CALIFORNIA

Family Law Monthly

March 2018

Volume 2018 • Issue No. 3

HIGHLIGHTS

CHILD SUPPORT

- Utah Judgment for Arrearages Due under California Support Order Was Not Controlling Order under UIFSA (see Page 46)

PARENTAGE ISSUES

- Child's Physical Presence in Alleged Father's Home Is Not Enough to Satisfy Receiving Requirement of Family Code Section 7611(d) (see Page 49)

- A complete table of contents appears on the next page.

LexisNexis™ Matthew Bender®

Premarital Agreements

Premarital Agreement Was Unenforceable because Unrepresented Spouse, Who Drafted Agreement, Was Not Given Seven-Day Review Period or Written Advisement of His Rights

*By Carol Rothstein, Esq.**

In *In re Marriage of Clarke & Akel* (No. A149052; Ct. App., 1st Dist., Div. 5. 1/24/18), 19 Cal. App. 5th 914, 2018 Cal. App. LEXIS 57, the First District Court of Appeal held that a premarital agreement was unenforceable, when the evidence showed that the husband, who was unrepresented, was not given the required seven-day period to review the agreement [Fam. Code § 1615(c)(2)]. The court held that this requirement could not be circumvented by adding a provision to the agreement stating that the parties had had seven days to review the agreement, when in fact they had not.

In the opinion by Justice Needham (Jones, P.J., Bruiniers, J., concurring), the appeals court found that the agreement was unenforceable for a second reason: the husband did not receive a written advisement of his rights, nor did he sign a waiver of those rights [*see* Fam. Code § 1615(c)(3)]. The court concluded that these safeguards were necessary, even though the agreement was originally drafted by the husband.

Facts and Procedure. Matthew and Claudia's wedding date was set for March 7, 2008. Without consulting an attorney, Matthew prepared a draft premarital agreement, which he emailed to Claudia on February 26. The agreement provided, in relevant part, that

---

* Carol Rothstein, J.D., is the principal author of CALIFORNIA FAMILY LAW MONTHLY. She is a research attorney in Lafayette, California.

CONTENTS:

COVER STORY

Premarital Agreement Was Unenforceable because Unrepresented Spouse, Who Drafted Agreement, Was Not Given Seven-Day Review Period or Written Advisement of His Rights — *re Marriage of Clarke & Akel* (No. A149052; Ct. App., 1st Dist., Div. 5. 1/24/18) 39

POINT OF VIEW

Tax Law Changes Directly (and Sometimes Indirectly) Related to Divorce—Joseph M. Doloboff, Esq., and Stacy Phillips, Esq. 44

CHILD SUPPORT

Uniform Interstate Family Support Act

Utah Judgment for Arrearages Due under California Support Order Was Not Controlling Order under UIFSA—*In re Marriage of Connolly* (No. C080256 & C083238; Ct. App., 3d Dist., Div. 6. 2/9/18) 46

JUVENILE COURTS

Evidence

Briefly Noted—*J.H. v. Superior Court* (No. B284802; Ct. App., 2d Dist., Div. 6. 2/15/18) 48

Indian Child Welfare Act

Briefly Noted—*In re R.H.* (No. B282855; Ct. App., 2d Dist., Div. 6. 1/31/18) 49

PARENTAGE ISSUES

Presumptions

Child's Physical Presence in Alleged Father's Home Is Not Enough to Satisfy Receiving Requirement of Family Code Section 7611(d)—*W.S. v. S.T.* (No. H042611; Ct. App., 6th Dist. 2/1/18) 49

TAXATION

Spousal Support

Voluntary Spousal Support Payments Held Nondeductible—*Devaleria (David Alan) v. Commissioner* (No. 18396-16S, U.S. Tax Ct., 1/31/18) 53

Innocent Spouse Relief

Taxpayer Entitled to Innocent Spouse Relief in Regard to Unreported Income from Ex-Spouse's Retirement Account—*Bishop (Colin C.) v. Commissioner* (No. 22108-16S, U.S. Tax Ct., 1/4/18) 54

SUBJECT INDEX **55**

TABLE OF CASES **55**

Cross-references are made in this publication to
CALIFORNIA FAMILY LAW
PRACTICE AND PROCEDURE, 2nd ed. (7 vols.),
CALIFORNIA FAMILY LAW LITIGATION GUIDE
(5 vols.), and
CALIFORNIA JUVENILE COURTS:
PRACTICE AND PROCEDURE (1 vol.)
Published by Matthew Bender & Co., Inc.

continued from page 39

Matthew's home ("the house") would remain his separate property until seven years after the marriage, when it would become community property; that Claudia would acquire a two-percent interest in the house for every year they were married if they divorced before seven years; and that Claudia would have a lifetime tenancy in the house.

