ACFLS
NEWSLETTER

ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

DEBRA S. FRANK, CFLS, EDITOR — FALL/WINTER 2001, NO. 3

INSIDE:

FRAUD AND OVERSIGHT: HIDDEN ASSETS

CONDENSED FROM CALIFORNIA SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS 2000 FAMILY LAW CONFERENCE PRESENTATION

(PART TWO, CONTINUED FROM LAST ISSUE)

AS EDITED BY NANCY A. KEARSON, CPA, CVA

Presented at the 2000 Florida Conference By:

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Justice Donald B. King (Retired)
Retired Justice - California Court of Appeals

Commissioner James Endman
Los Angeles Superior Court

Although Financial Status has been presented as a relatively new approach, seasoned agents have been utilizing various indirect methods of detecting a taxpayer's lifestyle or their level of business activity for years. Historically, conventional audit techniques have been discovered to be grossly inadequate for the purpose of demonstrating an understatement of taxable income. In such event, the government has typically resorted to one or more indirect methods of detecting unreported income. Although utilized extensively in potential civil and criminal tax fraud matters, the Financial Status approach implemented by the Internal Revenue Service can be anticipated to incorporate any of various accepted indirect methods of proof in what might otherwise be deemed a generic civil tax audit. In fact, there need not be, and usually will not be, a fraud component to trigger utilization of an indirect method in an audit.

The agent may pursue an indirect method although the taxpayer's books and records appear reliable. In fact, it is the indirect method that may provide strong evidence that the taxpayer's books are unreliable. In *Holland v. United States*, the Supreme Court stated "To protect revenue from those who do not render true accounts, the government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history." Indirect methods of proof providing reliable estimates of the taxpayer's taxable income have been consistently affirmed on the basis that: "To require more would be tantamount to holding that skillful concealment is an invincible barrier to proof." Agents utilizing an indirect method in a Financial Status audit can be expected to aggressively attempt to pierce this otherwise "invincible barrier." Accepted indirect methods of determining income include:

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FROM THE EDITOR

DEBRA S. FRANK, CFLS

It has been a privilege serving as your Newsletter Editor for the calendar year 2001. The events of September 11, 2001, certainly have changed all of our lives, and have caused us to examine our own foundations. It has made me aware of the important role that family law lawyers play in our client's lives and how vital a role we fulfill in our society. The September 11, 2001 events remind us on a frequent basis of the importance of our positions.

ACFLS is a tremendous organization; it does fulfill the terms of its MISSION STATEMENT, to promote and preserve the Family Law Specialty. The Association does seek to advance the knowledge of Family Law Specialists, monitor legislation and proposals affecting the field of family law, promote and encourage ethical practice among members of the bar and their clients, and promote the specialty to the public and family law bar. Its members are diligent, interested, concerned and proactive in the area of family law, and it has been an honor to have been involved with this organization.

This Quarter's Newsletter brings us articles from Jennifer Beever and Peter Walzer, entitled "Measure Your Marketing to Maximize Your Firm's Profitability"; Robert Roth's Appellate Perspectives column entitled "Lessons for Trial Counsel from Reversals in Recent Family Law Appeals"; Nancy Kearson's Ask the Expert column entitled "Internal Revenue Code –

Rules for Identifying Alimony Disguised as Child Support", and the second part, continued from the last issue of the Newsletter, of her coverage of the presentation of the California Society of Certified Public Accountants 2000 Family Law Conference entitled "Fraud and Oversight: Hidden Assets", which she edited; Dawn Gray, who provided us with summaries of 2001 Chaptered Family Law Bills; and Leslie Ellen Shear's comment on *Montenegro v. Diaz,* and her article on the structure of move-away analysis.

Please join me in welcoming Linda Wisotsky as your 2002 ACFLS Newsletter Editor. Please send your submissions in Word or WordPerfect on disk to: Linda N. Wisotsky, Newsletter Editor, 9454 Wilshire Blvd., Penthouse Suite, Beverly Hills, CA 90212, Tel: 310-273-3737, Fax: 323-936-6987. Or, e-mail a WordPerfect or Word attachment to: acflsnewsletter@aol.com.

PRESIDENT'S SOAPBOX

MOVING FORWARD

DAVID J. BORGES, CFLS, PRESIDENT

After the events of September 11, 2001, all of us probably view life in a very different way. Our safety and security can no longer be taken for granted. However, we must move forward to reestablish a sense of security and to make the best out of a bad situation.

As family law practitioners, we have always had the responsibility of assisting clients in a significant transition so that they could get on with their lives. The old saying that "criminal law attorneys have the worst people at their best" and "family law attorneys have the best people at their worst" may be truer than ever. Although we are not mental health professionals, all ACFLS members should be more sensitive than ever to the psychological needs of our clients.

While we should not be "couch quarterbacks" (want-to-be psychologists), I think that we need to be observant to the emotional stress of our clients so that we can be better prepared to refer them to the appropriate resource, if necessary.

Our Board of Directors will hold its annual meeting on Saturday, December 1, 2001, at 10:00 a.m. at the Crowne Plaza Hotel Union Square, 480 Sutter Street, San Francisco. At that time, the incoming president, Tom Woodruff, will preside over the meeting. Should any ACFLS member wish to attend, please contact: Pat Parson, ACFLS Administrator, 1884 Knox Street, Castro Valley, CA 94546, (e-mail: acfls@aol.com), so that the necessary arrangements can be coordinated.

Based upon the chaos after the events of September 11, 2001; based upon the death of a close family member; and based upon the demands of business at my law office; this will be a brief president's message. I have sincerely appreciated the opportunity to serve as the ACFLS President, having the privilege to work in conjunction with a phenomenal board whose members are exemplary examples of Certified Family Law Specialists. So, lets move forward and fulfill the ACFLS Mission Statement set forth hereinbelow.

ACFLS MISSION STATEMENT

ACFLS

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 Specialties;
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.

Comment: *Montenegro v. Diaz*

CAL SUPREME COURT QUIETLY CHANGES THE CHILD CUSTODY LANDSCAPE WHILE SIDESTEPPING CENTRAL QUESTIONS

LESLIE ELLEN SHEAR, J.D., CFLS, ACFLS TECHNOLOGY COORDINATOR, LESCFLS@ MSN.COM

This article is being published concurrently in the afcc california chapter newsletter.

The California Supreme Court's recent decision in *Montenegro v. Diaz* (2001) 26 Cal.App.4th 249 changes the landscape for California custody practice, and removes many of the uncertainties which complicated custody law. Justice Janice Brown's opinion for a unanimous court put the brakes on expansions of the changed circumstance doctrine. Appellate decisions increasingly barred consideration of the child's best interests in many modification proceedings. Most importantly, the unanimous Court declared in *Montenegro* (albeit in *dicta*) that "the changed circumstance rule should be flexible and should reflect the changing needs of children as they grow up."

This Comment looks at the Supreme Court's opinion from the perspective of the author of one of the three *amici curiae* briefs submitted to the Court. In a previous article[1], I critiqued move-away law and the changed circumstance doctrine. I described an emerging new paradigm in custody practice which was ignored by appellate courts. *Montenegro* provided an opportunity to present these concerns to the California Supreme Court.

The *Montenegro* decision embodies a dramatic and welcome paradigm shift. Until now, California custody modification law has been premised on the notion that custody determinations entail permanent binary choices – Joint or Sole Custody? Mom or Dad? Once those choices have been made, case law erected an increasingly high burden for modifications, based upon an increasingly rigid standard. Stability (defined as remaining in the care of a "primary" parent) was key. The paradigm was incongruent with the practical experiences of families and the professionals and courts who assist them. Change is the defining characteristic of

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ACFLS AND OTHER AMICI URGE CHILD-CENTERED DEFINITION OF CHANGED CIRCUMSTANCE DOCTRINE

(Watch for the full text of all three *amicus* briefs at www.acfls.org)

The Court of Appeal opinion in *Montenegro* created a furor in the family law community. Lawyers and mental health professionals perceived the opinion as placing California's children at risk. Recalling the influence in *Burgess* of Judith Wallerstein, Carol S. Bruch and Janet Bowermeister's *amicus* brief, family lawyers and mental health professionals saw this as a critical opportunity to help shape child-centered doctrines.

ACFLS lent its voice by joining with the Levitt and Quinn Family Law Center and a group of child custody experts and family lawyers in signing on to Leslie Ellen Shear's *amicus* brief, filed on behalf of Gregory. The brief included discussion of the differential impact of the Fourth District approach on low income families, the importance of principles of therapeutic jurisprudence, and the fallacy of the primary parent doctrine.

The *amicus* brief of ACFLS members Harold Cohn and Shelley Albaum traced the history of California's changed circumstance doctrine and showed that it was never intended to curtail the Court's consideration of a child's best interests.

ACFLS member Sandra Purnell and psychologist Mary Duryee, joined by many mental health professionals (including divorce researchers Janet R. Johnston and Joan B. Kelly), submitted a brief which set forth current social science knowledge about the importance of children's multiple attachments, and the need to modify parenting plans in response to developmental and other changes.

WILL THIS CHILD MOVE?
THE STRUCTURE OF MOVE-AWAY ANALYSIS

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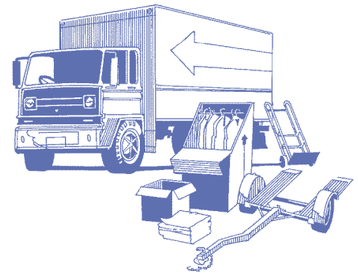
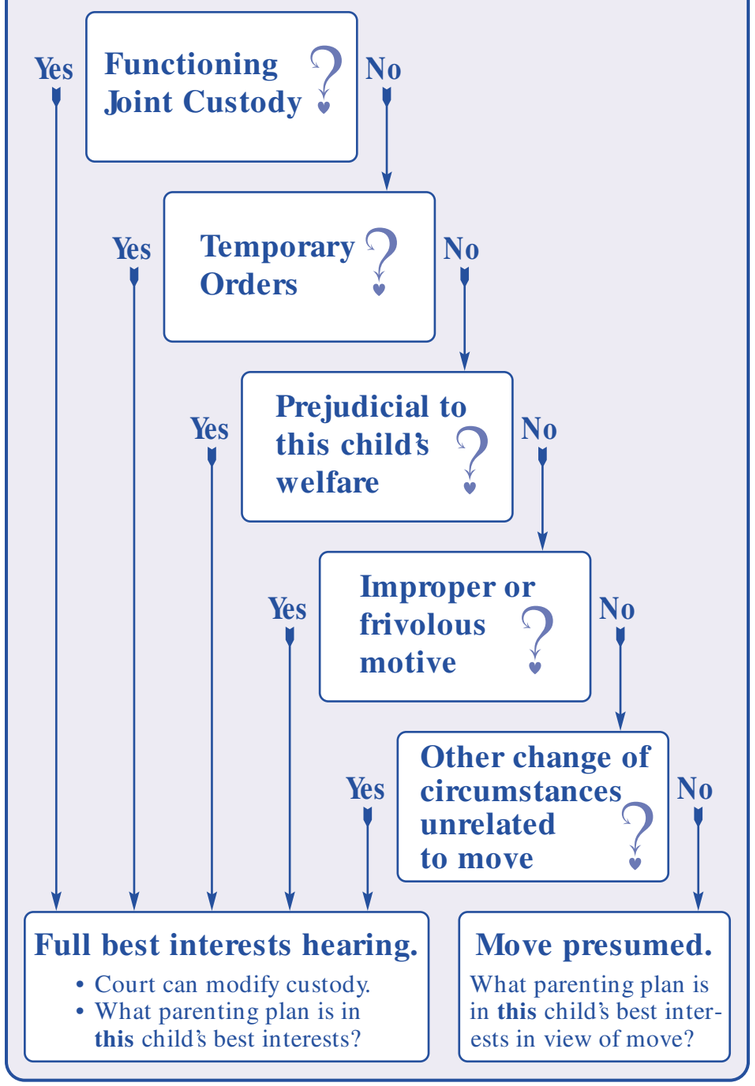


MOVE-AWAY FLOW CHART



We have an unfortunate tendency to reduce the complexities of case law into buzzwords and shortcuts. The accompanying flow chart illustrates the steps which lead to either a full best interests hearing or a hearing about what plan will serve the child's best interests given the reality of the move.

The Lawyer's Job in Move-Away Cases

Counsel should always file a Memorandum of Points and Authorities which gives the Court a roadmap, and discourages the trial judge from taking shortcuts with cases of this importance and complexity. The flowchart (and this analysis) will also assist counsel in organizing the evidentiary presentation. *Marriage of McGinnis* (1992) 7 Cal.App.4th 473 governs procedures for move-away cases. *Burgess* limited its disapproval of *McGinnis* to the burden of proof (see footnote 10), *Hoversten v. Superior Court* (1999) 74 Cal. App.4th 636,643-644. Counsel should insist that Courts follow the *McGinnis* protocol and that anything less is a deprivation of due process. The Court must give the parties an opportunity to conduct discovery and present evidence (including a child custody evaluation[1]) relevant to each step of the analysis.

Post-*Montenegro* and *Burgess* move-away cases involve the following sequence of issues:

1. Do the parties have a functioning joint custody arrangement?
(If yes, the Court must conduct a full best interests hearing. If no, move to item 2.)

While the subsequent cases tend to focus on timeshare, preservation of critical attachments is the core rationale of *Burgess*. Timeshare does not predict attachment. Consequently litigation of

CONTINUED ON PAGE 30

What Changed in Gregory's Life?

It didn't matter to Gregory's well-being whether various orders were the results of stipulations or contested hearings, or whether they were labeled interim orders or final judgments. From a child-centered standpoint, what is going on in the child's life, not in the courtroom, is key. The changes in Gregory's life that should have influenced his parenting plan were significant:

- Gregory matured from toddler to school-aged child, and his developmental needs changed dramatically.
- Gregory's relationship with his father grew in importance as his time with his father was increased in age-appropriate stages.
- Gregory formed an important relationship with his new stepmother.
- Gregory became a big brother and his sibling relationships were increasingly important.
- Gregory's Mom did not benefit from parent-education or therapeutic interventions, and continued to exclude his father and make hostile remarks.
- Gregory's new school schedule made the existing parenting plan no longer feasible.

