not want to be part of such a system. He announced that he would no longer go to court and would only represent clients in a participatory negotiation process aimed solely at creative settlements. If the process broke down, he would refer his clients to litigation counsel and he would withdraw. In his first two years he handled 99 cases with only four unable to reach full settlement.

Collaborative Law is a conflict resolution process guided by the uncompromising principle of a non-litigation approach to problem solving. Going to court is not an option for resolving differences. Eliminating the threat of litigation with its rancor and divisiveness creates a profound change for participants and their attorneys. Cooperating, information sharing and creative problem solving replace suspicion, fear and mistrust. The collaborative law model allows attorneys to leave behind the negative characteristics of the adjudicatory model which are emotionally and physically destructive to attorneys and their clients alike.

The ground rules for the process are:

- A pledge by attorneys and parties alike to commit themselves to avoiding litigation.
- Agreement by the parties to provide full, honest and voluntary disclosure of all information.
- Employment of neutral experts, jointly retained by the spouses.
- A process of informal four-way meetings among the participants;
- Replacement of counsel if the clients elect litigation or if either party thwarts the collaborative process.

Nothing prohibits any party unilaterally, and without reason, to terminate their role in the collaborative process and proceed along the more traditional path of individual representation and court intervention. A major disincentive to litigate is built into the process by the provisions that present counsel will withdraw and not represent the party if the client elects litigation. Collaborative counsel will also withdraw from participation if his or her client refuses to follow collaborative guidelines or abandons the process.

A contract and court stipulation confirming the principles and guidelines are an integral part of the process. Without such agreements, the process would be considered a cooperative divorce as opposed to a Collaborative divorce.

Collaborative Law provides the client with control of the process and the outcome. Both parties are allowed to speak and be heard in a safe environment for communicating. The widest ranges of settlement options are considered because the process is interest based rather than claim-denial based. The process controls the pacing of the case rather than being driven by a court calendar or statutes. Participants work face to face with an open and honest exchange of information.

Having two attorneys involved does not produce the same cost as litigation. The use of jointly selected experts and advisors, the elimination of filtering, and obtaining all information simultaneously by all parties greatly reduces legal fees and expenses. Since the parties have made a commitment not to litigate, the parties and the attorneys devote all of their efforts to a negotiated settlement (agreement) in an efficient and cooperative manner. Further, the parties develop a rapport with both attorneys. This removes the mistrust and fundamental differences each party brings to the divorce process that can cause mediation to fail or create prolonged litigation.

Costly and often unnecessary court preparation and appearances (including time spent waiting for the case to be called), depositions and other formal discovery methods are eliminated. Instead, voluntary discovery occurs with full and accurate disclosure of all assets and liabilities in which the parties may have an interest. The legal requirements that both parties serve each other with final declarations of disclosure and income and expense statements still are met with full compliance with the family code.

After each party selects independent collaborative counsel, the process moves forward using four-way meetings. Typically, the process comprises four stages. In the first stage, all necessary information is gathered. The second stage analyzes the information, choices, options, and possible outcomes that might be available. During these stages there is a joint commitment to develop all of the facts. Anything any party wants to see or review, they can do. If one party has all the information and records, it is that party's responsibility to get all of the information to the other party. Stage three begins the negotiation phase with the development of a settlement model. Once all of the options have been considered and the parties are ready to work on a settlement, the parties develop comprehensive models for settlement which reflect each other's interests. In stage four a settlement is negotiated. With all participants thoroughly prepared and aware of the range of creative possibilities, they are ready to begin actively negotiating the full settlement of all issues. As the attorneys are the experts in law, the clients are the experts in what works in their life, so, the attorneys assist the clients to find the solutions. The dictating of results by the attorneys is not part of the process. There is no court decision, but rather a resolution creatively crafted by both clients with the assistance of their attorneys.

In the mid 1990's the Collaborative Law movement came to California with the first groups starting in Santa Clara and San Mateo. These groups were concerned not only about the high financial and emotional costs to clients in litigated divorce, but also about the tremendous level of

LACFLA Training...

Organizers Patsy Ostroy, CFLS, and Fern Salka, CFLS, show their delight at the success of the program.

emotional and physical stress among family law attorneys in their area.

In Sacramento, a group of attorneys, after having attended a Sacramento County Family Law section-sponsored seminar on Collaborative Negotiation, formed the Sacramento Collaborative Negotiation Group (SCNG – www.divorceoption.com). This group, after extensive research and review, prepared guidelines and principles governing the collaborative law process for use in the Sacramento area. A Stipulation and Order re: Collaborative Law was prepared and reviewed by our local family law judges. The response by judges has been extremely positive and supportive. The stipulation has been filed and approved by the courts in Sacramento, El Dorado, Placer and Yolo counties.

These local guidelines are available to all. They may be downloaded either at SCNG's website – www.divorceoption.com or at my firm's website, www.divorcepage.com.

Any attorney may act as collaborative counsel. Membership in a group is not a requirement. However, being educated about the process enhances the understanding and ability to actually conduct and proceed collaboratively.

The wave of the future of Collaborative negotiation is evidenced by the forming of more than 20 attorney groups throughout California alone. More groups are in the process of being formed as this is written. The International Academy of Collaborative Professionals (IACP) was formed in 1999 as a nonprofit corporation with the mission of educating both professionals and the public in collaborative solutions to disputes. At its website (www.collabgroup.com) are links and listings of groups in California and the United States, as well as Canada.

California counties, that have either a collaborative group formed or have attorneys actively involved with collaborative negotiation include: Alameda, Contra Costa, El Dorado, Fresno, Lassen, Los Angeles, Marin, Modoc, Napa, Orange, Riverside, Sacramento, San Diego, San Francisco, San Mateo, Santa Clara, Santa Cruz, Shasta, Siskiyou, Solano, Sonoma, Tehama, Trinity, Ventura, Yolo.

Other groups are in the process of forming throughout the State.

The American Bar Association in late 2001 published a book on collaborative family law entitled: *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation*. This 264-page book was written by Pauline H. Tesler, a family attorney from Marin and San Francisco. Information on obtaining the book may be found at www.abanet.org/abapubs/books.

Collaborative negotiation is very similar to mediation with many of the same benefits (particularly saving parties time and attorney fees). As with mediation, this process is also voluntary. While the collaborative law process most commonly is compared to the adversarial system, it does respond to some concerns expressed about mediation. One frequently cited drawback in mediation is the power imbalance between the parties. While this is a challenge to a mediator (and in my experience capable of being resolved), it is much less of a problem in the collaborative process. In collaboration, the lawyers can intervene directly to head off an unreasonable position or redirect or absorb undue emotion. With direct attorney-to-attorney communication, problems are forewarned; there is cooperation in moving matters along, and attorneys can deal directly with issues.

I believe that it is the duty of the family law attorney to advise clients from the outset, at the initial consultation, of all of the alternatives of resolving disputes. These include Collaborative Negotiation, Mediation, and Litigation. Clients deserve to be informed and educated about these options.

LACFLA Training...

LACFLA President Donna Beck Weaver, CFLS, welcomes Fred Glassman, CFLS, to the training.

Want to talk to every family law bench officer in the state? How about reaching 500+ of the state's CFLS's with your ideas?

When you brief an interesting issue, figure out a way to enhance your practice, find a great practice tool, or have thoughts about the development of California family law and family law practice, it is time to write an article for the Newsletter. When you are involved in something important in the family law community or know someone worth profiling, it is time to write an article for the Newsletter.

The ACFLS Newsletter is written by our members and colleagues for our members and all of the state's family law bench officers. The Newsletter offers a unique opportunity to contribute to the development of family law and family law practice. Your voice, your ideas, your experience and your expertise can make a difference.

Please email your contributions or queries in Word™ or WordPerfect™ to custodymatters@earthlink.net. Include a brief bio. Photos (especially digital or clear enough to scan) and art illustrating your article are extremely welcome.

Deadline (first drafts) for the next issue is April 10, 2003.

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ISSUES RELATED TO AMENDED FAMILY CODE SECTION 721
Speakers: Dawn Gray, CFLS, Nevada County and Steve Wagner, CFLS, Sacramento

MOORE/MARSDEN ISSUES AND THE BONO CASE
Speakers: Ron Granberg, CFLS, Salinas and Tom Woodruff, CFLS, Sacramento

IMPUTING INCOME ISSUES AND HARDSHIP DEDUCTIONS
Speaker: Commissioner Gale Hickman, Orange County Superior Court

APPELLATE ISSUES YOU SHOULD KNOW BEFORE JUDGMENT
Speaker: Greg Ellis, Certified Appellate Specialist, San Francisco

EVENTS SCHEDULE:

Welcome reception Friday evening

Friday Night Dine-Around in the La Jolla area

Seminars Saturday, May 3, 9:00 a.m. to Noon; afternoon free to explore the area

Saturday Night Dinner at one of La Jolla's Finest Gourmet Restaurants. $100 PER PERSON. Price includes hors d'oeuvres, dinner, wine and champagne

Seminars Sunday, May 4, 9:00 a.m. to Noon

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FAMILY LAW SPECIALISTS
SPRING SEMINAR
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Complete the form below and mail to: ACFLS Administrator, Pat Parson, 1884 Knox St., Castro Valley, CA 94546; 510-581-3799; fax: 510-581-8222; email: acfls@aol.com.