Matthew retained an attorney to represent Claudia in negotiating the agreement, but did not retain an attorney for himself. On March 4, three days before the wedding, the attorney met with both parties. He advised Matthew to seek independent counsel, but Matthew maintained he could represent himself. The attorney also discussed some of the provisions with Matthew, asking him what he meant by "divorce" in the provision giving Claudia a percentage interest in the house if they divorced before seven years and whether he intended to waive his right to reimbursement of his separate property interest in the house if it became community property. The next day, the attorney sent the parties a revised version of the agreement, which contained three new provisions: (1) both parties waived any separate property interest they might have in their community property, including any right to reimbursement under Family Code section 2640; (2) Matthew waived his right to reimbursement of his separate property contributions to the house; and (3) Matthew agreed to pay all expenses on the house during Claudia's lifetime tenancy. The revised agreement stated that each party had had more than seven days to review the agreement before executing it. The parties signed the final version of the agreement on March 6, and Matthew executed a separate written waiver of legal counsel on the same day.

After the parties separated in 2014, Claudia sought enforcement of the premarital agreement in the dissolution action. The trial court concluded that the agreement was unenforceable because Matthew had not been given the final version of the agreement at least seven days before executing it [*see* Fam. Code § 1615(c)(2)] and because Matthew had not received a written advisement of the rights he was relinquishing under the agreement and had not waived those rights in writing. Claudia appealed.

Required Findings Regarding Voluntariness of Premarital Agreement. A premarital agreement that was not entered into "voluntarily" is not enforceable, the appeals court wrote. The party against whom enforcement is sought ("the challenging party") will be deemed not to have voluntarily executed the agreement unless the court makes the following findings: (1) the challenging party was either represented by independent legal counsel or waived representation, in writing, after being advised to seek counsel; (2) the challenging party had at least seven calendar days between the time he or she was first presented with the agreement and advised to seek counsel and the time the agreement was executed; (3) prior to executing the agreement, the challenging party, if unrepresented, received a written advisement of the rights and obligations he or she was relinquishing and executed a document declaring that he or she received the required information; and (4) the challenging party did not execute the agreement and waivers under duress, fraud, or undue influence [Fam. Code § 1615(c)]. The party seeking enforcement has the burden of presenting sufficient evidence for the court to make the required findings, or the agreement will be held unenforceable.

Seven-Day Requirement Was Not Met. In this case, Matthew received the final draft one day before he executed it. The final draft included "significant provisions" that were not part of the initial draft, including a waiver of his statutory right to reimbursement for his separate property contributions to the house and a provision requiring him to pay all of the expenses for the house during Claudia's lifetime tenancy. Given the material nature of these additions, the appeals court wrote, substantial evidence supported the trial court's conclusion that Matthew was first presented with the agreement on March 5. In addition, Matthew was not advised of his right to seek counsel until March 4, two days before executing the agreement. Accordingly, the seven-day requirement was not met.

Claudia argued that Matthew must be deemed to have received the agreement seven days before he executed it, because the agreement contained a provision to that effect, which had been inserted by her attorney. Claudia relied on Evidence Code section 622, which provides that "the facts recited in a written instrument are conclusively presumed to be

Invitation to Subscribers: If you have comments on the *Monthly*, or would like to share practice tips, or thoughts on cases, legislation, or other family law developments, we'd like to hear from you. Subscribers whose comments are selected for possible publication will be contacted for formal permission to publish. All comments selected for publication are subject to editing as to space and content. Submit your comments: Cathy Seidenberg, J.D., Cathy.J.Seidenberg@lexisnexis.com.

BOARD OF EDITORIAL CONSULTANTS

Grace Ganz Blumberg, Esq.	Los Angeles
Dawn Gray, Esq.	Grass Valley
Kathryn Kirkland, Esq.	San Diego
Lawrence E. Leone, Esq.	Los Angeles
Sandra L. Mayberry, Esq.	San Diego
Robert Polevoi, Esq.	Oakland
Stacy D. Phillips, Esq.	Los Angeles
Stephen B. Ruben, Esq.	San Francisco
Stephen James Wagner, Esq.	Sacramento
Deborah H. Wald, Esq.	San Francisco
Vanessa Kirker Wright	Santa Barbara
Marshall S. Zolla, Esq.	Century City
Carol Rothstein, J.D.	Principal Author

MATTHEW BENDER & CO., INC.
Publisher

Cathy Seidenberg, J.D. Legal Editor

Copyright © 2018 by Matthew Bender & Co., Inc.