One of the fallacies underlying the changed circumstance doctrine is the notion that there is a marked difference between joint custody and visitation. The modern view is to discard those binary concepts in favor of the parenting plan continuum. The post-*Burgess* quest of California appellate courts to mark a bright line timeshare percentage where true joint custody begins, and where there is no longer a "primary" parent ignores the complex realities of children's needs and experience.

MONTENEGRO V. DIAZ

CONTINUED FROM PAGE 4

childhood. Change is also the defining characteristic of the unmarried, divorcing, divorced and remarrying families who need assistance from the Court.

With *Montenegro,* the Supreme Court comes closer to recognizing that rather than choosing *who* (as in "who wins custody?"), the core task in custody determinations is determining *how* (as in developing, implementing and adapting parenting plans which meet children's changing best interests). For this reason, the rather unassuming *Montenegro* decision is more important than its predecessor – *Marriage of Burgess* (1996) 13 Cal. 4th 25. *Montenegro* rejects the *Burgess* paradigm, and indirectly reverses some of the more troublesome *Burgess* holdings. Justice Brown's opinion paves the way for a more child-centered approach to custody modification. (See page 5 of this Newsletter for a discussion of move-aways Post-*Montenegro.*)

Montenegro leaves the most critical question – what is a changed circumstance? – unanswered, with a tantalizing hint of progressive change. Justice Stanley Mosk's opinions in *Marriage of Carney* (1979) 24 Cal.3d 725, *Marriage of Burchard and Garay* (1986) 42 Cal.3d 531 and *Burgess* greatly expanded the changed circumstance test, and tied it to a once-fashionable psychological theory – the concept of a primary psychological parent. Mosk participated in oral argument on *Montenegro* (asking a question which suggested he was still focused on the primary parent concept) but passed away before the case was decided. *Montenegro* addresses the need for change, while not directly questioning the psychological construct which provided the underpinnings of Supreme Court modification doctrine, starting with *Carney*. More fully updating the changed circumstance doctrine to reflect a more comprehensive view of children's developmental needs was reserved for "another day."

Montenegro limits the cases to which the changed circumstance doctrine applies rather than defining change of circumstance in a child-centered way. Only those orders which are unequivocally and explicitly final will trigger the changed circumstance doctrine. By determining that the doctrine does not apply to the *Montenegro* case, the Court defers defining changed circumstance, while hinting that it must be a child-centered and developmentally oriented definition. Delay in developing that definition perpetuates uncertainty for California's parents and their children.

It makes no difference to the child whether the parenting plan which no longer meets her needs was labeled temporary or final at the time it was created. All applications of the best interests statutes ought to have a child-centered rationale. This one does not, but suggests that a silent revolution may well have begun.

There would be no need to distinguish between temporary and final orders if the Court had developed a clear, child-centered definition of changed circumstance. With a good definition, the doctrine would appropriately apply to all modification proceedings, including modifications of *de facto* arrangements. Courts, mediators, attorneys and parents would not have to devote time (and families would not have to devote attorneys fees) to characterizing present or past orders as final or temporary. Instead, they could focus on whether the plan presently meets the child's needs. Surely this would be a better use of time, resources, attention and intellect. The parent seeking modification would have the burden to establish what needs are unmet, and the *nexus* between those needs and the parenting plan. Thus, the changed circumstance test would continue to serve a gatekeeping function.

Gregory's Story

When Gregory Montenegro was getting ready to start kindergarten, his parents (Alex Montenegro and Deborah Diaz) were in court for at least the fifth time litigating over his parenting plan. Gregory is the child of unmarried parents who never lived together. Like most children of unmarried parents, Gregory lived in his mother's home, where he and his father had brief visits for the first 18 months.[2] After a dispute over an overnight in his father's care, Gregory's dad filed a parentage action and the first of several court-ordered parenting plans was created by stipulation.

The trial court found that Gregory's mom repeatedly flunked the "friendly parent" test of Family Code §3020 and §3040. Deborah's hostile attitude and actions towards Gregory's father and stepmother did not change significantly over 3 plus years of litigation and court-ordered therapeutic/educational interventions, although she was somewhat more compliant with court orders.

As Gregory grew from toddler to kindergartner, his time in Alex's care expanded over many trips to court. One of the parenting plans was contained in a document which was labeled a "judgment" because it recognized Alex's paternity. By the time he was ready to start kindergarten, Gregory was spending approximately 12 out of every 28 days in his father's care. Although the stipulation and order labeled his time with his mother "primary" custody, the plan allowed Gregory to maintain close attachments with both of his parents. Gregory now had a stepmother, a sibling, and another sibling was on the way.[3]

Deborah and Alex agreed at trial that the existing schedule would no longer be feasible when Gregory started kindergarten. They could not agree on a choice of school, nor on a plan for his care once he left pre-school and started kindergarten. San Bernardino Judge Fred Mandabach placed Gregory in his father's primary custody, finding that his mother's hostile attitude was unabated, while his father was willing and able to coparent cooperatively.

Fourth District: Considering Best Interests Was an Abuse of Discretion

The Court of Appeal reversed, holding that the mother's continued hostility and recalcitrance was not a change of circumstances. The Court of Appeal cited the "deferential abuse of discretion" test as the standard, but found that Judge Mandabach abused his discretion by considering Gregory's best interests.

The holding is stunning in its heartlessness – how can a society which values its children conclude that considering their best interests in a custody case could ever be an abuse of discretion?

The Fourth District characterized the error as an abuse of discretion, but the gravamen of the holding was not that the trial judge abused his discretion, but rather that he applied the wrong standard of law, i.e. the best interests mandate rather than the changed circumstance doctrine.

The Court of Appeal held that since Gregory's mother had always been hostile to his relationship with his father, there was no change of circumstances and thus **Gregory's best interests didn't matter.** The only component of best interests that mattered, by operation of law, was the continuity of his relationship with a "primary" parent. The Court's reading of the law was that the trial court had no discretion to consider the child's best interests absent a change of circumstance. Instead of then remanding Judge Mandabach to make findings as to whether such a change of circumstance existed, the Court of Appeal reversed the trial court, returning "primary" custody of Gregory to his mother.

Judge Mandabach's approach to the case had been child-centered, therapeutically oriented and incremental. He gradually increased Gregory's time with his dad in an age-appropriate way. He tried a series of therapeutic interventions with Deborah, hoping to avoid the need for a complete change of custody. If the Supreme Court had not intervened, judges faced with hostile or alienating behavior would have to change custody at the first opportunity (regardless of attachment and developmental status), or leave the child in an emotionally abusive placement for the rest of the child's life.

The Supremes: Shifting the Focus From Stability to Fluidity

Fortunately, the Supreme Court vacated the Court of Appeal decision and took the case. Almost exactly two years from the date of Judge Mandabach's ruling, the Supreme Court unanimously reversed the Court of Appeal and remanded the case for further proceedings. The Court sidestepped refining the changed circumstance doctrine by holding that the prior parenting plan was not final, and thus Judge Mandabach properly considered Gregory's best interests without requiring that Alex or Minor's Counsel prove a change of circumstances. Justice Brown wrote:

> **Child custody proceedings usually involve fluid factual circumstances,** which often result in disputes that must be resolved before any final resolution can be reached. Although the parties typically resolve these disputes through stipulations confirmed by court order, they often do not intend for these stipulations to be permanent custody orders. Indeed, these temporary custody orders serve an important role in child custody proceedings, and our statutory scheme expressly provides for them. (See, e.g., § 3061.) Because many parties would not enter into a stipulated custody order if a court might later treat that order as a final judicial custody determination, we must be careful in construing such orders. Otherwise, we may discourage these parties from entering into such stipulations.
>
> With this in mind, **we hold that a stipulated custody order is a final judicial custody determination for purposes of the changed circumstance rule only if there is a clear, affirmative indication the parties intended such a result.** In adopting this holding, we recognize the reality that many family court litigants do not have attorneys and may not be fully aware of the legal ramifications of their stipulations. [Emphasis added.]

The Court's recognition of the fluid nature of children's circumstances and needs marks a dramatic change in California custody doctrine. Just five years ago, the California Supreme Court's *Burgess* opinion focused on the permanence rather than fluidity.

While reserving a full exploration of the changed circumstance doctrine for another day, the unanimous court agreed with *amici* that a rigid changed circumstance doctrine compromises children's welfare. Justice Brown wrote for the Court,

> In reaching this conclusion, we do not dismiss the arguments of various *amici curiae* who contend this court should reevaluate the changed circumstance rule in light of new developments in social science and child psychology and development.

Although we agree that **the changed circumstance rule should be flexible and should reflect the changing needs of children as they grow up,** we need not reach this issue today because we conclude that the changed circumstance rule does not apply. Accordingly, we leave any review of the changed circumstance rule for another day. [Emphasis added.]

Practical Implications: More Changes Than Appear at First Glance

Montenegro quietly overturns years of prior opinions, including much of the reasoning of *Marriage of Burgess,* which struggled to classify which orders were subject to the changed circumstance doctrine. Efforts to create a bright line based upon the stage of the case, whether the order was a stipulation or adjudication, or the nature of the modifications sought (revising the schedule v. change of custody) are now moot. Discussion of such classifications was increasingly resembling the debate of theologians about how many angels can dance on the head of a pin – and was no more relevant than that debate to the daily lives of the children who the doctrine is supposed to serve.

Judges and lawyers no longer have to worry that interim and trial arrangements pieced together under stressful circumstances will be etched in stone. Incremental, therapeutic and trial plans can be used to help stabilize families and determine whether more drastic modifications may be necessary. While continuity of care remains an element of best interests analysis, it is no longer a bar to consideration of myriad other best interest factors unless the order being modified expressly states that it is "permanent."

The distinction between judgments and pre-judgment orders appears to be abolished. The parenting plan which the Court found to be temporary was contained in a document labeled "judgment."[4] Similarly, it seems that the Court intends stipulations and adjudications to have identical effect. The Court held,

> "…[W]e see no basis for treating a permanent custody order obtained via stipulation any differently than a permanent custody order obtained via litigation."

Presumably this also means that there is no basis for distinguishing between temporary orders obtained by stipulation rather than litigation. Any other result would create an incentive to litigate and be contrary to the pro-settlement public policy of *Montenegro.*

Until a parenting plan is encompassed in an order which expressly states that it is "final," children's needs now override legal technicalities. However, deciding whether to label a plan temporary and final becomes a new and unnecessary topic of negotiation, positioning and contention, wasting resources and increasing conflict for children's families.

Burgess gave considerable weight to the language in the Conciliation Court agreement which characterized the mother as the children's primary custodian. This holding troubled family law practitioners (both legal and mental health professionals) who had been telling parents to ignore labels and focus on the actual parenting plan. The emphasis on labels created new arenas for conflict. In *Montenegro* the California Supreme Court gives no weight to the fact that the prior order labeled the mother as "primary" custodian, and instead focuses on the fact that Gregory spent 12 out of every 28 days with his father. While not specifically overruling *Burgess* on this point, the Brown opinion in *Montenegro* foretells a new focus in the Supreme Court.

Montenegro also marks a dramatic shift in the Court's thinking about the caseload implications of custody modification law. Where prior decisions focused on restricting access to the Court for modification proceedings, Brown's opinion is founded upon recognition of the central importance of self-ordering to family law courts. The Purnell/Duryee *amica* brief and my brief argued that a rigid changed circumstance test would chill self-ordering because of parental fears that any arrangement, formal or informal, would be set in stone. The Court agreed, picking up on our references to Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce,* 88 Yale Law Rev. 950 (1979). Relitigation when the plan does not meet the child's needs and settlement fails is normalized, rather than pathologized. Thus the role of the Court is to assist those families who cannot adapt their parenting plans collaboratively, while encouraging most families to engage in self-ordering.

My brief also noted the differential impact that a rigid changed circumstance doctrine had on poor and limited income families. Parenting plans for such families are usually created without the assistance of certified family law specialists, private therapists, evaluators and mediators, or lengthy hearings in which every nuance of family life and parental character is explored. Again the Supreme Court opinion makes special note of the needs of unrepresented litigants, marking a new focus in custody modification law.

Montenegro may also make it less necessary for fathers of infants and toddlers to insist upon a 35-40% timeshare at separation in order to preclude characterization of the mother as primary parent (which amounts to a "move-away free card" after *Burgess* and the successor cases). Until a final judgment, the parenting plan should now be seen as fluid, step-ups as expected, and there should be no need to consider whether the proposed move constitutes a change of circumstances. Rather, parents can be more assured that Courts will be free to make a best interests determinations. Recognition of the fluidity of children's needs (particularly the needs of very young children) should also make it more likely that Courts will not feel obligated to permit unmarried and newly separated mothers of infants, toddlers and preschoolers to move. Rather, courts might well defer this decision until the time of a "final" custody order.