HOTEL INFORMATION:

RESERVATION DEADLINE: APRIL 12. ACFLS Seminar Room Rates: $149 single or double, plus tax. This rate will be available three days before and three days after the seminar if you wish to extend your visit. All rooms are two room suites complete with separate living room and bedroom. All suites come equipped with two telephones with voice-mail, two televisions, microwave, refrigerator, coffee maker, and pull-out sofa bed. Also included: delicious, cooked-to-order breakfast featuring hot items, as well as fresh fruit, pastry, breakfast breads and beverages. Check in: 4:00 pm; Checkout: Noon.

Make reservations directly with the hotel at 858-453-0400 (ask for Reservations). The block of rooms is reserved under the Association of Certified Family Law Specialists.

TRANSPORTATION:

The hotel is a short distance from the San Diego Airport. Cloud 9 Shuttle provides transportation to and from the airport for a nominal fee. Call 1-800-9-SHUTTLE (1-800-974-8885) for reservations.

REGISTRATION MUST BE RECEIVED BY APRIL 25, 2003. Price includes Welcome Reception, Course Materials and Continental Breakfast on Saturday and Sunday.

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There Is a Better Way

Continued from page 7

issues in the case in a way that encourages everyone's input and maximizes the clients' control over the resolution of their case. The process at the four-way meetings bears a lot of resemblance to mediation. However, unlike mediation, each client is independently represented, thereby equalizing any potential imbalance of power which might be the roadblock to settlement in a traditional mediation process. Despite the independent representation, there is an air of informality, and the creation of trust between the clients and the lawyers. In fact, another unique aspect of collaborative law is that the clients often feel as comfortable with their spouse's attorney as they do their own. Since the environment is non-combative, and there is the voluntary exchange of all relevant information and records necessary to reach a resolution, settlement is often achieved very quickly and easily. And even when the case presents very difficult, heated issues, the participants' commitment to the process allows the parties to work through those issues in a non-threatening, non-combative atmosphere. In fact, the collaborative agreement that we use even includes an option for the parties to agree to certain restraining orders during the process. This provides the additional protection which may be necessary in certain cases, and which may also be the barrier to mediation.

The two attorneys often talk or meet before the first four-way meeting to get a better understanding about the case, and disclose any sensitive or potentially explosive issues presented by either client. And since the attorneys have all been trained similarly, there is a shared language that provides the clients with a sense of confidence in their lawyers and the process, and allows for a consistency in the overall approach to the settlement of cases, no matter which collaborative law attorneys are hired. Moreover, in most cases, the attorneys know each other, have worked with each other, and are familiar with the other attorney's style, again allowing for a more congenial environment for settlement.

There are many benefits to our clients in choosing Collaborative Law. Since the environment throughout the process remains cooperative, and communication remains open, the spouses are more likely to work together, minimizing parental conflict, protecting children, and creating an invaluable foundation for reduced conflict in the future. In addition, since all participants are committed to the same goal, there is a team approach rather than an adversarial one. In keeping with the team approach, if experts are needed, both parties can jointly hire a neutral expert or consultant which helps shorten the duration of the negotiation and reduce the overall expense. Finally, since there are no court proceedings involved, the process is shorter, less expensive, less stressful and more private.

Collaborative Law is a rapidly growing resolution process, and my prediction is that it will become even more popular than other forms of ADR because of the need for so many people to have their own representation, and feel like there is someone "on their side." There are many Collaborative Law groups throughout the State of California and the nation, and there is even an International Academy of Collaborative Professionals (IACP) that produces a journal entitled The Collaborative Review. There are more than 50 groups listed in their journal, and at least eight groups in the Bay Area alone. Our group, the Peninsula Collaborative Law Group, began in 1999. In San Francisco County, a letter signed by the Supervising Judge, Donna J. Hitchens, is given to every person who files a divorce or custody action, explaining that there are ways of resolving their case "without fighting through the courts" and advising that "one of the best methods is to work things out by participating in Collaborative Law." In the State of Texas, there is even a specific, very detailed, Family Code section allowing for the parties to opt out of litigation and into the collaborative law process.

It has now been almost three years since I had my first Collaborative Law case, and I have worked with several different collaborative law attorneys in various cases. I am pleased to say that my clients have reached settlement using this method in all of the cases I have had thus far, and it is my opinion that they have done so more quickly, and certainly more cost-effectively, than if they had litigated their case. My hope for the future is that all clients will be familiar with this process, and be presented with the option of choosing collaborative law to resolve their case.

LACFLA Training...

Private judge and mediator (and retired Commissioner) Keith Clemens and Linda Bodenheimer, CFLS, listen to Chip's presentation.

LACFLA Training

Collaborative Family Law Training Photo Essay by Leslie Ellen Shear, CFLS, Newsletter Editor.

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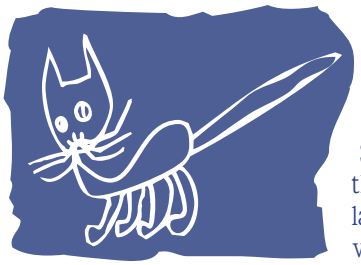
CUSTODY MATTERS

News and Views About Children's Issues in California's Family Courts

Leslie Ellen Shear, CFLS, Newsletter Editor
Encino (Los Angeles)
custodymatters@earthlink.net

The first thing any two family lawyers do when they see each other is vent their frustration through war stories. So, since we are here for mutual support, let me begin by venting. Among the low points of my last few months of courtroom practice was last week when opposing counsel in an initial OSC argued that if the brand new family law bench officer allowed her newly separated client to take three children (aged 18 months to five years) on a 60-day vacation to visit family in a non-Hague country, they could preserve their attachment and attunement with their left-behind parent by daily email.

Young children, who do not yet have a sense of time, can only develop and sustain attached, attuned, meaningful relationships with parents who are frequent caregivers. Children need their parents' advocates to hold themselves to a higher standard. (Reminder: for basic information about age-appropriate parenting schedules, download Model Parenting Time Plans for Parent/Child Access by Joan B. Kelly and Leah Pallin-Hill at www.supreme.state.az.us/dr/Pdf/Parenting%20Time%20Plan%20Final.pdf.)



Instead of being a "Burger King" lawyer, who asks his or her clients what they want, and tells them they can "have it your way," consider sharing this, and other parent education resources with each of your clients at the earliest opportunity. You'll sleep better at night.

This column usually follows particular custody cases and topics. Because this is the Collaborative Family Law issue, I've turned my attention to larger, systemic questions. But first, a quick update on some of the appellate cases. (Please keep me posted about cases affecting children as they work their way through the appellate courts, so that I can report on them in this column.)

Custody Issues Work Their Way Through the Appellate Courts

Family lawyers and mental health professionals keep stopping me to express their relief that *Marriage of Rose and Richardson* has reaffirmed that *Montenegro v. Diaz* restored the statutory best interests standard to most custody modification proceedings, in place of an ever more formidable and child-unfriendly expansion of the judicially created changed circumstances doctrine.

The parties have completed briefing in *Marriage of LaMusga* (may a trial court deny relocation without changing "primary" custody where it would prejudice the children's welfare because of alienation?) before the California Supreme Court, leaving the future of move-away law uncertain. Meanwhile, one of the new bills in Sacramento proposes a detriment standard for relocation cases.

We completed oral argument in *Marriage of Abargil* (relocation to Israel in the wake of the Passover Massacre) before Division Eight of the Second District at the end of January, so a decision is probably imminent. Given the disparities between *Marriage of Condon* and *Marriage of Lasich,* the decision is bound to be interesting.

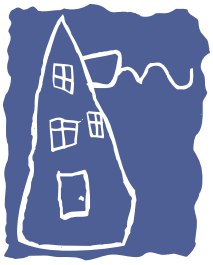
The First District's stay in *Marriage of Galante and Summerfield* (do the Hague Convention and ICARA pre-empt the conflicting international child custody jurisdictional scheme of the UCCJEA?) against a trial court order enforcing (under the UCCJEA) a Zimbabwe *ne exeat* order continues. The Zimbabwe order registered and enforced by the trial court requires a white, British-citizen mother who escaped domestic violence, child abuse, poverty, famine, political chaos and social disintegration in Zimbabwe after the government-encouraged "war veterans" drove her off the farm to exercise custody of the parties' California-born teenage children in Zimbabwe. The Court of Appeal has also shown interest in the effect of the 2001 amendments to CCP §917.7 which apparently exclude UCCJEA and Hague cases from the automatic stay of orders allowing children to leave the jurisdiction.