While *Montenegro* does not go as far as *amici* hoped in developing a child-centered paradigm, its philosophy and focus are dramatically different than those of *Burgess*. California awaits the next case with the expectation that the primary parent doctrine will no longer dominate child custody modification law. Family law practitioners should watch for the right changed circumstance case to take to the appellate courts, and develop a careful and detailed trial court record of the changes in the child's life and needs which support a need for modification. The briefs of *amici* should be treated

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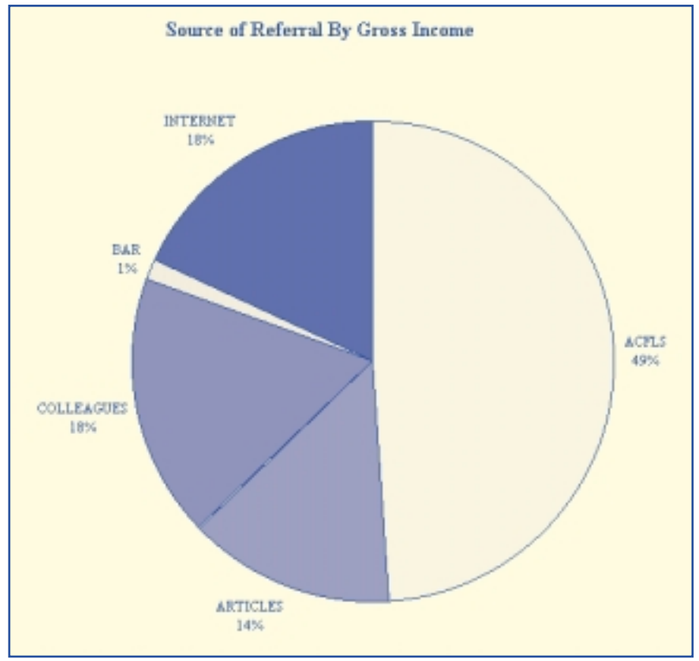
MEASURE YOUR MARKETING TO MAXIMIZE YOUR FIRM'S PROFITABILITY

BY JENNIFER BEEVER & PETER M. WALZER, ESQ.

In your need to sell yourself and your practice, are you spending all your time marketing and too little time engaged in the practice of law? Are you spending your lunches at networking groups and your evenings at Bar Association meetings? Do these efforts bring in business? You can plan marketing activities which produce referrals by measuring the effectiveness of your previous marketing efforts. With some simple data capture and calculations, you can determine how your marketing efforts are working for you. Measuring your marketing success will provide you with a tool that will assist you in using your marketing dollars and time most efficiently.

There are two types of analysis that will help you with your planning. First, you need to compare each marketing activity and find out which is the most productive. After all, there are only so many hours in the day. Second, for each marketing activity that produces income, what is the return on your investment? This analysis is critical. If you find that two marketing activities generate equal shares of your income, you should find out which activity costs more in time and money and therefore is less productive. It is possible that one marketing activity may cost next to nothing, yet generate as much revenue as another activity that costs hundreds of dollars.



To compare the revenue produced by each marketing activity, start by listing gross income for each client for the last fiscal year. Determine who referred the client to you and which marketing activity generated that referral. For example, in the accompanying chart, we listed ACFLS, Bar Association activities, articles published, web site, and attorney contacts as referral sources. One way to analyze the data is to input it in Excel or a similar spreadsheet program with your clients listed on the left column and the referral sources listed across the top row. Enter the gross income earned from each client under the referral source that was responsible for that client, and subtotal the gross income for each referral source column. You or your bookkeeper should be able to generate this data from Quicken, Quick Books or a similar program that generates a report entitled "Transaction Detail by Account" with each client being entered as an account.

To calculate the percentage of the client revenue you get from each referral source, divide the subtotaled gross income generated by the referral by the amount of your total gross income for the year. The resulting number is the percentage of your total income generated by each referral.

In the cases where two or more referral sources could be responsible for one client, at first keep the analysis simple and try to attribute only one primary referral source to each client. For example, your referral source may be a member of ACFLS who receives your newsletter. Did your ACFLS affiliation result in the referral, or did your newsletter? If both contributed, and you want a more detailed analysis, you could consider splitting the revenue between the two sources.

If you are using a spreadsheet, you can easily create a pie chart that will visually represent the distribution of income by referral source. With this picture, you will be able to see where your clients are coming from and analyze the productivity of your various marketing activities. You will clearly see that some activities are more effective than others and other activities generate almost no referrals.

The next step in this analysis is to analyze how effectively each different marketing effort is in generating business. This analysis is called Return on Investment or ROI. To quantify your marketing activities you need to translate the amount of time you spend on an activity into a dollar amount. We estimated the amount of time spent for each marketing activity and assigned a dollar value to each hour spent away from billable work at the office. One way to determine the dollar value per hour is to

CONTINUED ON PAGE 25

2001 CHAPTERED FAMILY LAW BILLS

BY DAWN GRAY, CFLS

The following family law–related bills have been chaptered. They go into effect on January 1, 2002, unless otherwise noted. These are summaries only, intended to provide the reader with general information about the subject matter of a particular bill. Interested parties should read the bill for a full understanding of its effect. Full texts of bills, their history and committee analysis are available at www.leginfo.ca.gov/bilinfo.html.

ASSEMBLY BILLS

AB 25 (Ch. 893, Stats. 2001; Migden):

This bill expands domestic partnership law to apply to any two persons of the opposite sex who are over age 62. It extends causes of action for wrongful death and negligence to domestic partners, authorizes domestic partners to make medical treatment decisions on each other's behalf and requires group health care service plans to offer coverage to the domestic partners of employees. It also expands stepparent adoption procedures to include adoptions of one domestic partner's child by the other partner, and expands the Public Employees' Medical and Hospital Care Act to cover domestic partners.

The bill also extends spousal rights in conservatorship proceedings to domestic partners, revises the statutory will form to provide for the inclusion of a domestic partner, and extends intestate succession statutes to include domestic partners. Finally, it allows a domestic partner to make a claim for disability benefits on behalf of a disabled partner, and makes other related changes.

AB 102 (Ch. 133, Stats. 2001; Pacheco):

This bill, **effective on July 31, 2001,** amends the Child Abuse and Neglect Reporting Act (CANRA) to provide that any mandated reporter who reasonably suspects that a child has been the victim of child abuse or neglect that endangers the child's emotional well-being, or is endangered in any other way, may make a report to a child protective agency. It also requires child protective agencies to forward reports of child abuse or severe neglect to the Department of Justice, specifies that abuse or neglect in out-of-home care means physical abuse and other specified acts, and makes conforming changes.

DAWN GRAY, CFLS

Dawn Gray is a Certified Family Law Specialist whose practice is limited to contract research and writing on issues related to family law.

She currently serves as the ACFLS Legislative Coordinator.

AB 160 (Ch. 698, Stats. 2001; Bates, Cohn, et al.):

This bill amends Family Code §§6380 and 6383 and Penal Code §136.2 to state legislative findings and declarations regarding the relationship between civil and criminal restraining or protective orders. **Effective on January 1, 2003,** it provides that if the court issues a restraining order to restrain harm, intimidation, or dissuasion of a victim or witness in a domestic violence criminal case, such restraining or protective order has precedence over any civil court order, in addition to having precedence over any other court order against the defendant. In addition, the bill directs the Judicial Council to promulgate a protocol, for adoption by local courts, to provide for coordination of all orders regarding the same persons, which protocol must permit family or juvenile court orders to coexist with criminal court orders as long as the orders are consistent and protect the safety of the parties.

The bill requires a court that modifies, extends, or terminates an order protecting a victim of violent crime from contact with the defendant to transmit that modification, extension, or termination to the law enforcement agency that entered the protective order into the Domestic Violence Restraining Order System. Finally, it requires that modifications, extensions, and terminations of orders protecting victims of violent crime from contact with the defendant be issued on forms adopted by the Judicial Council and approved by the Department of Justice.

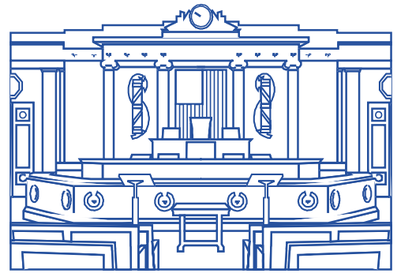
AB 362 (Ch. 110, Stats. 2001; Corbett):

This bill adds Family Code §6210 to define the term "dating relationship" for purposes of the Domestic Violence Prevention Act and the issuance of various protective orders for the prevention, or the prevention of the recurrence of, domestic violence as "frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations."

AB 538 (Ch. 353, Stats. 2001; Cardoza):

This bill modifies provisions relating to adoptions. Existing law provides that a child, the child's natural mother, or a man presumed to be the child's father, among other specified persons, may bring an action to determine the existence or nonexistence of the father and child relationship, and requires that action to be consolidated with an action to terminate the parental rights of the father in adoption proceedings. This bill requires a paternity action that is consolidated with an action to terminate the parental rights of the father in adoption proceedings be heard in the county in which the action to terminate parental rights is filed, unless the party filing the action demonstrates that transferring the action to the other court poses a substantial hardship, in which case the consolidated action must be heard in the county in which the paternity action is filed.

Existing law authorizes the probation officer, qualified court investigator, or, at the option of the board of supervisors, the county welfare department in a county in which an adoption proceeding is pending, to conduct an investigation of each case of stepparent adoption, and provides that the court may not make an order of adoption until after the probation officer, qualified court investigator, or county welfare department has filed its report and recommendation and the court has considered them. This bill additionally authorizes a licensed clinical social worker or licensed marriage family therapist to conduct such an investigation and prepare and file a report and recommendation regarding the stepparent adoption to be considered by the court.



Existing law requires that, as soon as possible, but not later than 30 days after initial placement of a child into foster care, the child protective agency provide the caretaker with the child's current health and education summary, and for each subsequent placement, the child protective agency shall provide the caretaker with a current summary, within 48 hours of the placement. The bill provides that the child protective agency may disclose specified information to prospective caretakers prior to placement of a child if the agency intends to place the child with the prospective caretaker or caretakers and the prospective caretaker or caretakers are willing to become the adoptive parent or parents of the child and meet other criteria. The bill also provides that the child protective agency may disclose the child's placement history or specified underlying source documents to the prospective caretaker. Finally, this bill requires that siblings be assigned to the same social worker when there is a prospective adoptive family that intends to adopt the children as a sibling group, except as specified.

AB 539 (Ch. 702, Stats. 2001; Maddox):

This bill amends Family Code §914. Currently, the statute provides that a married person is personally liable for debts incurred by the person's spouse for necessaries of life and that the married person's separate property may be applied to the satisfaction of these debts. This bill specifies that an action based upon the marital liability must be commenced within the period stated in Code of Civil Procedure §366.2 (generally, one year following death). However, it also provides that if the surviving spouse had actual knowledge of the debt prior to expiration of that one-year period and the personal representative of the deceased spouse's estate failed to provide the creditor, asserting the claim under this section, with a timely written notice of the probate administration of the estate in the manner provided for pursuant to Section 9050 of the Probate Code, the appropriate limitations period is that set forth in CCP §§ 337 or 339, as applicable.

AB 583 (Ch. 703, Stats. 2001; Jackson):

Applicable to family law judgments which become final on or after January 1, 2002, this bill amends Family Code §§1101, 2100, 2102, 2105, 2106, 2107 and 2122 to change the interspousal fiduciary duty and disclosure declaration provisions. First, the bill amends Family Code §1101(a) and (g) to expand the application of the remedies for breach of fiduciary duty to apply to breach of any fiduciary duty, instead of applying only to the breach of duties specified under Family Code §§1100 or 1102, and to apply the remedies for breach of duty to breach of any such duty, including those specified in §§721 or 1101. The bill deletes the prohibition on interest being added to an award based on breach of duty, and provides that for the purpose of an award based on such breach, "the value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court."

Current law requires a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest, regardless of the characterization as community or separate, together with a disclosure of the parties' income and expenses. Current law also provides that each party has a continuing duty to update and augment that disclosure to the extent there have been any material changes. This bill modifies the provision regarding each party's continuing duty to update and augment his or her disclosure to specify that each party shall do so fairly, fully, accurately, and immediately upon such material change, and makes conforming changes. It also provides that from the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to assets and liabilities, child or spousal support and professional fees, each party is subject to the standards provided in Section 721 as to all issues relating to the support and fees, including immediate, full, and accurate disclosure of all material facts and information regarding the income or expenses of the party. It also provides that the duty ends as to a particular asset or liability once that asset or liability has been distributed.

Current law requires each party, from the date of separation to the date of the distribution of the community property, to provide the other party with an accurate and complete written disclosure of any investment opportunity that presents itself after the date of separation that results from any investment of either spouse from the date of marriage to the date of separation. Current law also requires that the disclosure be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the opportunity. This bill additionally requires the disclosure to contain any business or investment opportunity or income-producing opportunity that presents itself after the date of separation resulting from any investment, business or other income-producing activity of either spouse from the date of marriage to the date of separation. It also requires that the written disclosure be made in time for the other spouse to make an informed decision as to whether he or she desires to participate in the business or other potential income-producing opportunity, and also in time for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity.

Current law requires each party to serve the other with a final declaration of disclosure, executed under penalty of perjury on a form prescribed by the Judicial Council. This bill revises the provisions for mutual waiver of the final disclosure declaration, adds new language which must be included in any such waiver, and *requires* the court to set aside a judgment upon a party's failure to comply with all disclosure requirements. It provides that a party is subject to any available civil or criminal penalty for perjury in this declaration, in addition to the resulting judgment being subject to set-aside. It expands the penalties for noncompliance with the disclosure declaration provisions to include that sanctions against the noncomplying party must be in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both. It authorizes the court to require that the parties produce the preliminary and final disclosure declarations which they exchanged at any motion to set aside a judgment, and states that the court can return those declarations to the parties after the hearing.

Finally, the bill amends Family Code §2122 to delete the phrase "other than his or her own lack of care or attention" from the definition of actual fraud for purposes of setting aside a family law judgment, and provides that perjury in the waiver of the final disclosure declaration can also justify set-aside on the basis of perjury. It adds §2122(f) to provide that failure to comply with the disclosure declaration requirements is an additional ground for set-aside, and requires that any motion on this basis brought "within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply."

AB 731 (Ch. 816, Stats. 2001; Wayne):

Current law provides for the issuance and enforcement of protective orders in cases involving domestic violence, and provides that a protective or restraining order related to domestic or family violence and issued by a court of another state, a tribe, or a military tribunal shall be deemed valid if the issuing court had jurisdiction over the parties and the matter. This bill deletes the latter provision and instead enacts the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, which authorizes the enforcement of a valid foreign protection order in a tribunal of this state under certain conditions. It prescribes the criteria for a determination of validity of a foreign order, and specifies that registration or filing of an order in this state is not required for the enforcement of a valid foreign order. It also requires a law enforcement officer of this state to enforce a foreign order upon determining that there is probable cause to believe that a valid foreign protection order exists and has been violated. Finally, the bill authorizes any individual to register a foreign protection order, and requires the court to register the order.

AB 873 (Ch. 417, Stats. 2001; Harman):

Current law provides for the transfer of property upon death by various means, including wills, trusts, joint tenancies, and retirement death benefits, among others. Current law permits a trustee with a power of appointment to distribute property to beneficiaries according to the terms of the trust, and permits the structuring of certain financial accounts so that they will be payable to one person upon the death of another. Current law permits vehicles to be owned in joint tenancy and provides that, upon the death of one of the parties, ownership may pass to another joint tenant, and that dissolution of a marriage revokes a bequest of property made in a will to a former spouse and revokes a beneficiary designation to a former spouse under the Public Employees' Retirement System. Current law also provides that dissolution of marriage prohibits a former spouse from receiving the spouse's share under intestate succession.

This bill provides that specified property transfers to a transferor's spouse upon death fails if, at the time of death, that person is no longer the transferor's surviving spouse due to nullity or dissolution of marriage, except where the transfer is not subject to revocation at time of death, or where there is clear and convincing evidence that the transferor intended to preserve the transfer to the former spouse. The bill also provides that a joint tenancy (including community property with right of survivorship) created between a decedent and the decedent's former spouse is severed if it was created before or during marriage and, at the time of death, the former spouse is not the decedent's surviving spouse due to nullity or dissolution of marriage, except as specified.

AB 873 changes the notices required on petitions for nullity, dissolution or legal separation to further specify the types of things which may change upon entry of a judgment for dissolution. The bill also adds a subdivision to Family Code §2040 to include another type of Automatic Temporary Restraining Order, which prohibits either spouse from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court, except that the section does not restrain the creation, modification, or revocation of a will, or the revocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument, provided that notice of the change is filed and served on the other party before the change takes effect; the elimination of a right of survivorship to property, provided that notice of the change is filed and served on the other party before the change takes effect; the creation of an unfunded revocable or irrevocable trust; or the execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code.

The bill provides for the property rights of a person who subsequently purchases or encumbers property in good faith, and provides that a specified affidavit or declaration in this regard may be recorded. It provides that holders of certain property may transfer the property in accordance with provisions of specified instruments despite possible inconsistencies with the rights of a person named as a beneficiary, except as specified, and permits a court to award damages and fees when a notice of a person claiming an interest in certain property is determined to have been filed in bad faith. The bill deletes the definition of spouse from the California Statutory Will and makes related changes. It is operative on January 1, 2002, but provides that specified provisions do not apply if the decedent making the nonprobate transfer or creating the joint tenancy dies, or if the dissolution of a marriage terminating the status of a beneficiary occurs, before that date.

Finally, new Chapter 49 of the Statutes of 2001, operative January 1, 2002, revised, recast, and consolidated provisions regarding the determination of claims brought to determine ownership of real or personal property claimed by an estate, a ward or conservatee, or a trustee, as specified. This bill requires a court, acting under those provisions, to deny a petition, if the court determines that the matter should be determined by a civil action.

AB 891 (Ch. 651, Stats. 2001; Goldberg):

Existing law sets forth guidelines for determining the annual net disposable income of each parent for child support purposes. Amounts attributable to certain items must be deducted from the annual gross income of each parent in determining the annual net disposable income. Existing law also provides that if a court has ordered a noncustodial parent to pay child support, payments for the support of the child made by the federal government pursuant to the Social Security Act or the Railroad Retirement Act because of the retirement or disability of the noncustodial parent and transmitted to the custodial parent or other child support obligee each month are credited toward the amount ordered by the court to be paid for that month by the noncustodial parent for support of the child, unless those payments were taken into consideration by the court in determining the amount of the support to be paid. This bill revises the provision relating to federal payments to include benefits paid by the Department of Veterans Affairs. It also requires a custodial parent who has been notified that the noncustodial parent is receiving any of the federal benefits described above to contact the appropriate federal agency within 30 days of receiving that notification to verify the eligibility of the child to receive payments from the federal government on the basis of the noncustodial parent's disability.

Existing law requires local child support agencies to monitor child support cases and seek modifications when needed. This bill requires local child support agencies to prepare and file a motion to modify a support obligation within 30 days of receiving verification from a noncustodial parent or other source of the receipt of specified benefits.

Existing law provides that the Franchise Tax Board has the responsibility for management of child support delinquencies. The Franchise Tax Board is responsible for actions taken on any child support delinquency account transferred to that agency as necessary for recovering delinquent child support payments. Among other duties, the Franchise Tax Board is responsible for issuing and modifying earnings assignment orders on behalf of the local child support agency in order to take collection actions to recover delinquent child support payments.

Existing law also establishes a state supplementary income program which provides a monthly income based on need, as specified, to aged, blind, or disabled persons. This bill provides that a child support delinquency may not be referred to the Franchise Tax Board and if already referred, must be withdrawn, rescinded, or otherwise recalled, if the obligor is receiving payments under the state supplementary income program for aged, blind, and disabled persons, or but for certain excess income, would be eligible for those payments. The bill would prohibit an order/notice to withhold income issued by a local child support agency in the case of certain disabled obligors from exceeding a specified amount.

AB 1129 (Ch. 713, Stats. 2001; Liu):

This bill amends Welfare & Institutions Code §213.5. Current law authorizes the juvenile court to issue ex parte orders enjoining a parent, guardian, or current or former member of a dependent child's household from striking, molesting, assaulting, battering, or engaging in other specified violent behavior against the child or excluding that person from the dwelling of the person who has care, custody, and control of the child. A willful and knowing violation of an order issued pursuant to this provision is a misdemeanor. This bill expands that provision to authorize a juvenile court to enjoin *any person* from those acts, or to exclude such person from the household, and to simultaneously issue an ex parte order enjoining *any person* from similar behavior against the parent, caretaker or guardian of a dependent child regardless of whether the child resides with that parent. Finally, it also adds the requirement that prior to a hearing on the issuance or denial of such an order, a search for prior convictions, restraining orders or outstanding warrants shall be

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FRAUD AND OVERSIGHT: HIDDEN ASSETS

CONTINUED FROM PAGE 1

1. IRS Net Worth Method

The net worth method is the most commonly used method of reconstructing income. It is merely an effort to determine whether there has been an increase in the difference between the taxpayer's assets and liabilities during the relevant tax year. Any unexplained increase in the taxpayer's net worth during the tax year is deemed attributable to current taxable income. The net worth method involves a reconstruction of the taxpayer's financial history since all assets, expenditures and sources of funds utilized during the tax year must be analyzed. It was first utilized in cases such as *Capone v. United States*, 51 F.2d 609 (7th Cir. 1931) to corroborate direct proof of specific unreported income. It is designed to seek out current unreported income that has been used by the taxpayer to acquire assets and requires the government to:

a) Establish a firm opening net worth at the beginning of the taxable period with reasonable certainty to provide a starting point from which to calculate future increases in the taxpayer's assets (which are included at their cost, not their fair market value);

b) Establish the taxpayer's net worth at the end of the taxable period, with any excess over the opening net worth plus non-deductible expenditures representing the "net worth increase" for the year;

c) Establish a likely source of currently taxable income from which the net worth increase arose, or negate any non-taxable sources of income, and;

d) Investigate any reasonable leads furnished by the taxpayer that would tend to negate an increase in the taxpayer's net worth.

The net worth method can be anticipated when there has been a noticeable change in the taxpayer's assets and liabilities during the year, the taxpayer maintains no books and records, or the taxpayer's books and records are inadequate, not available or withheld. The net worth method may also be utilized to corroborate other indirect methods of proving income and to check the accuracy of reported taxable income.

2. IRS Cash Expenditures Method (Source and Application of Funds Method)

The cash expenditures method is merely concerned with the flow of cash for expenditures and the relationship of those expenditures to any available sources of funds. The sources of funds must be further identified as either taxable or non-taxable.

The theory of the cash expenditures method is that if the taxpayer's expenditures during a given year exceed reported income, and the source of funds for such expenditures is unexplained, the excess expenditures represent unreported income.

The cash expenditures method can be anticipated if there are only one or two years under examination, the taxpayer has attempted to skillfully conceal his income, there is little change in the taxpayer's assets and liabilities during the period under examination, comparative balance sheets for the taxpayer are available, or the taxpayer has little or no apparent net worth and most of the expenditures seem to constitute non-deductible living expenses.

Much of the information utilized by the agent in pursuing a cash expenditures analysis is typically obtained from interviews with the taxpayer and others. As such, it is extremely important for the taxpayer's representative to be familiar with the taxpayer's lifestyle and the nature of his or her business activities before determining whether to allow the taxpayer to be interviewed. Certainly, if there are sensitive issues, the taxpayer should not likely be subjected to the interview. If interviewed, the taxpayer must respond truthfully. In certain situations it is preferable to have the agent submit their questions in writing and to provide a written narrative response.

3. IRS Bank Deposits Method

The bank deposits method is an attempt to reconstruct the taxpayer's taxable gross receipts. It is often used where the taxpayer is engaged in a business activity and regularly or periodically makes deposits into bank accounts. It is limited not only to a review of items actually deposited, but includes a review of other income received by the taxpayer, not deposited.

The bank deposit method involves an analysis of all deposits, canceled checks, and currency transactions of the taxpayer. In addition, there must be a determination of "cash on hand" to overcome the taxpayer's possible assertion that unexplained deposits were derived from prior accumulated funds.

The agent must generally establish a likely taxable source of any unreported income and must overcome any credible claim of a cash hoard. Further, the agent must establish with reasonable certainty the amount of cash on hand at the beginning of the tax year and must investigate any reasonable leads supplied by the taxpayer.

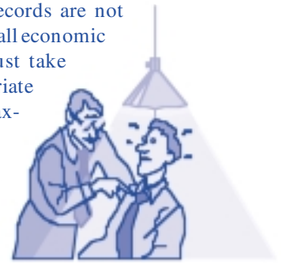
Although it appears to be a relatively simple test to perform, the bank deposit approach becomes difficult as the unexplained deposits begin to accumulate or account activity becomes excessive.

4. IRS Mark-Up Method

The mark-up method is based on the premise that there are certain percentages or ratios between sales, cost of sales, and net profit that are common to similar businesses in the same locality. Therefore, a taxpayer's profits may be determined by applying an acceptable industry-wide percentage to reported gross sales, gross receipts, or costs of goods sold. The resulting figure is then compared to the taxpayer's reported profit to determine if an understatement may have occurred.

The mark-up method is typically used to corroborate results obtained from one of the other indirect methods or to help establish a source of income because it is the least likely to result in the reconstruction of gross receipts or gross profit.

The mark-up method can be expected to be used more frequently through the government's MSSP approach to audits as agents gain experience about the business operations of different industries.



If the taxpayer's books and records are not reflective of the taxpayer's overall economic profile/lifestyle, the agent must take into consideration an appropriate method for computing the taxpayer's income.

Calculations based upon an indirect method must be corroborated with proper and competent evidence, including interviews with the taxpayer, records furnished by the taxpayer and third party sources. During Financial Status training, IRS agents have been reminded that fraud might be a factor. Badges of fraud may include omissions of specific income, omissions of an entire source of income, personal expenditures and asset acquisitions in excess of reported income, a pattern of unreported income or overstated deductions over more than one year, concealment of a bank account, refusal to make certain records available, attempts to mislead the agent, admissions of unreported income or overstated deductions, maintenance of a double set of books, and repeated attempts to conclude the audit and pay any resulting liability.

Much of the foregoing information is anticipated to be developed by the agents during interviews with the taxpayer and others.

Net Worth Method – Family Law

The reasons for use of the net worth method in family law are similar in purpose to the IRS method as discussed above. Simply stated, the income which has been disclosed does not match the assets accumulated during the time period in question. The format of the calculations can be as follows:

	Total assets
Less:	(Total Liabilities)
Equals:	Net Worth
Less:	(Prior year's net worth)
Equals:	Net Worth Increase or (Decrease)
Plus:	Total Personal Living Expenses
Less:	(Total Funds From Known Sources)
Equals:	Total Funds From Unknown Sources

An example would be as follows:

	12/31/97	12/31/98	12/31/99
Assets (at cost)	$ 150,000	$ 275,000	$ 575,000
Liabilities	(50,000)	(40,000)	(30,000)
Net Worth	$ 100,000	235,000	545,000
Prior year's net worth		(100,000)	(235,000)
Net Worth Increase		135,000	310,000
Personal living expenses		500,000	600,000
Total funds from known sources		(150,000)	(175,000)
Total funds from unknown sources		$ 350,000	$ 425,000

As stated above, the assets must be stated at the acquisition price (cost). The reason for this is that some increases in net worth could come from the natural appreciation, such as real estate. This would tend to overstate the funds from unknown sources. Also, assets, such as cars, tend to depreciate and to not use the acquisition price would tend to understate the funds from unknown sources.

Lifestyle Method – Family Law

This method is equivalent to the method employed by the IRS described above as the "IRS Cash Expenditures Method (Source and Application of Funds Method)". The concept here focuses more on income available than assets accumulated. Often this is the case where the parties spent all of their income. While this, in and of itself, may not determine any hidden assets, it can be very helpful to determine income available for spousal and child support.

Total expenditures including asset acquisitions and debt reduction	$525,000
Less known sources of income and new debt	(200,000)
Income from unknown sources	$325,000

Specialty Areas of Concentration

There are numerous basic methods to analyze business and personal records to catch someone in the act of taking income/assets. The basic analysis is not a part of this paper. That, is something most Certified Public Accountants normally possess. The advanced specific application of methods unique to a specific business is what this section is all about. As a foundation, it is helpful to understand the three basic types of people that can take money from a business. They are the "dumb", the "I think I'm smart, but I'm not", and "the smart one". The description of each is as follows:

1. **Dumb** – This person takes money off the top (directly from gross sales) and deposits the proceeds in a personal bank account. One would not believe how often this happens. All one needs to do is to add up the deposits into the personal account and compare the total deposits to the reported income. Bingo! Oh yes, this type of person probably tells his friends how he cheats the government.