Modification Issues Challenge Appellate Courts

A Petition for Review of the Third District's recent move-away decision, *Marriage of Abrams* (C040855) is pending. The case is well suited for Supreme Court consideration along with *Marriage of LaMusga*. *Abrams* squarely presents the question of whether trial courts have discretion to act in children's best interests, and to consider the impact of loss of involved fathering (or mothering) and disruption of school, social and community ties on the particular children in question

when faced with a custodial parent's move request. Mom is represented by Bunmi Awoniyi and Jay-Allen Eisen and Dad is represented by Katherine Codekas (all three practice in Sacramento).

The Court of Appeal decision in *Abrams* ignores *Montenegro v. Diaz* and *Marriage of Rose and Richardson* with an uninsightful application of excerpts from *Marriage of Burgess.* The Court applied a "prejudicial to the children's welfare" rather than best interests standard, although there is no evidence that the prior order contained the requisite *Montenegro* language of finality. The Court noted that the geographic restriction in the prior order fails to specifically opt out of the changed circumstances standard. In *Montenegro* the Supreme Court held that the changed circumstances doctrine does not apply absent a clear and unequivocal expression that the parenting plan was intended to be final. *Rose and Richardson* amplifies on that holding, and applies the best interests standard to a post-judgment move-away. Few trial courts would want to reduce the scope of their discretion by including language of finality. No children would be well-served by restrictions on the ability of a court to base all decisions upon their best interests.



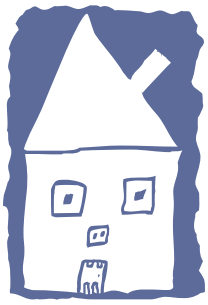
Abrams involves a convenience move (Sacramento suburb to San Ramon) by a custodial parent, which would require a change of schools for the children, and reduction of their opportunity to enjoy the kind of involved fathering which research shows (see discussion in this column in the Winter 2002 issue) makes a significant outcome difference for children. We know from the involved fathering research that fathers make a difference in the lives of their children after divorce and separation when they monitor their children's activities, are involved with school and homework, and engage in authoritative parenting.

Relocations which compromise involved parenting should not be rubber stamped. Rather, Courts should engage in thoughtful decision-making about the developmental impact of this loss for the particular child. The Abrams court lumps an entire continuum of different impacts on different kids, without considering differences in meaning and magnitude for the individual child. The following child-indifferent holding in *Abrams* is incompatible with the statutory best interests mandate, the statutory protection of a child's right to frequent and continuing contact with both parents, and the statutory grant of power to restrain moves which are "prejudicial to the child's welfare":

> However, it is not enough to show the child has a meaningful relationship with the noncustodial parent and will be "negatively impacted" by the custodial parent's good faith decision to move. If this were sufficient to support denial of a move-away order, no primary custodial parent would ever be able to secure such an order. (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 717; *In re Marriage of Edlund & Hales* (1998) 66 Cal.App.4th 1454, 1472.)

Abrams illustrates the core flaw in *Burgess*. Moves have different meanings in the lives of different children. Courts must be free to make individualized determinations, applying the best interests standard. Forbidding courts to consider the merits of the custodial parent's decision-making about the move is naïve. Central to the question of custody is the capacity of a parent to recognize the children's needs, and to balance them with other concerns.

Abrams frames the holding in terms of preserving children's stable emotional ties with a "primary" parent. But most children require stable emotional ties with both parents, which are worthy of protection. There is no direct correlation between timeshare and the strength of the emotional ties between parents and children.



Research also shows that the quality of parenting diminishes, as the timeshare increases from approximately half time to most of the time, or as it diminishes from approximately half the time, to occasionally. Custodial parents are overburdened and stressed. Noncustodial parents are insufficiently involved and attuned to make much difference in their children's lives. Visiting at a distance requires giving up peer and enrichment activities for time with a parent, instead of spending that time in normal childhood pursuits with parental involvement. Shared parenting strikes the necessary balance (given two parents with sufficient empathy, attunement and parenting skills) for optimal parenting. See, *inter alia,* Rosenthal and Keshet, *Fathers Without Partners: A Study of Fathers and the Family After Marital Separation* (Rowman and Littlefield: 1981) and ("Father Absence and Children's Welfare," in E. Mavis Hetherington, Ed., *Coping With Divorce, Single Parenting and Remarriage: A Risk and Resiliency Perspective* (1999) 118). Recent studies by Ira Ellman, Sanford Braver and William Fabricius comparing college students whose divorced parents moved away during their childhoods with those who did not show distinctive, negative, long term consequences of such moves. California appellate courts ignore that data at our children's peril.

The last few months brought one other significant custody decision – *Marriage of Loyd* (F040008, Fifth District, Filed 1/30/03; pub. order 2/28/03). This case discusses substance abuse and recovery, use of day care v. stay home parenting as factors to consider in custody cases, and the standards for modification. Dad was represented by Bakersfield attorney Larry G. Wilson. Mom was self-represented on appeal.

This case is notable because the appellate court reversed a trial court modification of custody – something that many lawyers tell custody clients is highly unlikely. Reading *Loyd* reminds us that the way the issues are framed in the trial and appellate courts matters, and that trial judges do not have unlimited discretion in custody matters. The case illustrates how a superficial child custody evaluation, which does not reflect research about what matters in child development, can lead a bench officer far astray. Lurking in the wings is the question of maternal bias – a sense that now that Mom was no longer abusing drugs, the children naturally belonged in maternal care, regardless of their past caretaking history. The one year gap between the change of custody and the reversal represented a huge period of time in the lives of the children. Finally, the notion that the only options were a binary choice between Mom and Dad rather than moving towards a more equal time share is troubling.

Continued on page 26

Custody Matters

Continued from page 26

In *Loyd*, Mom experienced post-partum depression following the birth of the parties' second child, self-medicated with alcohol and ended up spending five and one half months in rehab. She experienced one relapse and then sustained her sobriety. While Mom was in rehab, Dad filed a disso, and obtained default *pendente lite* custody orders of the parties' infant and toddler.

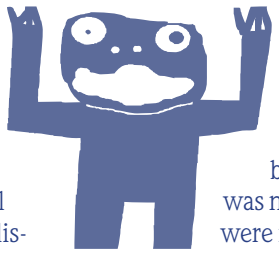
After Mom finished rehab, Dad filed a child support OSC and Mom responded with a request for visitation. The Court ordered alternate weekend and holiday visits for both children with Mom. Nine months later, Mom again sought modification of the parenting plan. This time she asked for primary custody.

Mom argued that her recovery from substance abuse was a change of circumstances which triggered a best interests standard modification proceeding. She asserted that a change of custody was in the preschooler's best interests because "Bryan's work schedule, the minor children were spending many hours with third party caregivers, day care providers and [Dad]'s parents, and that [Mom] is a homemaker and could care for the children in her home during the day."

The court-connected custody evaluator found that Dad worked six eight-hour days each week, and that the children spent five of those days in child care, transported by their paternal grandparents, with whom Dad and the children resided. The evaluator described Dad's home as "a positive and nurturing environment." Mom "had remarried and was a stay-at-home mother. [Her] two children from a previous marriage resided with her, as did her newborn from her current marriage."

The record does not appear to contain important information bearing on the children's best interests. The portions of the court evaluator's report quoted by the appellate court do not discuss these young children's attachments with their various caregivers, those caregivers' attunement with the children or the preschoolers' relationships with their siblings (celebrated as a critical factor in *Marriage of Williams* (2001) 88 Cal. App. 4th 808). Nor does it address the question of whether Mom's full time caretaking responsibilities for five children, three of whom were not yet in school, would give each of the children sufficient attention and care, or over-task Mom, adversely impacting her parenting and/or triggering a relapse. No mention is made of any support network available to Mom.

"The investigator opined that the children would benefit from being in [Mom]'s care during the week, noting that this arrangement would maximize the amount of quality time each parent would have with the children. Thus, the investigator concluded [Mom] should receive primary physical custody of the children with liberal visitation to [Dad]." There was no discussion of a shared parenting plan, yet this appears to be a case in which the children could benefit from involved parenting by each of their parents.



After the one relapse, Mom had maintained her sobriety. However, she was not participating in a 12-step program and there was no evidence of any other relapse prevention efforts. The Court does not mention any expert testimony addressing the questions of Mom's relapse risk, and any prior history of major depression or substance abuse. Evidently the birth of her fifth child had not triggered another post-partum depression or a relapse.

Dad testified that he had reduced his work schedule to five days per week. The trial court followed those recommendations, and the Court of Appeal reversed.