2. **I think I'm smart, but I'm not** – This person takes income off the top, but by doing so distorts the normal gross profit percentage on sales. This can be caught by comparison to industry percentages, or better yet, a shelf test. This is the majority of people in family law.

3. **The smart one** – This one is hard to catch. I don't necessarily want to give a road map to "how to get away with something" but this person is real. What happens here is that the person knows not to deposit money taken from the top into a personal bank account and that if they take the money it would distort the "normal gross profit" percentages. As a result, the person takes money off the top and pays in cash (not getting reimbursed for the cash disbursement personally) for product. This will keep the normal gross profit percentages in line with the industry or even a shelf test. It is not as lucrative as the two methods above (because they only get the gross profit on the product instead of the gross sale) but they are able to get under the radar of the other two tests outlined above.

Knowing the type of character outlined above, we can now go to the specific additional procedures that can be applied to specific types of businesses. Remember that this is in addition to the normal analytical procedures standard to any engagement. Also remember the warning at the beginning of this outline that these may be just a starting point for further analysis.

1. **Restaurants –**

Analysis of "Z tapes" for total sales. Also break down a common denominator of something to sales. For example, try analyzing the number of laundered napkins to each sale. Then take the number of napkins laundered to compute total sales. Determine average sales by looking at sales receipts. Also, analyze the menu and the related cost of each item. Remember that for the most part the expenses will be real and the sales false. This is why this method works.

2. **Edible oil importer –**

Break down and analyze the number of pounds or barrels of oil sold. Figure the average price per barrel sold after refinery losses. Compute sales based on number of barrels sold and average price per barrel.

3. **Swap meet rental income –**

Walk through swap meet and count either the number of empty spaces or the number of spaces occupied. Talk to tenants about how busy the meet normally is and the vacancy, or lack thereof. Determine the rental charge per standard size. Determine the number of standard sizes that are normally rented. Compare to revenue shown.

4. **Rental properties –**

Same as swap meet above, but compare to rent rolls.

5. **Banker or other business executive –**
Analyze the complete method of compensation. Trace any bonuses for possible diversion to a non-community bank account.

6. **Pool service, appliance repair or any other type of service business route –**

One can try for invoices, standard route or customer lists. This may provide something. However, since the abuse in this area is to take the money from the top, it may be best to do a lifestyle analysis to prove unreported income. Clearly, the money to live on had to come from somewhere.

7. **Attorney –**

Analysis of client trust account for income which has been earned, but not yet transferred from trust account to general account. This, depending on the size of possible abuse, may require the expertise of an attorney expert in the field to be able to calculate the unreported income.

8. **Greenhouse –**
Determine the cost per square foot of plants. Determine the average gross profit per plant. Determine inventory turnover.

9. **Doctors –**
The latest trend is to pocket the co-pays paid by patients. Figure the revenue from 1099's and interpolate the copay against the amount shown.

10. **Convenience stores –**
Shelf test for average gross profit. Determine sales based on purchases.

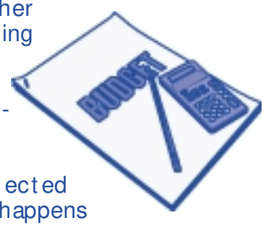
11. **Beauty parlor –**

Hire private detective to determine the number of customers per hour, day, week and the type of service. Determine revenue based on results allowing for additional costs not shown on business records (payroll of each workstation which may have been paid in cash).

THE FRAUDULENT SPOUSE CASE STUDY

Preamble

The difficulty in dealing with many marital dissolutions often involves one spouse or the other in some way not reporting income or assets. This can include filing false tax returns caused by cash and perquisites not being reported. In such an instance the Federal and State Governments are usually the ones damaged by not receiving the proper amount of income taxes associated with the endeavor. The non-operating spouse may or may not be aware of the occurrence. In other circumstances the operating spouse may, in fact, be stealing from the community in addition to stealing from the government. Furthermore, child and spousal support gets affected tremendously. When this happens the non-operating spouse must make well-informed, tough decisions as to the cost to proceed in uncovering the depth of the problem versus the potential benefit derived.



This lecture deals with the issues associated with making the decision to go forward with the attempt.

1. **The Problem**

Ed and Janet Smith were married for over ten years. During the marriage they started a wholesale and retail auto parts supply business. The business grew over the years and they lived a good life. The business is fictitiously titled XYZ Auto Parts. In addition to the automobile parts business, Ed had a real love for collecting 1950 - 1960 "muscle cars." So much so that they had accumulated over 30 of that type of car. Each car was worth approximately $25,000.00.

Their children grew and began to work in the business.

Because the business was doing so well, it had to move from its smaller location to their own building. The building was well located and consisted of a retail counter, large multi-level parts storage, a dispatch area for a fleet of delivery trucks, a sales department office, accounting department offices and above the accounting offices was an apartment for Ed.

Ed would physically and emotionally abuse Janet.

Janet filed for divorce over a year ago. During that time she hired an attorney and a forensic accountant. The initial investigation performed by the forensic accountant dealt with the temporary support for Janet and the children. An Order to Show Cause (OSC) took place and a temporary support order was agreed to by the parties.

Shortly after the OSC, Ed talked Janet into getting the attorneys and accountants out of the case and settling the case themselves. This seemed like a good idea to Janet so she put her attorney and accountant on hold for the time being.

As time went on, Ed played games with the support he was to pay Janet for her and the children. He claimed that the business was doing badly and was not worth anything. He used the support as a tool to control Janet. Eventually Janet had enough. She decided to go forward with the divorce in order to get a better handle on the income available for support and to get an idea what the business was worth.

2. **The Need for a Plan**

In order to effectively deal with this situation an overall plan needed to be developed. The responsibility for quarterbacking fell on the shoulders of the attorney. It would be the attorney's responsibility to gather all of the information from the team to be assembled. This would include the type and number of people, the costs, availability, and logistics.

Since there was knowledge that Ed was skimming cash from the business and using business funds to further his car collection, there was no choice but to attempt to put the business in the hands of a receiver. This way the real income could be ascertained. In order to do this it was necessary to obtain declarations from the forensic accountant about why and how he thought the defalcation could be taking place. Additionally, it was essential that declarations from the client and other sources be obtained as to their specific knowledge of what was going on.

The element of surprise was critical. To accomplish this, it would become necessary to obtain access with an *ex parte* motion without notice to the other party. Furthermore, because of the numerous discovery issues that this type of endeavor has, a discovery referee would need to be appointed to supervise and make decisions on the issues as they arose.

The cars would have to be dealt with at the same time. Since some of the cars were at the business and some were not, a coordinated effort must exist. If not, they could have been removed within hours and never seen again. The plan was to have all of

the cars put on trucks and placed in safe keeping. Later they could be sold and used in the division of the community.

The following is an analysis of the specific issues which were dealt with.

3. Basis for Relief

Fiduciary obligations result from the existence of the marital relationship. Those obligations, as in a general business setting, require candor and preservation of the estate (marital or otherwise) for the benefit of the community and require avoiding self dealing or dissipation of the estate. Those fiduciary obligations extend to management and control of the community estate including personal property of the estate as more fully set forth in Family Code §1100 *et seq.*

The remedies for breach of fiduciary obligations between spouses include, but are not limited to, transfer of management and control responsibilities, seizure and sale of assets to preserve the community estate, and other remedies set forth in Family Code §1101, which could include alternate valuation analysis.

It is precisely these two Family Code Sections that permit the actions for which this outline is about. If a spouse materially fails to fulfill the obligations of §1100 then §1101 gives you the remedies.

The next steps will give you some guidance on things to consider in conjunction with exercising §1101.

4. Appointment of a Receiver

The appointment of a receiver is no small task to accomplish. It is necessary to convey to the court that property is being lost, removed or materially injured. In the instant case Ed admitted selling at least one or more of the vehicles described above and had not deposited the money in the parties' joint bank account. Furthermore, the Court had ordered Ed, at a previous hearing, to sell a sufficient number of cars to raise $50,000.00 and to place it in the joint bank account. Therefore, he was in direct violation of an existing court order.

In addition to the above, Janet had observed documents while working on the business premises which supported her belief that cash proceeds from daily sales were not being accounted for in the daily proceeds of the sale of the business.

The facts suggested that community assets were being diverted and that Ed was systematically skimming cash from the business and not paying Court ordered support.

The authority to do the above is found in the Code of Civil Procedure, §564. It states, in part:

(a) A receiver may be appointed, in the manner provided in this chapter, by the court in which an action or proceeding is pending in any case in which the Court is empowered by law to appoint a receiver.

(b) In Superior Court a receiver may be appointed by the Court in which an action or proceeding is pending, or by a Judge thereof, in the following cases:

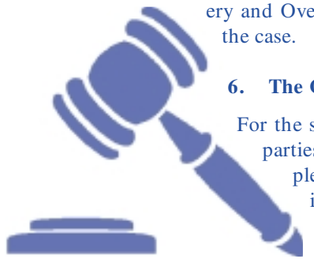
In an action… between the parties jointly owning or interested in the property or fund, on the application, or of any party whose right to or interest in the property or fund or proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

5. Posting a Bond

When a Receiver is appointed, *ex parte,* the court is required to make an order for the party requesting such to post a bond. The Code of Civil Procedure, §566 states in part as follows:

(a) If a receiver is appointed upon an *ex parte* application, the Court, before making the order, must require from the applicant an undertaking in an amount to be fixed by the Court…

Janet's attorney should try to make a request to keep the bond at a minimum. The reason for this is because the bond can be expensive and the need for the bond is lessened by the fact that there will be a Case Manager and a Discovery and Oversight Referee involved in the case.



6. The Case Manager

For the safety and security of both parties, and because of the complexity of the issues involved, it behooves the appointment of a Case Manager. The Case Manager is usually a retired judge. The main advantage here is that decisions and rulings can be made on the spot as things develop. Additionally, both parties' rights get protected; and the appointment will also help reduce the financial obligations of both parties because they can address their disputes with the Case Manager and avoid the necessity of additional costly court appearances pending trial on unresolved issues.

The authority for this can be found in two different places, Family Code §2032 and the Code of Civil Procedure §639. The Family Code states, in pertinent part, as follows:

(a) Either party may, at any time prior to the hearing of the cause on the merits, upon noticed motion, request the court to make a finding that the case involves complex or substantial issues of fact or law related to property rights,… or support. Upon that finding, the Court may in its discretion direct that implementation of a case management plan…. The case management plan shall focus on specific, designated issues. The plan may provide for the allocation of separate or community assets, security against these assets, and for payments from income or anticipated income of either party for the purpose described in this subdivision and for the benefit of one or both parties…. The Court may order that a referee be appointed pursuant to Section 639 of the Code of Civil Procedure.

The Code of Civil Procedure §639 states, in pertinent part, as follows:

When the parties do not consent, the court may upon the application of any party, or of its own motion, direct a reference in the following cases:

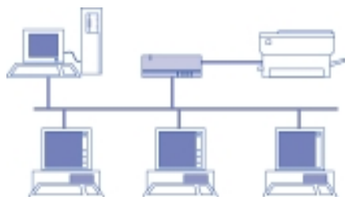
(a) When the Court in any pending action determines in its discretion that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.

7. The Accountant's Role

There is no question that the most exciting part of this whole endeavor rests in the hands of the Accountant. Well, I suppose that not everyone would share that same opinion. It was, however, exciting and these are some of the advance planning considerations the Forensic should consider:

A. Computers and Software

Having had access once before for an OSC for temporary support, we had a preview of the books and records. During the initial stages, within our analysis of the operations of the company, we became aware that the Company had recently spent a significant amount of money on some specialty software for the automotive parts business, together with the requisite hardware and installation.



We contacted the manufacturer of the software about the back-up procedures, functions and controls of a similar system. Since most specialty software manufacturers tend to know not only their existing customers, but their potential customers, it became necessary to be very cautious about names and locations. We were merely a CPA firm inquiring about their product. If the software people suspected who the client was, it would be possible for them to tip-off XYZ Auto Parts and foil the whole plan of surprise.

Two other computer experts were then consulted. One was on the staff of the forensic accountant (a necessity nowadays) and the other was an outside hardware and software installer/ programmer.

The goals on the day of the take-over were as follows:

a. Make a duplicate back-up tape or diskettes of the existing back-up.

b. Make a back-up of the current system.

c. Cause the system to print out hard copies of the inventory.

d. Cause the system to print out hard copies of the sales history and related costs.

e. Obtain all codes and passwords at all levels of authorization, especially the supervisor level.

f. Obtain access to all operating manuals.

g. Determine, if possible, the extent anyone was trying to delete or change information from the system.

h. Secure the physical location of the file server.

To accomplish the above, it was necessary to take the anticipated system tapes and diskettes. In case the anticipated system hardware configurations were different from the actual, we contacted several computer stores for their supply, hours of operation and location to the subject company. A petty cash fund of $500.00 was necessary to handle many of the incidentals of the day.

The computer experts would be the first group to be put in position after the initial serving and take-over. In conjunction with the computer experts, all other personnel associated with the event were asked to keep an eye on employees for their access to the computer terminals.

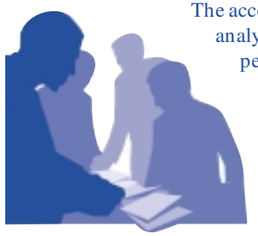
As discussed later, the employees of the Company were immediately terminated and hired by the receiver. Therefore, they would receive instructions from the receiver as to what they could and could not do.

The biggest fear was that some individual would just type in a command to either destroy files or reformat the hard disk. The idea of a Poison Pill batch file was a possibility. With over fifty (50) pairs of eyes watching we felt confident we would have that problem covered. By the time the initial shock wore off and everyone began to understand what was happening, we would be in place.