The children are now aged four and five, so preschool and kindergarten occupy at least part of the work day, and soon school will be a full time endeavor. Dad's work day ended at 4:40 p.m. Thus he was available for dinner, homework, social and enrichment activities, and bedtime routines. The Court of Appeal also noted that the child custody evaluator who recommended the change of custody, also recommended that the children continue in the same day care program because of its preschool component. Removing the children from day care/preschool would eliminate the opportunities for peer relationships, social skill building, school readiness preparation, and intellectual stimulation which preschool provides.

The trial court found that Mom's recovery constituted a change of circumstances and changed custody. The Court's remarks on the record (there was evidently no statement of decision requested or required) made it clear that the Court found Dad's work hours and Mom's "stay-at-home" mom status the factors which made a change of custody in the children's best interests.

The way in which the changed circumstances doctrine operated here is interesting. Mom's recovery constituted the change of circumstances, but it was Dad's work schedule which drove the best interests analysis. There was no evidence that the children were not flourishing in Dad's care. It seems to me that Mom's recovery should have triggered consideration of expanding the children's time in her care, not a total change of custody.

Dad appealed, saying that it was an abuse of discretion for the trial judge to ignore the children's needs for stability and continuity.

One year after the order changing custody, the Court of Appeal reversed, citing *Burchard v. Garay* (1986) 42 Cal.3d 531. *Burchard* held that the fact that the stepmother could care for the child at home, while his unmarried mother required child care was an improper basis for an award of paternal custody. The Court cited the portions of *Burchard* discussing attunement, attachment and continuity of care.

The Court of Appeal hinted strongly that a parenting plan which reduced the hours of day care by giving Mom greater caretaking responsibility while Dad was at work would be an acceptable solution. The thinking of the trial court and court-connected evaluator appear to have been far too superficial to address what really mattered to these young children's development and in their relationships. Better training of judges and evaluators, and developing a greater experience base, could have spared this family years of disruption and limbo. One can't help but wonder what would have happened if the parents had chosen the collaborative law model and crafted a parenting plan which increased the children's time in the care of their mom in view of her recovery and

their relationships with their siblings, rather than litigating over who would "win" sole custody.

You can follow these, and other pending appellate cases at appellatecases.courtinfo.ca.gov.

The Case for Collaborative Family Law

There is no perfect model for providing families the necessary professional assistance for reorganizing family finances and childrearing responsibilities at life transitions. No one knows better than CFLS's how family courts are failing to live up to the aspirations of fairness, equal access, thoughtful decision-making and child-centered outcomes. The Worker's Comp-like Family Law 2000 proposal died in the legislature a few years back, but it is a *de facto* reality in most California courtrooms.

The truth is that the complex tasks of uncoupling; reorganizing family finances; and establishing, implementing and adapting a parenting plan over the changing years of childhood require time, and professional assistance. Abbreviated interventions are time bombs, exploding into modifications, enforcement problems, or damaged families populating our dependency courts and criminal courts.

The struggle with the volume of families flooding into the courthouse in an era of shrinking funds for public endeavors makes it impossible for courts to do the job we now assign them, much less offer the kind of therapeutic jurisprudence (Google™ that term when you get a chance) some families require. Unless we divert those families who really don't need adjudication out of the litigation process entirely at the earliest opportunity, our courts cannot possibly meet the needs of those families who will require judicial intervention.

Accidental Litigants and Incidental Negotiations

More than half of all of our American families must become litigants in order to move from one phase of their family lives to another, even though 95% of these "cases" settle. Three decades after the introduction of "No Fault," it is mere historical accident that sends all restructuring families to the courthouse. Isn't it time to turn the whole system upside down? Given that most cases are settled, it makes no sense to turn family members into litigants in most cases. Settlement efforts are incidental, and worked around the structure of adversary litigation, in the typical family law matter. Negotiation often takes place in high pressure situations, such as outside the courtroom where the matter will otherwise be adjudicated. The model discourages, rather than facilitates, thoughtful decision-making. Collaborative Family Law, which organizes time and effort around settlement, should be part of a menu of pre-court options offered by the Family Court to every potential family law litigant.

Beverly Hills CFLS Fern Topas Salka (one of the founding mothers of the Los Angeles Collaborative Family Law Association) observes that the court system was never designed for the kinds of issues families bring to the courthouse. She says that what is most exciting about Collaborative Family Law is the opportunity to design a new process from the ground up.

Playing Basketball Refereed by a Hockey Umpire

As the judicial turnover in family law departments grows higher, going to family court is like playing basketball refereed by a hockey umpire. Here in California we employ a generalist paradigm in which quite often the person who knows the least about family law, the dynamics of families and the needs of children, is the judge. So long as we run former prosecutors and civil litigators through a quickie course of Family Law 101 and Custody 101, we will continue to do more harm than good in many courtrooms. Both the legal and human issues that each family presents are complex, and require a level of expertise, which cannot be acquired without years of formal and informal training.

I have enormous empathy for the newly assigned family law bench officer (but not always sufficient patience), but I fear for the welfare of my adult and child clients and their families when I walk into a courtroom during his or her first few years on the bench. Even when we have years and years of experience and expertise, these families bring difficult and complex challenges to us. The risks for families are acute, and the magnitude of the harm which can be done cannot be over-estimated.

At the bare minimum, family law judicial officers should meet the qualifications to be a CFLS, and should have intensive advanced training in the specialized psychological issues associated with divorce, separation and custody. We can't afford to have our judicial officers learn the basics on the job at the expense of families. We can't afford the wasted resources. California should look at Australia, which has a specialized family law bench. Most families can't afford to hire lawyers and expert witnesses to teach the judge what the person in charge of the proceedings should already know.

Litigant Dissatisfaction and Term Limits Produce Poor Legislation

The problem is compounded by the after-effects of term limits, in which amateur legislators please gender-based constituencies with poorly conceived statutory schemes. Each legislative session attempts to remedy the legitimate and illegitimate dissatisfaction expressed by family law litigants with overbroad classifications rather than thoughtful, experienced and expert decision-making. The less able the courthouse is to meet the needs of families, the more pressure there is for statutory solutions which end up exacerbating, rather than remedying, the problems they seek to redress. In the next issue, we'll take a more in-depth look at the 2003 crop of family law bills. Meanwhile, you can track these bills at www.leginfo.ca.gov.

But even if we doubled the economic resources of family law departments, had a perfect statutory scheme, and only had the most highly experienced and specially educated judicial officers, the adjudication model would only be viable as a safety net, not as the primary process for family reorganization.

The growth of Collaborative Family Law has the potential to improve both

Continued on page 28

Custody Matters

Continued from page 27

the lives of children whose parents work in that model and those who go to court. Unless we develop a system in which most families' contact with the legal system is limited to registering judgments and orders they develop themselves, the courts cannot possibly devote the time, resources and expertise that are necessary for wise interventions and decision-making for the families who need adjudication. The more families we divert from the courthouse, the more resources we have to devote to the difficult cases.

What children and their families need is the opposite of global case management. Global case management forces everyone on to the same time table, and wastes thousands of dollars in attorney time, and endless hours of judicial time. Every case should choose its own pace. They need a courthouse in which experienced and highly trained specialized mediators, evaluators, facilitators and judges are available for those families who need their assistance, when that assistance is needed. That means designing a process which makes litigation the exception, not the rule.

Risks of Collaborative Model

I've been intrigued by, but skeptical of, the collaborative model for the past few years. My primary concern has been the "all or nothing" rule which can force a party to have to choose between unfair concessions on an important issue in order to save all the agreements which have been reached. Then I heard Pauline Tesler lecture and read her book. In Pauline's variant of the collaborative model, a private arbitrator is chosen who can hear limited issues when appropriate. I was also troubled by the loss of rights (such as retroactive support) which can result from failure to act promptly. That risk could be somewhat remedied by a well-crafted stipulation at the beginning of the process.

When I started to apply the "compared to what" test, Collaborative Family Law became more attractive. The problem with "bargaining in the shadow of the law" (a phrase coined by Robert Mnookin, one of the founders of the interest-based negotiation movement) is that the negotiations are haphazard, shaped by the adjudicative process, and often framed by competition rather than complementarity. Litigation elevates unrealistic hopes for vindication, validation and victory. Satisfaction with settlements reached in the "shadow of the law" is low, as financial resources and emotional energy are exhausted – people see the outcome as a defeat rather than an accomplishment.

Collaborative practice turns our habitual framework on its head – all time, money, effort, and attention are focused on problem-solving, not litigating. The parties are never paying their lawyers hundreds of dollars an hour to cool their heels in the courthouse hallways, awaiting a cursory moment on a 30-case calendar.

Roots of Collaborative Family Law

Collaborative Family Law has its roots in two movements – mediation and interest-based negotiation. Training in mediation and in interest-based negotiation is essential for effective collaborative law practice. While you can learn techniques in some intensive trainings, turn to the books of Mnookin, Fisher, Ury and others (starting with the classics, *Getting to Yes, Getting Past No,* and *Getting Together*) for a grounding in interest based negotiation theory and practice. For those of you interested in learning these principles and skills, I'll post a negotiation reading list at www.acfls.org. Watch for it on the redesigned web site.

As presently constituted, Collaborative Family Law is an option only for those who can afford costly private legal services. But nonprofit and government subsidized Collaborative Family Law Centers will have to follow close behind. The challenge will be not to water it down, the way that court-connected mediation (custody and otherwise) has become a watered down and flawed parody of the marathon bargaining sessions model which inspired it.

Collaborative Family Law practice builds on skills that many family lawyers already have. Trainers tend to stress how different it is, but most of us have learned how to assist our clients in engaging in information gathering, creative thinking, cost-benefit analysis, and separating the practical tasks before them from the complex emotions of uncoupling. Strong collaborative training, and reading the literature of interest-based negotiation will optimize the skills many family lawyers already have. One advantage of a mixed collaborative and litigation practice is that lawyers will be able to help their clients apply the "compared to what" test as they make decisions.

Although the concept has been around for a decade, this model is still in its infancy. Some of the folks traveling around the country putting on trainings do more training than actual collaborative practice. It will take some effort and inquiry to find the best training. As we move along our journey to offer our clients the Collaborative Family Law option, we should expect that we will need to participate in a variety of training programs, and augment them with reading and real world experience.

Every family lawyer's daily life places the aspirations of the adjudicative process and the realities of litigation in sharp contrast. Client dissatisfaction is leading to skyrocketing rates of bar complaints, fee arbitrations and malpractice actions, as well as to ill-conceived legislation. Like adjudication, collaboration is an imperfect and risky option. But common sense tells us that if 95% of all cases settle anyway, families should start with (or after crisis interventions, move on to) a process organized around finding solutions rather than competing for victory.

From the Editor's Desk

Continued from page 2

This newsletter lands on the desks of every family law judicial officer in the state, as well as some 500 ACFLS members. Your contribution to this newsletter can make a dramatic difference in the practice of family law, and the experience of families all over our state. Judges attending a recent training were told that reading this newsletter is a must. Each of our readers has areas of special experience and expertise. In order to maintain the high quality of this publication, we need your contributions. Those who publish in the newsletter also find that they get referrals from colleagues around the state, so writing is not only a public service, but good for business. Please send your contributions to me at lescfls@earthlink.net. Stumped for a topic? Email me for suggestions or a book review assignment.

Selected Collaborative Family Law Web Links

International Academy of Collaborative Professionals www.collabgroup.com

Collaborative Divorce℠ www.collaborativedivorce.com

Stuart G. Webb (founder of Collaborative Law) www.divorcenet.com/mn/webb.html

Pauline Tesler, Collaborative Lawyer www.divorcenet.com/ca/tesler.html

Collaborative Alternatives www.collaborativealternatives.com

Consortium for Cooperative Law www.noncombatdivorce.com

Collaborative Lawyers of Northern California (Shasta County) www.collaborativeattorneys.com

Collaborative Lawyers of Santa Clara County www.nocourt.org

San Francisco Collaborative Law Group www.collaborativelawsf.com

Los Angeles Collaborative Family Law Association www.lacfla.com

Coalition for Cooperative Divorce (Woodland Hills) www.nocourtdivorce.com

A Better Divorce (L.A. County, South Bay) www.abetterdivorce.com

Divorce – Collaborative Style (video) www.tonyseton.com/collaborate/

The Mediation Center (Chip Rose) www.collaborativelawyers.com

Sacramento Collaborative Negotiation Group www.divorceoption.com

Central Valley Collaborative Law Affiliates (Fresno) www.peacemaking.com/cvcl/

Collaborative Lawyers of Marin www.collaborativelawyers.com

Collaborative Family Lawyers (Ventura) www.collaborativefamilylawyers.com

Peninsula Collaborative Family Law Group www.collaborative-law.com

Mediate.com Collaborative Law Section (excellent articles & forms) www.mediate.com/collaborativelaw

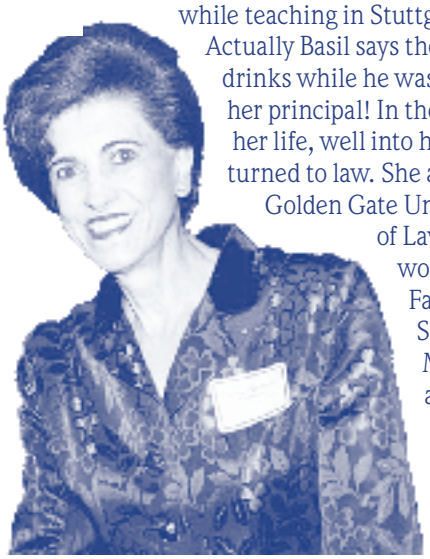
Millennium Divorce www.millenniumdivorce.com/links/collaborativedivorce.html

In Memorium
Athena V. Mishtowt

VIVIAN L. HOLLEY, J.D., CFLS, DIRECTOR AT LARGE, NORTH, AND PAST PRESIDENT

The Family Law legal community including ACFLS, San Mateo County, and everyone else whose lives she touched have lost a treasure.

It is with great sadness I report that on November 23, 2002, Athena V. Mishtowt passed away after a long illness and frequent hospitalizations. Athena can never be replaced. She is survived by her husband of more than 40 years, Col. Basil Mishtowt, her family, her friends, her clients, and her colleagues all of whom loved her dearly.



Athena was the personification of grace and graciousness. She never had an unkind word for anyone or anything. She was caring, supportive, and eager to serve her clients and her community. Athena came to law in her 60's as a second career – originally she had been a teacher, and met Basil while teaching in Stuttgart, Germany. Actually Basil says they met over drinks while he was still dating her principal! In the later part of her life, well into her 50's, Athena turned to law. She attended Golden Gate University School of Law and then worked with Family Law Specialist Ruth Miller as her associate from 1993 until 1998 when she opened her own law practice in San Mateo County. According to Ruth Miller, "Athena loved practicing family law" and thought "if she had to stop practicing family law it would be the end of her." Athena served her community in many capacities, including as a museum docent, as well as on the Board of Directors of ACFLS as Director North-Elect and Director North. Many ACFLS members not on the board first met Athena when she presented Ruth Miller the ACFLS Hall of Fame Award in December, 1999. Athena and "Mish" regularly attended the ACFLS spring seminars, where I had the honor and pleasure of getting to know Athena as a friend and colleague.

Athena never complained about her physical condition which was painful and which made it difficult for her to attend court or even to exit an elevator. Who among us will forget her beauty or her candy-red scooter for that matter? After meeting Athena, it would be hard to name a person with a more positive and cheerful attitude about life. She stands as a role model for all of us.

Athena, you were such a classy lady. You will be missed, but never forgotten.

ACFLS Represents California at Council of Community Property States

Alan Tanenbaum, J.D., CFLS, Technology Coordinator

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The 15th Annual Symposium of the Family Law Council of Community Property States will meet March 20 to 23, 2003 in Coeur d'Alene, Idaho. The meetings rotate through each of the nine Community Property states, presenting seminars on the treatment of a selected community property issue each year.

This year, the topic is "Everything You Wanted to Know About Retirement Division, but Were Afraid to Ask." The goal is to produce a paper that deals with the special aspects of drafting the documents of retirement fund division in each of the Community Property states and which will be the definitive statement of how to draft such documents. Accompanying the paper, the presenters will make a 30-minute presentation.

ACFLS represents California at the Annual Symposium and hosts it for California every nine years. The State Bars of each of the other states represent those states, but California's State Bar does not sponsor activities outside of the state. As a result, ACFLS provides California's representatives and speakers each year.

The format of the program is a Thursday reception from 6 to 8 pm, followed by a Friday of presentations from 8:30 am to 4:30 pm. Saturday morning there is a round table update of recent law and legislation in each state.

This year the Council is inviting all those who have participated over the years to attend as a kind of reunion. The Idaho chapter has opted to recreate the meeting of 1993 at 1993 prices at the Coeur d'Alene Resort. The rates are Premier (Tower/View) $129 (single or double), Deluxe $85 (single or double), and Economy $65 (single or double). The seminar costs $225. Attendees are invited to an opening reception in the Hagadone Suite at the resort from 6 pm to 8 pm, breakfast and lunch on Friday and breakfast on Saturday, which are included in the price. Friday night's dinner is at the Clark House, an early 20th century mansion on Hayden Lake. The Dozier Jazz Duo will play. Saturday afternoon there will be a wine tasting on the lake and a dinner at the resort.

Air travel to Coeur d'Alene is through Spokane. The resort can help with transfer arrangements. Those who wish to attend, should contact Linda Pall, the 2003 Symposium Chair. Southwest has flights from Oakland to Spokane Washington. There are and shuttles and rental cars to drive the 30 miles to the Resort. This has always been one of the most interesting seminars of the year. It has always broadened our perspective on the covered topic. Definitely worth attending.