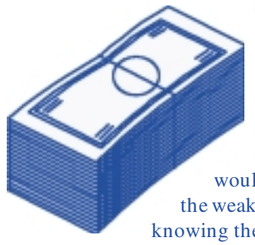
The very first task assigned to the computer expert team was to locate the file server and physically locate the keys.

B. Accounting Personnel

A team of seven (7) individuals was assigned to deal with the case. The majority of them were to be paired up with the Receiver's personnel. The reason for this was because they had similar records to deal with, but for different purposes.



The accounting personnel wanted to analyze what was currently happening with the company financially (the last twelve [12] months) and the Receiver wanted to record transactions from the point they took over forwards. Additionally, we were going to be dealing with cash, both in the drawers and safe at the time of the takeover and throughout the day. It is best to have at least two individuals, in addition to the Company personnel, present whenever cash is counted or otherwise dealt with.



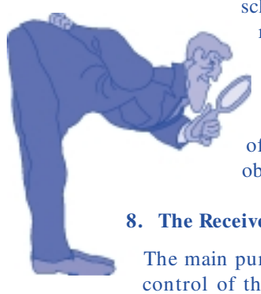
The first assignment was to count the existing cash in the drawers and the safe. Furthermore, we had our personnel interview the employees handling the cash for the purpose of flow-charting the entire cash handling process. This would help in dealing with identifying the weaknesses and assisting the Receiver in knowing the process.

One of the next steps would be to search the entire building for any type of accounting records. This naturally included the accounting offices and the resident file cabinets, desks, drawers, etc.

If bank records were found for accounts not previously known to exist, they were to be noted and analyzed.

If receipts were found which appeared to be set apart from the regular accounting records, they were to be analyzed.

The next step was to identify assets. This involved inventorying trailers, back rooms, storage lockers and living quarters. A comparison was made of the fixed asset schedules from the Company's tax return and then matching it to the specific item.



Finally, it would be necessary to compute the current income of the business from the records obtained.

8. The Receiver's Role

The main purpose of the Receiver was to have control of the operations of the business. It would do no good in this case to have access to the business without complete authority to record all transactions and control the assets of the business. The job of the Receiver is simple. It is to inventory the assets and handle all monetary transactions.

Mechanically, the Receiver does not use the existing accounts of the business, rather they set up entirely new accounts and the transactions controlled by the Receiver go through those new accounts. The existing bank accounts would be frozen and the balance transferred to the new accounts. This would necessitate coordination with personnel to be at the banks, with the appropriate paperwork, at the time of the takeover.

Technically the employees of the Company would now be employed by the Receiver. An ample supply of W-4 forms would need to be brought for employees to fill out. Upon the takeover the employees would need to be gathered and given an explanation as to what has happened and what will happen as far as their duties are concerned. The main theme to convey to the employees was, despite the circumstances, it would be business as usual.

9. Security

Security was needed for several reasons. Firstly, Ed was known to be a violent person. He had physically abused Janet many times before. Secondly, his living quarters were located directly above the offices of the business. Janet informed us that he owned several guns. Thirdly, we wanted all of the exits covered in case items were removed from the premises. Lastly, having armed security would deter irrational behavior and promote calm during what was to be a turbulent period.

We had a complete floor plan of the premises, showing locations of personnel, assets, and the like. A copy was given to each team group.

A sufficient number of personnel would be needed to cover all entrances. In addition, one person was to be assigned to cover Ed at all times and one person was to roam the interior premises.

Two video cameras were used to record the event. The primary purpose was to have the ability to analyze the situation later in case something went wrong. Additionally, it could be used to show how things went right. One last reason deals with how people react when they know they are being filmed. They tend to be more careful about their actions.

10. Inventory Personnel

XYZ Auto Parts had a large inventory. Customers of XYZ Auto Parts were used to calling, ordering and having deliveries made either once or twice per day. This included a large area covering several miles – some as far away as 30 miles. If XYZ did not have the part they were looking for, they lost a sale.

It was our original plan to count the inventory at the time of the business takeover. In preparation for this, we contacted several inventory specialists from the auto parts industry.

We had to be extremely careful in describing the business to the inventory companies because an inventory company was used by XYZ Auto Parts at one time for their fiscal inventory. We did not want XYZ tipped off. After narrowing down who the inventory company would be, we then had to make plans for the contingency of actually having the inventory counted. The inventory company stated that it would take approximately 22 to 24 employees to accomplish their inventory, and could take several hours to do.

Up to this point, we were told by company personnel that the computer system was not able to print out a reasonable representation of the inventory of XYZ Auto Parts. If we could determine that it could, in fact, be printed out, we may not need the inventory personnel. Furthermore, if the discovery referee decided that the inventory people were not necessary at the day of the takeover, then they would have to be called off. So, they were merely on stand-by, ready to go at a moment's notice.

11. The Muscle Cars

As stated above, Ed was in the habit of purchasing, refurbishing or rebuilding what are known as "muscle cars" of the 1950s and 1960s. We had a suspicion that there were approximately 8 to 10 cars at the location of the business. Furthermore, there were another 15 to 20 cars at other locations.

We contacted an auctioneer for this type of car, to determine the marketability of such vehicles, and how they could be sold. We were told that there was a market for them, and that there were several locations where auctions took place on a regular basis. There would be no trouble selling these types of cars at all.

We hired the auctioneer to coordinate the removal and storage of all vehicles on the day of the takeover. This included large vehicle trucks which hold 6 to 8 vehicles at a time to pull up to the location as we took over, physically remove the vehicles from the building, and put them onto the transporter truck.

At the same time the auto parts business was being removed of its vehicles, other locations of which we had knowledge would be done simultaneously. Once all the cars were removed, stored in a safe place and eventually sold, the proceeds of these cars could be used in the division of community property and to form a liquid base in which to pay associated costs of this entire endeavor.

12. The Police

As a further precaution, and in conjunction with the order given by the court, the local police were to cooperate in serving Ed on the day of the takeover. The police would meet us at a rendezvous point just prior to making the raid.

13. Other Miscellaneous Things to Consider

Private investigators were hired to do searches for accounts and other assets which may be in Ed's name or the company's name. This, coupled with a writ of execution at the banks at the time that we were at the business was to be accomplished.

14. The Pitfalls

It is important to keep in mind that when one proceeds with an *ex parte* request to seize a business and for all intents and purposes, to serve a Civil Search Warrant, that constitutional requirements of due process and search and seizure are not ignored.

Both the Federal and State Constitutions contain provisions requiring compliance with principles of due process, notice, and opportunity to be heard. In circumstances such as this, those requirements may be bent where irreparable harm is likely to occur if immediate action is not taken. It is essential to obtain thorough declarations demonstrating the necessity to proceed without notice to the party whose business is being seized. Furthermore, the necessity of the presence of a judicial officer is heightened when you take into consideration unlawful search and seizure issues.

15. D-Day

On the actual day of the takeover, all personnel were required to report to the offices of the attorney for one last coordination meeting. The assemblage included several people from the attorney's office, 7 to 10 personnel from the accountant's office, 7 people from the receiver's office, a judge, the auctioneer and his personnel, the computer experts, armed security guards, etc.

We once again went over floor plans as to who was going to be matched up with whom, and where they were physically to go upon the approval. Each group had a list of what they were expected to accomplish, where, and by when. The last thing that was necessary was to rendezvous with the police.

We met at approximately 9:30 a.m. with the police in the parking lot of a large restaurant. The judge explained to the police who we were, what we were doing, and how this effort could be coordinated. The plan was that the police, the judge, the armed security personnel, the lawyer, the receiver, the person videotaping,

and the accountant would go in first. Once it was determined that the place was secure and Ed was properly served, then others would be called in.

The first team arrived at the business at approximately 10:00 a.m. Other personnel would follow in 5 minutes, so as to not draw attention as to too many cars driving up. When the first wave went in, we immediately went into the accounting office to find Ed. We found Ed. The attorney served him papers, and explained what he was doing and why, and that the place was now in receivership, introduced the receiver, and introduced the judge. The judge explained a few more things to Ed. Ed naturally asked to use the telephone to call his attorney. The referee determined at that point and time that a proper service had taken place, and that we could bring in our personnel.

I went out to the parking lot and waved the remaining entourage. All security personnel went to each exit and secured each exit. The employee personnel were quite alarmed. At that point and time, the judge gathered the personnel into one location and informed them of what was going on.

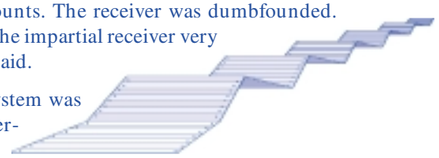
Everything went like clockwork. Everyone knew where to go, and knew what to do. The business was buzzing with activity. Once Ed was off the telephone with his attorney, we asked for access to the living quarters of Ed. Ed initially declined, and a locksmith was summoned immediately. Ed changed his mind, and for the first time, allowed access to the living quarters above the accounting department. Living quarters consisted of a kitchen, bedroom, and a large living room.

What became strikingly clear upon entering the living quarters, was that Ed was the Imelda Marcos of cowboy boots, made from almost any material you could imagine. In addition, he had racks of fine western clothing, including hats, all acquired during a time when he was telling his wife that he was not doing well, and could not pay her support.

We found boxes of records which were not associated with the regular accounting records of the business. They would need to be analyzed.

While we were up in the living quarters, one of the security personnel was looking up at the ceiling, and noticed that a ceiling tile had finger prints on it. The security guard removed the ceiling tile and found additional boxes of records. The additional records showed that apparently there was a second business going on at the company. Ed was apparently doing automobile repairs, including oil changes and brakes. This was never reported anywhere in the records we had seen previously.

The receiver had a conversation with Ed, after which he came to me and informed me that Ed told the receiver that Ed had not gotten a paycheck in two years from the business. The receiver was puzzled as to what we were doing there, if they really could not afford to pay him. I told the receiver, after looking at the payroll records, that Ed was technically correct. He had not physically received a paycheck in his hands. However, there were paychecks of $10,000.00 per month being directly deposited into his personal accounts. The receiver was dumbfounded. "He lied!" This made the impartial receiver very wary of whatever Ed said.

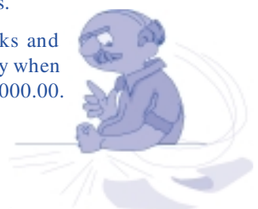


After the computer system was initially secured, personnel were asked about the operating manuals for the system, and they had told us that none existed. The software people never gave them any. Furthermore, they said that an inventory printout of the type and nature that we were requesting could not be done.

One of our computer experts then called the software company, and the software company informed us that of course there would be manuals, and they were located in a particular spot.

We went to that particular spot, and behind some doors – there they were. This gave us the ability to do the next step which was to print out the sales history, and see about costs and inventory accounting. It took our computer experts less than 30 minutes to get the reports going. Printers and paper were going as fast as they could. Once we determined that the printouts appeared reasonable, and included the inventory and related costs, the discovery referee determined that the inventory personnel would not be needed.

Around this time, Ed stormed out of the business and half an hour later called from a pay phone. In talking through his son, who was at the business, he stated that he was outside the offices of the Internal Revenue Service, and that if we did not leave, Ed would go in and confess everything and have the Internal Revenue Service take over because Ed felt that the Internal Revenue Service was bigger than our group. However, as an incentive for us to leave, Ed admitted to a few things.



First of all, he admitted that the books and records show $600,000.00 for inventory when the inventories actually were $1,000,000.00. Secondly, Ed acquired some property without his wife's knowledge in another state. He already admitted to doing the service jobs at the auto parts business. We informed his son that he is best advised to advise his father to come back to the business with his attorney and begin settlement negotiations. And that is exactly what happened.

Upon further investigation, even though Ed admitted to skimming over $400,000.00 of the inventory, the inventory records printed out by us indicated that the inventory level was closer to $1,200,000.00.

For the next several days, into long hours of the night, both sides sat down and worked out a settlement.

MONTENEGRO V. DIAZ

Continued from page 8

as reference materials for those briefing California's next changed circumstance case. Meanwhile, *Montenegro* offers language which can help parents and professionals advocate for approaches which focus on children's needs rather than procedural technicalities.

Endnotes:

1 Leslie Ellen Shear, *Life Stories, Doctrines and Decisionmaking: Three High Courts Confront the Move-away Dilemma,* 35 Family and Conciliation Courts Review 439-458 (September, 1996). See also, Leslie Ellen Shear, *From Competition to Complementarity: Legal Issues and their Clinical Implications in Custody,* Kyle Pruett & Marsha Kline Pruett, Eds., Child and Adolescent Psychiatric Clinics of North America: Child Custody (W.B. Saunders: April, 1998).

2 This is a typical pattern. In my *amica* brief I argued that the changed circumstance doctrine had a differential and gender-biased impact on children of unmarried parents, and children whose married parents divorce before the child's fifth birthday. Except in exceedingly rare circumstances, Courts do not award "primary custody" to fathers of infants and toddlers. Babies come home with their mothers after birth, and mothers frequently breastfeed. Until fairly recently, it was thought that young children should not spend overnights with their fathers. Joan B. Kelly, Ph.D. and Michael E. Lamb, Ph.D., *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,* 38 Family and Conciliation Courts Review No. 3, July 2000, 297; Richard A. Warshak, Ph.D., *Blanket Restrictions: Overnight Contact Between Parents and Young Children,* 38 Family and Conciliation Courts Review No. 4, October 2000, 422. Research on the role of fathers demonstrates that mothers are often the gatekeepers to paternal involvement in child-rearing, particularly in the early years. Michael E. Lamb, Ed., *The Role of the Father in Child Development* (1996); Kyle D. Pruett, *Fatherneed: Why Father Care Is as Essential as Mother Care for Your Child* (2000). Thus primary parenthood is determined by biology and social custom for these children. Doctrines which reify the original custody arrangements thus favor maternal custody, violating the statutory prohibition against using gender as a basis for determining custody. For an example of this phenomenon, see *Lester v. Lenanne* (2000) 84 Cal.App.4th 536.