Questions? 208-882-7255

The Coeur d'Alene Resort has been awarded five stars by Golf Digest, a gold medal by Golf Magazine, the AAA Four Diamond Award and the Mobil Four Star Award and was selected by the readers of Conde Nast Traveler as America's top mainland resort. The Resort also offers lake cruises, and a spa. Information about the Coeur d'Alene Resort is available at www.cdaresort.com/home.asp. The area surrounding Coeur d'Alene offers sightseeing, wildlife viewing and hiking. The resort's waterfront setting offers a diverse menu of aquatic activities ranging from lake cruises to sailing to jet skis to parasailing. Away from the lake, Guests can play the world's only floating moveable green at The Resort's spectacular new waterfront golf course, or challenge the champagne powder blanketing north facing slopes at Silver Mountain (www.silvermt.com/), America's newest ski and summer resort (skiing is open until mid-March). CCPS delegates can also visit a ghost town, challenge the white water, troll for a Chinook Salmon, or go horseback riding.

Family Law Council of Community Property States

Sponsored by the Idaho State Bar Family Law Section

The 15th Annual Symposium: Everything You Wanted to Know About Retirement Division in Community Property States But Were Afraid to Ask

Thursday, March 20, through Sunday, March 23, 2003 at the Coeur d'Alene Resort, Coeur d'Alene, Idaho

Yes, I am attending the 15th Annual Symposium for 8.5 CLE hours!

Name _____

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I remit the following funds:

I am the presenter for my state_____ (no charge)

I am a delegate from my state, Alumnus, or Idaho State Bar Family Law Section member. $175.00 per person, breakfast/lunch included _____

I am neither a delegate nor a Family Law Section member. $225.00 per person, breakfast/lunch included _____

I am bringing a guest who would like to have breakfast, lunch and Saturday breakfast with us. $50.00 per person _____

I want to attend the Clark House Dinner Friday night. $85.00 per person incl. transportation, no host bar _____

I want to attend the Resort dinner Saturday night. $85.00 per person _____

Total Remitted: _____

I will be attending the reception Thursday evening: Yes ___ No ___

I will be attending the wine tasting Sat. afternoon: Yes ___ No ___

Make your room and any golf or other sporting reservations directly with the Coeur d'Alene Resort, 1-800-688-5253.

Send this form to Idaho State Bar Family Law Section, ATTN: March Symposium, PO Box 895, Boise, Idaho 83701 with your check for the amount indicated.

M/M: When Cash Should Be King

Continued from page 15

Arguments Supporting the Proposed Formula

Proponents of the Proposed Formula contend that a fair *Moore/Marsden* calculation doesn't credit the Separatizer with the mortgage because:

1. A mortgage isn't an asset, and shouldn't be treated as one.
2. Fair apportionment of appreciation must consider only the relative financial sacrifices made by the Separatizer and the community. Sacrifices are measured in cash.
3. Public policy favors the community over the Separatizer.

For example, *Bono v Clark* (2002) 103 Cal.App.4th 1409, 1429, observed that what it termed its "extension of the *Moore/Marsden* rule"[3] was "consistent with California's 'partnership' model of marriage, which strongly favors community property."

Wanted: A Unified Theory

Trial courts cannot use the Proposed Formula because no precedent supports it. Trial courts must continue to treat the three reimbursements (community-to-separate, separate-to-community, and separate-to-separate) unequally:

1. Community property contributed to separate property is reimbursed under the Current Formula;
2. Separate property contributed to community property is reimbursed "without interest or adjustment for change in monetary values" (Fam. Code §2640, subd. (b)); and
3. Separate property of one spouse contributed to separate property of the other receives no reimbursement (*In re Marriage of Cross* (2001) 94 Cal.App.4th 1143)

Legislation should be passed adopting the Proposed Formula for all three.

Footnotes

1 Despite *In re Marriage of Branco* (1996) 47 Cal.App.4th 1621, the community shouldn't be credited with the entire mortgage either, even if it is considered a "community mortgage."

2 Attorney's BriefCase's excellent program, "Pushing the Limits: An In-Depth Analysis of *Moore/Marsden* Issues," presented by Thomas W. Wilson, Esq., analyzes this issue. A copy of the program materials may be purchased for $50.00 from Attorney's Briefcase (www.atybriefcase.com, info@atybriefcase.com).

3 *Bono* "extended" the *Moore/Marsden* rule for the benefit of the community only by agreeing with *In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962 and *In re Marriage of Allen* (2002) 96 Cal.App.4th 497 that the rule applies to community-paid improvements. *Bono* "extended" the *Moore/Marsden* rule for the benefit of the Separatizer in three ways: a) by delaying the commencement of the post-marital appreciation period (i.e., the period during which appreciation is shared with the community) from date of marriage to date of improvement, b) by accelerating the end of the post-marital appreciation period from date of trial to date of separation, and c) by adding pre-improvement appreciation to the numerator of the Separatizer Formula and to the denominators of both Formulae.

GARBAGE IN, GARBAGE OUT

Continued from page 13

Time for filing a request for Statement of Decision, as well as other Statement of Decision deadlines, can be extended by the court for good cause. *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140 fn. 11; CRC 232(g). Regardless of these deadlines, the court is authorized to issue a Statement of Decision *sua sponte*. *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 476 fn. 7.

Procedural Stage Two: Specifying Issues and Requesting Findings

Counsel must not only timely request a Statement of Decision, but may also specify the controverted issues that the party seeks a Statement of Decision on. Code of Civil Procedure section 632. This can include proposing additional findings not covered in the tentative decision. California Rules of Court, rule 232(b). Indeed, some authorities suggest that it is improper to generally request findings of fact on a subject without also providing suggested findings. *McAdams v. McElroy* (1976) 62 Cal.App.3d 985, 993.

The court is not required to make express findings of fact on every controverted factual issue in the case, so long as the Statement of Decision sufficiently disposes of all basic issues in case. *Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118. All that a court is required to do is provide an explanation of the factual and legal basis for its decision on the principal controverted issues for which findings are requested. *Akins v. State of California* (1998) 61 Cal.App.4th 1; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224. That is, the court need only make findings on "ultimate" facts – those facts that are relevant and essential to the Judgment, and which are closely and directly related to court's determination of the ultimate issues in case. *Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1080; *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 599. A detailed discussion of evidentiary facts is not required. *In re Marriage of Drapeau* (2001) 93 Cal.App.4th 1086, 1098-1099.)

However, the court's findings may not be so "ultimate" that they are simply legal conclusions, and must "be set forth with a degree of specificity which fairly discloses the court's determination on all issues of fact material to the judgment." *Guardianship of Brown* (1976) 16 Cal.3d 326, 332-333; *Employers Cas. Co. v. Northwestern Nat'l Ins. Group* (1980) 109 Cal.App.3d 462, 473. A 'material' issue of fact is one "which is relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case." *Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 565. A finding on a "subsidiary fact probative of the ultimate fact" can be material. *McAdams v. McElroy* (1976) 62 Cal.App.3d 985, 995.

Given these competing standards, counsel must find a middle ground in specifying issues and requesting findings. Cases commonly disapprove 'interrogating the judge' through overly long, burdensome requests for a Statement of Decision, and sometimes allow trial courts to ignore requested findings when presented in this manner. *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 525 [75 questions]. But see *Kroupa v. Sunrise Ford* (1999) 77 Cal.App.4th 835, 842 [court suggests that altogether ignoring 73 questions may be error, but decides issue on other grounds]. On the other hand, as discussed above, failure to ask for findings on a controverted issue may result in a waiver. While no precise rule can be stated for striking the proper balance, certain guidelines can be helpful.

The request for a Statement of Decision should be crafted with an eye toward the three basic sources of appellate reversals: errors of fact, errors of law, and errors of process. Callaghan's Appellate Advocacy Manual (1995) section 8:02. These analytical points are useful in guiding counsel's approach to the Statement of Decision process, regardless of whether your client is attacking the tentative decision or seeking to safeguard the tentative result.

Errors of fact refer to more than simply 'getting the facts wrong.' They also include questions of whether the facts: are sufficiently proven, are grounded in admissible evidence, support all elements of a *prima facie* case, and rise to the level of "substantial evidence" on all essential factors. Errors of law can include whether the proper substantive legal standard has been selected, whether that test has been correctly construed, and whether the governing principles have been appropriately applied. Errors of process involve procedural irregularities that undermine the fairness of the proceeding. Keeping such principles in mind, counsel should craft the request for Statement of Decision with a focus on addressing the controverted and pivotal issues of their case.

Procedural Stage Three: Proposals for the Contents of the Statement of Decision

Within ten days of a request for a Statement of Decision, any party can submit proposed findings. California Rules of Court 232(b). The request for findings (Stage Two) and the proposed findings (State Three) can be combined in a single document. One case suggests that even a losing party, under a tentative decision, should submit proposed favorable findings on important issues, to facilitate appellate review of whether those proposed findings should have been accepted or rejected. *McAdams v. McElroy* (1976) 62 Cal.App.3d 985, 993-994.

Proposals for the content of the Statement of Decision can be an opportunity for a prevailing party to safeguard a victory by addressing omissions and ambiguities in the tentative decision, and perhaps gently prodding the court to modify its reasoning to a more defensible posture. See *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1173 fn. 4 [even where the court issues an oral statement of decision in a one-day matter, counsel can submit a written proposed statement of decision that fills in gaps, which upon signing renders oral statement a non-binding tentative decision]. A proposed Statement of Decision can save a judge significant effort, and many courts will adopt counsel's proposed Statement of Decision in its entirety, if it reasonably reflects the court's reasoning process. The court is authorized to assign preparation of the Statement of Decision to prevailing counsel (see Stage Four), and even when it is not solicited, many courts will sign a draft submitted by prevailing counsel.

Procedural Stage Four: Preparation of the Initial Statement of Decision

Under California Rules of Court, rule 232(a), the court may provide that its tentative decision will automatically become a Statement of Decision absent a request for additional findings. *Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718. Alternatively, the court may designate that a

Statement of Decision be prepared either by the court or by a party. For trials taking less than one day or eight hours, the court is authorized to make its Statement of Decision orally; otherwise it must be in writing. Code of Civil Procedure section 632. Otherwise, the practice of designating the trial transcript as the Statement of Decision has been disapproved and construed as a refusal to issue a Statement of Decision, requiring mandatory reversal. *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 127.

Procedural State Five: Objections to the Statement of Decision

Once a Statement of Decision has been prepared, a party has the opportunity to file objections to omissions or ambiguities in the document. Code of Civil Procedure section 634. Ambiguities or omissions can also be challenged by certain post trial motions. Code of Civil Procedure section 634. Failure to bring omissions and ambiguities in a proposed Statement of Decision to the court's attention may result in waiver of the resulting error, and allows the appellate court to infer necessary findings if supported by the record. *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 593; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140-141. Note that a proposed alternative Statement of Decision is not a substitute for objections, and can result in waiver if not accompanied by specific objections to the draft Statement of Decision. *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380.

While failure to object may result in waiver and appellate affirmance, the court's failure to provide appropriate clarifications, when requested, can also require reversal. (*In re Marriage of Weinstein* (1991) 4 Cal.App.4th 555, 571. The objection process allows losing litigants to force the trial court to explain its rulings in a meaningful way, to facilitate effective appellate review. *DeArmond v. Southern Pac. Co.* (1967) 253 Cal.App.2d 648, 658. Counsel may want to review the analytical factors discussed in Stage Two in formulating their objections.

Courts are authorized to order a hearing on objections. More commonly, the court will rule on objections without hearing, as is also allowed under the applicable rule. CRC 232(f).

Statements of Decision and Trial Strategy

Ideally, the request for Statement of Decision should be drafted in concert with the trial brief and litigation plan, and should be submitted to the court before trial as a streamlined roadmap to the case. (Such an early request can be amended at the close of trial.) This way, the request may be viewed by the court as a useful tool that guides its analysis, rather than a 'sour grapes' attack on a tentative decision. This approach also helps avoid the dangers in short-cause matters of inadvertently failing to request a Statement of Decision before submission; or failing to comply with local rules governing requests for Statement of Decision. See, e.g., Contra Costa County Superior Court local rule 12.5 [Statement of Decision request in short matters must be made at commencement of trial]. But see Government Code section 68070 [local rules may be void to the extent that they contradict the applicable statutes and statewide rules].

Parties attacking a decision must use the Statement of Decision process to isolate and clarify the court's reasoning and the factual findings it relied on. This is crucial. Without such focus, appealable issues can become lost in a morass of details and theoretical justifications for a ruling that the trial judge never actually contemplated.

For example, *In re Marriage of Colburn,* 2002 Cal. App. Unpub. LEXIS 1722, is typical of those cases (often unpublished) where effective appeal from possible error in the tentative decision was undermined by failure to request a Statement of Decision. The trial court was not bound by its tentative rationale, and the alleged errors in a permanent spousal support ruling became lost in the murky soup of the fourteen applicable statutory factors. Family Code section 4320. Because the support award could be justified under those myriad factors, and isolation of the potentially reversible rationale was waived, the Judgment was affirmed.

In contrast, when a Statement of Decision is requested, counsel defending the result is given an opportunity to preserve a victory based on a shaky rationale. For example, in a suit against governmental agencies for flood damage, the appealing defendants complained that a Statement of Decision drafted by counsel reflected "the plaintiffs' reasoning, analysis and decision and not that of the trial court…" and that "the statement of decision was so plainly a rehashing of the plaintiffs' closing argument that it simply cannot reflect the trial court's decision." *Arrela v. County of Monterey* (2002) 99 Cal.App.4th 722, 750. This argument was rejected on appeal, and the trial court's tentative decision was ignored as non-binding. In essence, if you can get the trial judge to sign your proposed Statement of Decision, deficiencies in the tentative decision can be 'sanitized' if the result can be justified on another basis.

Except where objection is made to an inadequate finding, ambiguity in a Statement of Decision will never work in the appealing party's favor. The appellate justices will scour the record to find support for the Judgment, and they can be remarkably creative in finding favorable inferences. Therefore, it is better to ask the trial court if a particular unfavorable finding was made, rather than to avoid the issue, because the appellate courts will likely infer the worst. Specificity in factual and legal findings can be the foundation of an effective appeal – including specific findings negating potential unfavorable inferences.

This does not mean that a party who supports the tentative decision should solely focus on diluting the specifics of the court's findings. If a particular finding is requested, it can be dangerous to ignore the request or to bury the finding in ambiguity, because a failure to adequately make requested findings can justify reversal in itself. Where findings are required, the party seeking to protect the Judgment should be sure that all necessary findings have been made, while taking advantage of the opportunity to tailor the Statement of Decision to enhance its value on appeal.

Conclusion

There is no doubt that the Statement of Decision is an essential tool for safeguarding effective appellate review. Parties should be aware of the many junctures at which they have the ability to influence the Statement of Decision process, and be prepared to utilize those methods as appropriate. For appellate purposes, a Statement of Decision may only be as good as the findings that are requested, so it is best to approach the process with an eye toward the dynamics expected in a prospective appeal.

2002 Hall of Fame Award

ACFLS Honors Bill Hilton at Annual Holiday Party

Alan Tanenbaum, J.D., CFLS, ACFLS Technology Coordinator
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Ed. Note: ACFLS awarded the 2002 Hall of Fame Award to Bill Hilton at the annual holiday party. Here is an expanded version of 1994 Past President Alan Tanenbaum's remarks from that event.

ACFLS annually selects a Certified Family Law Specialist whose contributions to the specialty have been significant and who exemplifies the highest ethical and legal standards of practice in family law for the Hall of Fame Award.

Recipients over the last ten years have been Robert J. Fulton, C. Rick Chamberlin, Stephen Adams, John F. Staley, Garrett C. Dailey, Barbara A. DiFranza, Mark I. Starr, Stuart Walzer, Ruth Miller, George H. Norton and Lorraine C. Gollub. The award is given each year at the December meeting.

The recipient for 2002 is William M. Hilton for his contributions to the subspecialty of interstate and international custody and jurisdiction under the UCCJA and UCCJEA, the Hague Child Convention on the Civil Aspects of International Child Abduction and the Parental Kidnapping Prevention Act. While this may be considered a limited subspecialty, Bill has been invited to travel across the world to speak on the topic and has repeatedly been asked to represent children who have been abducted or who have been "trapped" by the differences in the laws of different jurisdictions.

Bill has had 15 published cases in the area. He is a certified family law specialist whose practice is centered in Santa Clara County. He maintains a website with voluminous information at the URL of www.hiltonhouse.com used daily by attorneys and members of the public who can research the law of interstate and international custody and abduction at no charge. There are 380 files on the site, at last count. When this writer attended a seminar in Chicago on Interstate Custody by three well known mid-west and Eastern custody lawyers, they referred to Bill's website as the primary site for an attorney to go for help.

At the time of the December dinner and the presentation of the award to Bill, Vivian Holley, one of ACFLS' past presidents, stood up and related her personal relationship with Bill's work, to give him her personal thanks and her deep gratitude for helping her keep her family together. Vivian Holley's late husband had been represented by Rudy Kraft, a CFLS in San Jose in his custody case, which involved his two daughters. In this case, Bill wrote the first international joint custody judgment between Australia and California in 1979. When the girls were not returned from a visit and were hidden in Australia by their mother in 1982, Bill's judgment was used to obtain an Australian order to enforce visitation. Bill also included provisions for a security bond in the order which was eventually used to pay attorney's fees and detective's costs to find the girls and have them returned.