3 The recent Second District decision in *Marriage of Williams* (2001) 88 Cal.App. 4th 808, holds that separating siblings absent "extraordinary emotional, medical or educational need, or some other compelling circumstance" is an abuse of trial court discretion. Gregory's sibling relationships were not considered by the Fourth District.

4 However, when discussing how to distinguish between temporary and final/permanent orders, the Court refers only to stipulations. Thus the most cautious practice until this issue is resolved will be for judgments to explicitly state that review and modifications are contemplated. In many cases, inclusion of such language will be a contentious issue focusing on a future circumstance which may or may not arise. Good public policy would reduce or eliminate the need for courts and families to struggle with such questions.

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LESSONS FOR TRIAL COUNSEL FROM REVERSALS IN RECENT FAMILY LAW APPEALS

BY ROBERT A. ROTH, ESQ., CERTIFIED APPELLATE SPECIALIST

When trial court decisions are reversed on appeal, the reasons often echo themes that an appellate attorney encounters regularly. Many cases are won or lost not on issues of cutting edge law, but on the fine points of proving up statutory requirements, preserving the record, and assisting the court in memorializing its decision. To illustrate some of these factors, I recently reviewed published family law decisions that were reversed over the past 24 months. Several important recurring patterns, instructive for trial counsel, came through.

One lesson is to be wary of shortcuts in proving up your case. While the prevailing party is entitled to powerful factual inferences on appeal, an appellate court will not manufacture evidence from thin air if you fail to put essential elements of your case in the record. Although this may seem elementary, lack of evidence on a required statutory element is a recurring ground for reversal. For example, in *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, a fee award was reversed when only the total amount requested was put in the record, with no billing statement or declaration being put in evidence to meet the statutory requirement of showing services were reasonably necessary. Likewise, in *In re Marriage of Zywiciel* (2000) 83 Cal.App.4th 1078, a spousal support award was reversed because no evidence was introduced regarding several mandatory Family Code section 4320 factors.

There are similar pitfalls when a trial court pushes counsel toward "expedience." This is aptly demonstrated when important proceedings are conducted in chambers. In *In re Marriage of Hall* (2000) 81 Cal.App.4th 313, a child support motion was handled entirely in chambers, without a synopsis of the proceedings being put on the record, thus undermining the resulting above-guidelines support award. Similarly, *Zywiciel* noted that evidence on the missing statutory factors may have been presented during extensive in chambers discussions, but in the absence of a synopsis on the record, reversal was required.

Counsel should be alert to the need for the court to make mandatory findings, whether required in response to a request for Statement of Decision, or simply mandated by law. It gains no genuine advantage to the client to avoid trial court findings, if they render a judgment susceptible to reversal on appeal. Thus, in *Hall*, an above-guideline child support award was reversed when the court failed to fulfill a *sua sponte* duty to provide reasons for differing from guideline support calculations. Reversal was ordered in *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, because of the trial court's failure to explain why it was ordering an intermediate step-down in spousal support. An eye toward the "big picture" suggests that counsel remind the trial court of findings that must be made.

Rising, *In re Marriage of Bonds* (2000) 24 Cal.4th 1, and *In re Marriage of Egedi* (2001) 88 Cal.App.4th 17, illustrate different ends of the spectrum in utilizing the Statement of Decision process. In *Rising*, lack of a finding for why an intermediate step down in support was ordered required reversal, even though the appellate court posited a reason that it confirmed would be adequate (to ease the impact of the ultimate step down). In *Bonds*, no remand was necessary after the wrong legal standard was used by the Court of Appeal to review a prenuptial agreement, because the Supreme Court determined that the trial court's factual findings were sufficient to satisfy the correct standard. In contrast, the trial court's findings in *Egedi* that a Marital Settlement Agreement was entered into freely and voluntarily allowed the appellate court to isolate a legal error (invalidating the MSA due to dual representation), and reverse without a remand for further proceedings on the validity of the agreement. The Statement of Decision process can thus be used both to obtain a "clean" victory that will not require further proceedings after appeal, and to isolate legal error to secure an unqualified reversal.

Another lesson from appellate cases is the power of undisputed facts. While the prevailing party is entitled to all factual inferences supporting the judgment (to the extent not contradicted by the court's Statement of Decision), this does not instantly render all of the opposing party's facts untrue, for purposes of appeal. Undisputed facts can form powerful building blocks for a reversal on appeal. Thus, in *In re Marriage of Terry* (2000) 80 Cal.App.4th 921, the bare facts of the wife's assets and the expected investment return were sufficient to establish her ability to be self supporting, and extinguish her right to spousal support pursuant to Family Code section 4322. In *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, the sheer magnitude of the husband's expected stock options demonstrated that an award of a percentage as a component of support would exceed both the marital standard of living and the children's reasonable needs. In *Keech*, basic math showed that the trial court's awards of support and fees left husband with only $93 per month for living expenses, leading to a reversal for failure to adequately consider the husband's needs in making the award. In *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, husband was able to prove his entitlement to reimbursements by showing that after accounting for all community funds in a mixed account, his separate funds necessarily were spent for community purposes. Notably, undisputed presentation of objectively verifiable evidence (i.e., dollar amounts) will frequently support a successful appeal, even without specific findings by the court. Counsel should carefully assess financial records to be put in evidence, and consider extensive offers of proof to clarify the existence or absence of factual disputes.

Finally, appellate decisions illustrate that "red herring" facts may underlie trial court decisions – facts that sound pertinent on the surface, but ultimately are not. It can be important to confirm if such facts are the basis for the court's decision, i.e., through a Statement of Decision, and whether there are independent grounds for the decision. For example, *In re Marriage of Serna* (2000) 85 Cal.App.4th 482, the Fourth District Court of Appeal held that because mandatory child support normally ends at about age 18, a parent's payment of adult child college and other expenses is not a relevant consideration in determining entitlement to spousal support. (Note that this issue of law is not entirely settled, as Serna disapproved other cases suggesting the opposite. I presently am handling an appeal raising the same question in the Sixth District.) *In re Marriage of Williams* (2001) 88 Cal.App.4th 808, reversed a trial court's decision to split four siblings in a move-away case because their parents were similarly qualified as custodial parents, finding that separating siblings is against public policy absent extraordinary circumstances. *In re Marriage of Smith* (2001) 90 Cal.App.4th 74, held that the fact that a father's incarceration is for domestic violence against family members does not obviate the need to prove his ability and opportunity to earn in imputing income for support purposes. Thus, trial counsel are well advised to carefully examine their opponents' expected factual claims, and look for contentions that – while perhaps emotionally powerful – ultimately should have no legal bearing on decisionmaking.

MEASURE YOUR MARKETING

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calculate the attorney's gross income for the year, divide by 260 (approximate number of working days in each year) to get an hourly rate, and then assign that rate to each marketing activity.

As an example, if you want to calculate whether an article you wrote was an effective marketing tool, estimate the amount of time it took you to write the article and multiply the time by your hourly rate. We roughly estimated $150 per hour to be the value of attorney time in determining how much an activity cost which represented income less overhead. You may want to use your billing rate, but whatever you do, do it consistently for every referral so you are comparing like numbers. Add in any out of pocket expenses incurred for each activity to the value you put on your time to get a total cost for that activity. In the case where you are analyzing the benefits of your ACFLS referrals, you may include time you spent away from the office at the State Bar conference, the cost of the hotel, and any other extra costs of that trip.

If an article took 40 hours to write with no out of pocket costs, the total dollar cost would be $150 multiplied by 40 hours or $6,000. If the total revenue generated from writing your article was $100,000, your ROI would be calculated by dividing $100,000 by $6,000. In this example, the article generated sixteen times the cost of the referral. This is a good return on your investment.

The weakness of this method is that the intangible benefits of certain activities may be overlooked in this analysis. There may be benefits that do not show up in the ROI. Some of your activities will reinforce your efforts in other areas. For example, public speaking can be labor intensive. You may not be able to link that activity to a specific client referral. On the other hand, you may still choose to continue that activity because your overall reputation in the community is enhanced and the public speaking may produce indirect firm leads.

This exercise in analyzing your marketing efforts will help you to determine which activity generates referrals and clients, and which activity is not effective. And, if your time and marketing budget is limited, you need to know which activity generates the most revenue. Armed with this information, you'll be able to make more informed decisions on how to spend your marketing dollars wisely.

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2001 CHAPTERED FAMILY LAW BILLS

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conducted as described in subdivision (a) Section 6306 of the Family Code.

AB 1323 (Ch. 39, Stats. 2001; McLeod):

Current law requires a person solemnizing a marriage to return the certificate of registry to the county recorder within 30 days after the ceremony. This bill instead requires the person solemnizing a marriage to return the certificate within 10 days after the ceremony. Current law provides for so-called "confidential marriage," whereby an unmarried man and an unmarried woman who have been living together may be married. A confidential marriage certificate attesting to the performance of the marriage is filed with the county clerk but is not open to public inspection except upon court order. Current law further requires that the person solemnizing such a marriage provide the parties who were married with an application to obtain a certified copy of the confidential marriage certificate from the county clerk; the application must be filled out by the parties who were married and sent by the person solemnizing the marriage to the county clerk. This bill deletes the provision requiring the person solemnizing a confidential marriage to provide the parties who were married with a copy of the confidential marriage certificate, and revises the last described provision to instead require that upon completion of the confidential marriage certificate the parties who were married shall be provided with an application to obtain a certified copy of the confidential marriage certificate from the county clerk.

Current law permits the county clerk to issue a duplicate certificate of registry of marriage if the original is lost or destroyed before it is returned to the county recorder. Current law further requires the person solemnizing the marriage to return the duplicate certificate to the county recorder within 30 days after issuance. This bill instead requires such a duplicate certificate to be returned within 10 days after issuance. Current law authorizes the county clerk to approve notary publics to authorize confidential marriages. This bill expressly provides that the county clerk should exercise reasonable discretion as to whether to approve notary publics to authorize confidential marriages.

AB 1426 (Ch. 371, Stats. 2001; Wright):

This bill amends Family Code §5241. Currently, employers are required to withhold child support payments from employees' earnings that are subject to an earnings assignment order. If an employer withholds support pursuant to an earnings assignment order but fails to forward the support to the obligee, the local child support agency is required to take appropriate action to collect the withheld sums. This bill provides that the child support obligee or the local child support agency may apply for an order requiring payment of support by electronic transfer from the employer's bank account where the employer has willfully failed to comply with the assignment order or where the employer has otherwise failed to comply with the assignment order on 3 separate occasions within a 12-month period. The bill also provides that the court may impose a civil penalty on the employer in the amount of 50% of the support amount that has not been received by the obligee under specified circumstances, in addition to any other penalty authorized by law. Finally, the bill makes employers liable to the obligee for interest incurred by the obligee resulting from the employer's failure to forward the payment.

AB 1449 (Ch. 463, Stats. 2001; Keeley):

Existing law requires the local child support agency in each county to enforce child support orders and to collect arrearages. This bill requires the Department of Child Support Services, in consultation with the State Department of Social Services, to establish and promulgate specified regulations by October 1, 2002, by which the local child support agency may compromise an obligor's liability for public assistance debt in cases where the parent separated from or deserted a child who consequently became the recipient of aid under the AFDC-FC or CalWORKs programs, if specified conditions are met, and the department determines that compromise is necessary for the child's support. The bill defines "guardian" and "relative caregiver" for these purposes.

The bill also requires the State Department of Social Services, in consultation with the Department of Child Support Services, to promulgate specified regulations by October 1, 2002, by which the county child welfare department, in case of separation or desertion of a parent or parents from a child resulting in aid, as specified, determines whether it is in the best interests of the child to have his or her case referred to the local child support agency for child support services, as specified. The bill further requires the local child support agency to consult with the county child welfare department prior to compromising an obligor parent's liability for debt incurred for AFDC-FC payment provided to a child. Finally, this bill requires the Department of Child Support Services and the State Department of Social Services to make a report to the Governor and Legislature, by October 1, 2003, which contains the topics specified in the bill.

AB 1697 (Ch. 754, Stats. 2001; Assembly Judiciary Committee):

This bill makes technical changes and revisions to a number of family law and court-related code sections. Current law requires each social study or evaluation made by a social worker or child advocate appointed by the court required to be received in evidence to include a factual discussion of specified factors including, but not limited to, whether the county welfare department has considered child protective services, and what plan, if any, exists for the return of the child to his or her parents. This bill requires the social worker or child advocate to consider whether the child has any siblings under the court's jurisdiction and information related thereto.

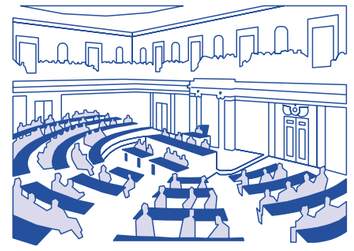
Current law provides that the juvenile case file of a minor may only be inspected by certain persons. This bill authorizes a commissioner or other hearing officer assigned to a family law case with issues concerning custody or visitation to inspect the case file, and, if actively participating in such a family law case, authorizes counsel appointed for the minor in the family law case to inspect the case file, but provides that prior to allowing him or her to do so, the court clerk may require counsel to provide a certified copy of the court order appointing him or her as the minor's counsel. The bill also limits the authority given under existing law for inspection by family court mediators and child custody evaluators to those such persons who are actively participating in the case.

The bill amends the Child Abuse and Neglect Reporting Act to classify employees or volunteers of a Court Appointed Special Advocate program as "mandated reporters." Also, current law provides for the manner of holding property by husband and wife. This bill specifies that husband and wife may hold property as community property with a right of survivorship. (N.B.: New Civil Code §682.1, which was enacted last year and was operative on July 1, 2001, provides for a new form of ownership of property as "community property with right of survivorship.")