There were many other stories to tell, including the story that Bill has always arranged to be ecologically correct by taking public transportation or, in some cases, by bicycle, to avoid dependence on the use of automobiles and oil products. When I went to the Oakland airport for an overseas trip this last year, I ran into Bill. He had come by public transportation to travel to The Hague. Bill is one of a kind. He has exhibited high professional competence, has been a major contributor to our public reputation and has lawyered for the love of the profession and the love of "doing the right thing." He has been a unique contributor to family law and has made us proud.

Congratulations, Bill.

ACFLS Holiday Party Celebrants (clockwise from top left):

Frieda Gordon & Avery Cooper, Mary Jo Hart & Bill Hilton, Joan Bauman, Lulu Wong, Sharon Bryan, Alan Tanenbaum & Bill Hilton, Gary Kearney, Board Inauguration.

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Calendar of Events

MARCH

8 Board of Directors Meeting.
Crowne Plaza Hotel, S.F.
Meeting starts at approximately 10 am and concludes at approximately 3 pm.

13 North. CA Dinner Meeting.
Speaker: Garrett Dailey, CFLS.
Topic: Prenuptial & Postnuptial Agreements, Legislation and Fiduciary Duty.
Trader Vic's, Emeryville.

20-23 Family Law Council of Community Property States Annual Symposium.
Coeur d'Alene Resort, Coeur d'Alene, ID.
Delegates will compare and contrast community property treatment of retirement benefits.
R. Ann Fallon, CFLS, Walnut Creek, will present for ACFLS.

25 Sacramento Luncheon.
Topic and Speaker TBA.
Mace's Restaurant, Sacramento.

27 South. CA Dinner Meeting.
Topic: Depositions of Parties.
Location TBA.

APRIL

10 North. CA Dinner Meeting.
Speakers: Alan Tanenbaum, CFLS and Lynne Yates-Carter, CFLS.
Topic: The Evolution of Fiduciary Duty Between Spouses.
840 North First St. Restaurant, San Jose.

29 Sacramento Luncheon Meeting.
Topic and Speaker TBA.
Mace's Restaurant, Sacramento.

MAY

2-4 11th Annual Seminar.
Embassy Suites Hotel, La Jolla, CA. See flyer for further details.

2 Board of Directors Meeting.
Embassy Suites Hotel, La Jolla, CA.

22 South. CA Dinner Meeting.
Topic: Depositions of Experts, I.
Location TBA.

27 Sacramento Luncheon Meeting.
Topic and Speaker TBA.
Mace's Restaurant, Sacramento.

JUNE

12 North. CA Dinner Meeting.
Speakers: John McCall, Madeleine Simborg, CFLS.
Topic: Ethical Considerations in Private Judging.
Alta Mira Hotel, Sausalito.

24 Sacramento Luncheon Meeting.
Topic and Speaker TBA.
Mace's Restaurant, Sacramento.

28 Board of Directors Meeting.
Morro Bay, location TBA

JULY

24 South. CA Dinner Meeting.
Topic: Depositions of Experts, II. Location TBA.

SEPTEMBER

4-7 State Bar Convention.
Anaheim.

7 Board of Directors Meeting.
Location TBA.

11 North. CA Dinner Meeting.
Speaker: Bill Hilton, CFLS.
Topic: Terrorism and Its Effect on the Hague Convention.
840 North First St. Restaurant, San Jose.

25 South. CA Dinner Meeting.
Topic: Collaborative Law.
Location TBA.

30 Sacramento Luncheon Meeting.
Speaker and Topic TBA.
Mace's Restaurant, Sacramento.

OCTOBER

9 North. CA Dinner Meeting.
Speakers: Steve Wagner, CFLS; Barbara DiFranza, CFLS; George McCauslan, FSA.
Topic: Making Sense of QDRO's. Iron Gate Restaurant, San Mateo.

28 Sacramento Luncheon Meeting.
Speaker and Topic TBA.
Mace's Restaurant, Sacramento.

Board of Directors Meeting.
Date and location TBA

NOVEMBER

13 North. CA Dinner Meeting.
Speakers: Honorable Charlotte Woolard; Honorable Marjorie Slabach; Margaret Lee, Ph.D.; Laurie Nachlis, CFLS.
Topic: Recent Developments in Move-Away Cases.
Crowne Plaza Hotel, S.F.

25 Sacramento Luncheon Meeting.
Speaker and Topic TBA.
Mace's Restaurant, Sacramento.

DECEMBER

6 Annual Meeting and Board of Directors Meeting, 10am.
Crowne Plaza Hotel, S.F.

6 Annual Holiday Party.
Crowne Plaza Hotel, S.F.

For further information on meetings, programs, etc., please contact ACFLS Administrator, Pat Parson (acfls@aol.com).

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

REFLECTIONS ON THE HUMAN SIDE OF FAMILY LAW PRACTICE:

HOW DO YOU DECIDE WHAT KIND OF FAMILY LAWYER YOU WANT TO BE?

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As family lawyers we spend a great deal of time discussing the law, judges, clients and receivables, but not much time discussing our lives as family lawyers. My column will focus on the struggle between being a human being and being a family lawyer. I welcome readers to write or e-mail me so that "Reflections" becomes a conversation among colleagues, rather than a monologue.

It seems to me that a great deal of our lives as family lawyers centers around the kind of lawyer we develop into or decide to be – our style, what works for us. My life in family law started as a law clerk when I was twenty two years old. I feel as if I was raised on the second floor at 111 North Hill Street, learning the lessons of love, hate, fear and power. When I decided to get married, seven years into my career as a family lawyer, I was married by a family law judge. A few years later my fetus participated in OSCs, MSCs, conferences and telephone calls. I heard "The Crocodile Hunter's" wife once say that she wanted to work with the animals filming the television show during her pregnancy because she thought that the child would benefit by being exposed to animals and nature. I continue to wonder if my fetus benefited from her experience sharing my daily life.

So when is it that you decide to be the type of family lawyer you ultimately become? My recollection is that the first five years of practice were simply about base survival – less about conscious choices and more about just staying in the game. Like a childhood dodge ball game where I got hit in the head, fell down and looked around in a confused daze as the coach yelled, "good block."

The next five years (years six through ten) seems to be the time we develop our personal style. We try to act like the lawyers around us and take a few risks to see what works and what does not. Are we to be loud, tough and angry with a "barracuda" reputation, responding to every good morning with "It's not going to be a good morning for your client, that's for sure."

Or will we be the type of very nice and genteel lawyer who is a pleasure to work with – except that they never call you back unless it is in the middle of the night when they know for sure that you will not be in your office. These are the type who are so calm and kind despite the fact that they live on the constant brink of an *ex parte*, noticed for the sole reason that they will not return a call.

One of my favorite types of lawyers, and I even call a few of these people my friends, are the extremely reasonable, very competent, very thorough and detail oriented who almost never make a mistake but take a lifetime to do anything.

There is also the shrill and shrieky lawyer who yells at you endlessly and ferociously when you present the bad news that your client does not agree with his views or cannot (or will not) pay the court-ordered support.

There is the brilliant, chaotic lawyer, whose mind you wildly envy, but who is so disorganized that she rarely makes it to a meeting and if she turns up, she has forgotten the one item critical to the meeting (like the extension cord to her laptop).

I love the lawyer who is sweet as pie to you on the phone and in person and then turns into a fire breathing Godzilla when writing letters to you and portraying you to the judge.

There are the lawyers who remind you of your mother, your father, your favorite teacher, your least favorite teacher and your ex-wife or ex-husband – those who make you laugh and those who keep you up at night because maybe they are right that you violated some professional rule which will be the ultimate and shameful end of your career. There are those who lie constantly, the ones who know it and the ones who do not; those that you trust and those who you should not have trusted.

So how is it that we decide what kind of lawyer we will be? I suppose there are personality traits that we have whether we like it or not. I am sure that those who I see as quite ignorant about the law and voicing absurd expectations for an adjudicated result, do not intentionally choose this route. Recently when I asked counsel for documentation of a reimbursement claim (maybe I used the fancy word "evidence") she responded by telling me that "In such and such branch court they don't have 'evidence'" and I should not try that crap with her.

So you spend the second five years of your career as a family lawyer trying on and imitating all the different qualities and approaches you find and combine them with the frailties, strengths and life experience which you acquired on your own and then you have it – your style which determines the kind of life you will have as a family lawyer.

Now that I am in year twelve of my career, I feel pretty comfortable with the style that I have acquired, finding that playing to my own strengths and visions is always more successful than trying to scream at the screamers or intimidate the intimidators.

I look forward to what years ten through fifteen bring me and will share my discoveries… as soon as I know.

Membership Application

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

Membership applications should be mailed to the ACFLS Administrator at the above address.
Please complete the following information and enclose your check payable to ACFLS as follows:
$150 for single membership; $100 for each subsequent membership from your firm.

Name: _____

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Date Certified by BLS: _____ SBN: _____

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ACFLS NEWSLETTER

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