Finally, this bill changes existing law which authorizes an appellate court to appoint counsel for an indigent appellant upon appeal from a judgment freeing a child who is a dependent child of the juvenile court from parental custody and control. Current law provides that those costs are a charge against the state. This bill instead provides that those costs are a charge against the court.

SENATE BILLS

SB 54 (Ch. 21, Stats. 2001; Polanco):



This bill amends the statutes governing the Public Employees' Retirement System to authorize a nonmember spouse whose separate account has been established following legal separation or dissolution of marriage of a member and division of the community estate, and whose account is credited with service subject to Second Tier benefits, to elect to have that service subject to First Tier benefits subject to specified conditions and additional contributions.

SB 78 (Ch. 296, Stats. 2001; Kuehl):

This bill amends Family Code §§1612 and 1615 to change provisions of the Uniform Premarital Agreement Act. It first states the specific findings that the court must make in order to find that a premarital agreement was executed voluntarily. Next, it provides that a provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of spousal support, is not enforceable unless the party against whom enforcement of the provision is sought was represented by independent counsel at the time the agreement was signed or if the provision is unconscionable at the time enforcement is sought. Finally, this bill provides that an otherwise unenforceable provision in a premarital agreement regarding spousal support does not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.

SB 104 (Ch. 688, Stats. 2001; Scott):

This bill reduces from 90 days to 30 days the period which birth parent or parents have to sign and deliver to the department or delegated county adoption agency a written, notarized statement revoking their consent to adoption and requesting the child to be returned to them, or to or to sign the waiver of the right to revoke consent on a form prescribed by the department in the presence of a representative of the department or delegated county adoption agency. The bill also provides that, after revoking the consent, the birth parent or parents may reinstate the original consent by signing and delivering a written, notarized statement to that effect to the department or delegated county adoption agency, in which case the revocation of consent would be void and a new 30-day period would commence.

SB 668 (Ch. 72, Stats. 2001; Poochigian):

Current law provides a method for allocating debts between a decedent's estate and a surviving spouse, allows a personal representative of a decedent and a surviving spouse to provide for allocation by agreement and, if that agreement substantially protects the rights of interested parties, provides that a court must order an allocation based on that agreement. In the absence of an agreement, debts of decedents are apportioned on all of the property of the spouses liable for the debts at the date of death that are not exempt from enforcement of a money judgment, in a proportion determined by the value of the property less any liens and encumbrances at the date of death, adjusted for any right of reimbursement that would have been available if the property were applied to the debt at the date of death. Current law also provides the same method of allocation of debts between the trust of a deceased settlor and a surviving spouse. This bill revises the provisions relating to the allocation of debts in the absence of an agreement, initially requiring that a court characterize the debts as separate or community, and then setting forth a procedure for allocating the separate or community property debts to assets similarly characterized, which would then be primarily liable for the debts.

Among other things, this bill also requires that if the net value of either spouse's separate property assets are less than that spouse's unsecured separate property debts, the unsatisfied portion of the debts be allocated to that spouse's one-half share of the community property assets. If the net value of that spouse's one-half share of the community property is less than the spouse's unsatisfied and unsecured separate debt, the bill requires that the remaining unsatisfied portion of the debt be allocated to the net value of the other spouse's one-half share of the community property.

The bill also provides that if the personal representative or the surviving spouse incurs any damages or expense, including attorney's fees, on account of the nonpayment of a debt that was allocated to the other party, or as the result of a debt being misallocated due to fraud or misrepresentation by the other party, the party incurring damages shall be entitled to recover from the other party for damages or expense deemed reasonable by the court. It defines a non-recourse debt as a debt for which the debtor's obligation to repay is limited to the collateral securing the debt and for which a deficiency judgment against the debtor is not permitted, and limits the amount of a non-recourse debt to the net equity in the collateral, as defined. Finally, the bill permits a court to order a different allocation of debts if the court finds it to be equitable under the circumstances, and also permits

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INTERNAL REVENUE CODE — RULES FOR IDENTIFYING ALIMONY DISGUISED AS CHILD SUPPORT

BY NANCY A. KEARSON, CPA, CVA, DABFA

The following article pertains to instruments executed after 1984.

When there are minor children in the family, careful thought and wording should go into the writing of the marital instrument regarding the timing of any step downs of spousal support. If alimony is later determined to be disguised child support the Internal Revenue Service may elect to identify a portion or all of the support as non taxable child support and reduce the support deduction and corresponding spousal income in part or in total by the amount of the support the Service believes is actually child support. The reclassification of tax deductible alimony to non taxable child support may even be retroactively adjusted. It could also occur even if other amounts designated as child support are included in the written instrument.

An area of especially close scrutiny is a marital agreement in which alimony is specified to be stepped down at regular intervals in a family where there are two or more minor children.

The code clearly states that if alimony is stepped down or reduced by any specified event or contingency related to a child, like reaching a certain age, marrying, dying, leaving school or similar criteria, the alimony is effectively disguised child support §71(c)(2) (A).

The code states in §71(c)(2)(B) that alimony may be treated as child support if the written instrument specifies support to be stepped down at intervals even *associated* with any of the contingent events listed above.

In Publication 504 the IRS gives rules for defining an associated contingency or triggering event leading to reclassification of alimony to child support. Publication 504 states "A contingency relates to your child if it depends on any event relating to that child. It does not matter whether the event is certain or likely to occur. Events relating to your child include the child's becoming employed, dying, leaving the household, leaving school, marrying or reaching a specified age or income level. Additionally, there may be other triggering events not specified here to which a step down in support could be linked to an event related to the child.

According to Publication 504 the following two situations are the only situations in which a step down would be considered a "clearly associated contingency".

NANCY A. KEARSON, CPA, CVA, DABFA

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If you would like to submit a question to this column, please email Nancy at nkearson@earthlink.net.

(1) A "clearly associated contingency" is one in which the step down in support does not occur within six months before or after the date the child reaches 18 or 21 or local age of majority. Although not spelled out in the publication, there may be individual instances in which the "six month" rule might also apply to other events like "high school graduation". Stepping down within six months related to graduation might also begin to look like an associated contingency if more than one step down is within six months before or after more than one child graduates from high school.

(2) Publication 504 also defines a second qualifying event for associating a contingency clearly related to a child. "The payments are to be reduced on two or more occasions that occur not more than one year before or after a different one of your children reaches a certain age from 18 to 24. This certain age must be the same for each child, but need not be a whole number of years." If there are two or more children and there is a step down of support within a year before or after the children successively reach a certain age between 18 and 24, a child support contingency will have been triggered.

In looking at avoiding the inadvertent association, relating to a step down of alimony with some event related to triggering child support, I find it useful to prepare a grid of the pertinent facts. Here is a hypothetical example:

Support Comparison

Description	Child 1	Child 2	Support
Children			
Birthday	July 1984	June 1987	
Date reach age 18	July 2002	June 2005	
Date of graduation	June 2003	June 2006	
Support Payments			
Begin			Sep. 2001
Age of child	17	14	
	6 months after graduation		
End			Dec. 2003
Months			28
1st Step Down			
Begin			Jan. 2004
Age of child	20	17	
		6 months after graduation	
End			Dec. 2006
Months			24
2nd Step Down			
Begin			Jan. 2007
Age of child	23	20	
End			Death or remarriage

Looking at the related factors in a grid format can bring new perspective to relationships that may be troublesome if not addressed at the time of the writing of the marital instrument.

Publication 504 can be downloaded from the IRS website at http://ftp.fedworld.gov/pub/irs-pdf/p504.pdf.

Please email to me your questions at nkearson@earthlink.net.

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certain third parties that incur specified damages or expense in connection with the allocation or misallocation of a debt under the provisions described above to recover them as the court that made the allocation deems reasonable.

SB 1221 (Ch. 293, Stats. 2001; Romero, Johannessen, Margett, Scott, Karnette, Speier):

This bill amends Family Code §4320 and adds Family Code §4325 to require the court to consider, when making a determination of permanent spousal support, any criminal conviction of an abusive spouse for the purpose of reducing or eliminating a spousal support award in accordance with §4325. New Family Code §4325 states a rebuttable presumption affecting the burden of proof in any proceeding for dissolution of marriage where there is a criminal conviction for an act of domestic violence perpetrated by one spouse against the other spouse within five years prior to the filing of the dissolution proceeding, or at any time thereafter, that any award of temporary or permanent spousal support to the abusive spouse otherwise awardable pursuant to the standards of the provisions governing the award of spousal support should not be made. It also authorizes the court to consider documented evidence of a convicted spouse's history as a victim of domestic violence, or any other factors which the court deems just and equitable, as a condition for rebutting the presumption. Finally, the bill states that the standard of proof for rebutting the presumption is a preponderance of the evidence.

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WILL THIS CHILD MOVE?

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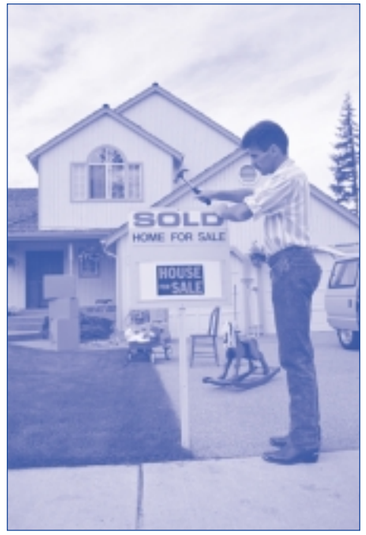
this issue entails presentation of evidence about the child's critical attachments as well as the time share. *Brody v. Kroll* (1996) 45 Cal.App.4th 1732 recognizes that a plan in which the child enjoys frequent paternal caretaking falls within the footnote 12 exception. If the child does not have a "primary" psychological parent, then the policy underlying *Burgess* requires a footnote 12 analysis.



2. Was the prior order temporary?
(If yes, the Court must conduct a full best interests hearing. If no, move on to item 3.)

This *Montenegro* analysis requires examination of both the language of the order and the surrounding circumstances to determine whether it was intended (by the parties if a stipulation and by the Court if an adjudication) to be final. The fact that the order is contained in a judgment is not dispositive. Ambiguity is resolved in favor of finding that it is a temporary order.

3. Would the move prejudice the child's welfare?
(If yes, the presumption in favor of the custodial parent's move is rebutted and the Court may prevent the move. If no, move on to item 5.)

It is important to review the examples of such prejudice which Justice Mosk lists in *Burgess*, "the nature of the child's existing contact with both parents – including *de facto* as well as *de jure* custody arrangements – and the child's age, community ties, and health and educational needs. Where appropriate, it must also take into account the preferences of the child."

4. Is the decision to move based upon an improper or frivolous motive?
(If yes, the presumption in favor of the move is rebutted and the Court may prevent the move. If no, move on to item 6.)

The stated reasons of the moving parent are only the starting point for this analysis. Evidence of this parent's hostility to the other parent, overzealous gate-keeping, etc. are relevant. Such evidence would also be relevant to item 4, in that a move which would not be prejudicial if the moving parent actively promoted the children's relationship with the left-behind parent may be prejudicial in the absence of such attitudes and actions.

5. Is there a change of circumstance other than the decision to move which materially affects the issue of custody?
(If yes, the Court must conduct a full best interests hearing. If no, the presumption kicks in and the case moves on to item 7.)

Montenegro recognizes the dynamic nature of families, and the many changes which may require revisiting a parenting plan. Anything (including changes in the child's age and developmental stage) which would otherwise be relevant to a custody modification is equally relevant in move-away cases. Mary Duryee's *amicus* brief in *Montenegro* argues that "Judicial analysis of change of circumstances must include factors both internal and external to the child."

6. If the move is to take place, what parenting plan is in the child's best interests and will best ameliorate the difficulties caused by distance?

This question requires careful consideration of both logistical and relationship factors. It requires a thorough evidentiary presentation and a careful evaluation.

The Evaluator's Job in Move-Away Cases

Evaluators must be familiar with the current state of the law, and include information necessary for the legal analysis in their reports. The evaluation must give the judge the information (both about this family and about the child development and custody literature) necessary to do his or her job. The relationship between the particular case (and the evidentiary record which is created in that case, including the analysis of the evaluator) is reciprocal. The law evolves and is refined as trial and appellate courts apply it and interpret it in the context of the facts of particular cases. If the case being evaluated goes up on appeal, the expert testimony is most valuable if it includes information which will help appellate courts learn what is important in the lives of children, even if that information falls outside of the current legal formulae.

The evaluator cannot, and should not, anticipate how the law will be interpreted. If the present case law's check list does not include all of the factors which the current state of psychological knowledge concludes are important to outcome for the child, then the evaluator must also include information and analysis about the impact of those factors in such a way that the evaluation will be valuable whether or not the judge decides to include those factors in his or her analysis. Thus a record is made from which the law can evolve and the legal analysis can be refined to incorporate relevant social science knowledge.

Evaluation is more likely to lead to settlement than litigation. The family needs information about the children's well-being which may fall outside of the current legal analysis, so that the parents can use that information in considering out-of-court resolutions.

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ACFLS Needs Your Input!

I've enjoyed this year of sharing the voices and ideas of both family lawyers and forensic professionals. The ACFLS newsletter lets us share our expertise, discover how things are done in other California communities and do a better job of meeting the needs of the families we serve.

Each member of ACFLS has some specialized expertise or unique perspective on the practice of family law that would interest us all. Help welcome Linda Wisotsky to the editorship by emailing her a contribution for the next issue. Whether you adapt a brief into an article, share a practice tip, report on events in the family law community, review a book or software, or promote reform – your voice makes a difference.

I am grateful to each contributor to the issues I edited. You always kept me interested and I learned a lot from each of you. Thanks to Tom Lamp and the staff of Jack Lamp Graphics, and to Graeme Magruder for producing a newsletter that is attractive and enjoyable to read.

Debra S. Frank, CFLS

DO YOU HAVE SOMETHING OF INTEREST TO SHARE WITH OTHER FAMILY LAW SPECIALISTS?

Write a Letter to the Editor.

Send your submissions in WordPerfect or Word on disk to:

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