For questions about missing issues, new subscriptions, billing, or other customer service problems call our Customer Service Department at 1-800-833-9844.
For editorial questions, contact Cathy Seidenberg, (908) 673-3379, or Cathy.J.Seidenberg@lexisnexis.com.

Note Regarding Reuse Rights: The subscriber to this publication in .pdf form may create a single printout from the delivered .pdf. For additional permissions, please see www.lexisnexis.com/terms/copyright-permission-info.aspx. If you would like to purchase additional copies within your subscription, please contact Customer Support.

true as between the parties thereto." The appeals court rejected this argument, stating that Evidence Code is inapplicable when the parties did not engage in arms-length negotiations or when the contract itself is invalid. Here, the premarital agreement was involuntary and therefore invalid under Family Code section 1615(c)(2), because the seven-day requirement was not met. The seven-day period, the court reasoned, is intended to protect unrepresented parties who enter into premarital agreements. This intent would be thwarted if it could be circumvented merely by inserting boilerplate language that does not reflect the true facts.

Agreement Was Invalid Because Matthew Did Not Receive Written Advisement of Rights He Was Relinquishing. The agreement was invalid for an additional reason, the appeals court wrote. Matthew was never advised in writing of the rights he was relinquishing and did not execute a written waiver of those rights, as required by Family Code section 1615(c)(3). Claudia's argument that this provision was inapplicable because Matthew prepared the initial draft of the agreement was without merit, because nothing in the statute suggests that an unrepresented person who drafts a premarital agreement can be deemed to have been advised of the rights that he or she is relinquishing.

Court Refuses to Find Part of Agreement Enforceable. Finally, the appeals court rejected Claudia's argument that the provisions that were drafted by Matthew himself were still enforceable, because Matthew drafted those provisions more than seven days before executing the agreement. The court stated that it could not "selectively enforce portions of an agreement" when any of the requirements for "voluntariness" were not met. Moreover, wrote the court, there was no evidence of a writing showing that Matthew was advised of the rights he was relinquishing in his draft of the agreement and no written waiver of those rights. Therefore, even the provisions Matthew drafted must be deemed to have been involuntarily executed.

Commentary

Dawn Gray

Let me say at the outset that I am truly bothered by this case, for a number of reasons. Matthew proposed a premarital agreement, drafted it himself and included provisions that benefitted Claudia, including a lifetime tenancy in their family residence. He sent her to an attorney to get her own legal advice and paid for it so it wouldn't be a problem and told the attorney that he was able to represent himself. The attorney proposed a few provisions involving waivers of reimbursement rights and who would make payments on the family residence during the tenancy period, and Matthew accepted those modifications and signed it. Then, when the marriage failed, he claimed that it was unenforceable against him. Not because there was a problem with its terms, but because the attorney that advised Claudia didn't fulfill the requirements of Family Code §1615(c)(2). I'm sorry, but I don't think that someone who proposes and drafts an agreement should later be able to say that he signed it involuntarily. Nevertheless, he escaped from the agreement on a "technicality" that is enshrined in the statute.

The 2002 amendments to Family Code §§1612 and 1615 were enacted to prevent overreaching by more sophisticated parties to premarital agreements. I don't believe that they were enacted as get-out-of-jail-free cards for the more sophisticated party, but that was their effect in this case. The appellate panel says that "[t]he seven-day rule is obviously designed to protect parties who enter into a premarital agreement without legal representation"; apparently, there is no point at which a knowledgeable unrepresented party who proposes the agreement's terms is held to know what he was doing. A rule is a rule, and this one actually discourages legal representation by sophisticated parties.

To me, this is a perfect example of unintended consequences from a well-intentioned statute that created rules that replaced judicial discretion. Matthew was allowed to escape from an agreement *that he himself proposed* when he no longer wanted to give Claudia the benefits that he had been willing to give her before their marriage. Perhaps obtaining these benefits was the consideration supporting her willingness to get married. But neither motive nor equity matters in the face of a clear seven-day rule and the requirement of a separate written waiver for unrepresented parties. Claudia's sights will undoubtedly turn to put her attorney in the bulls-eye.

Another thing that bothers me about this case is the appellate court's casual dismissal of Evidence

Code § 622's conclusive presumption of the truth of recitals in a contract. In support of its holding, the panel cites *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal. App. 4th 1167, 99 Cal. Rptr. 2d 198, and says that under this case, "[t]he statute does not apply to situations not involving arm's length negotiations. . .." What I don't understand is why *Clarke and Akel* did not involve arm's length negotiations. Claudia was represented by an attorney and Matthew had stated that he was able to represent himself. This wasn't an adhesion contract; Matthew proposed it and accepted the additional terms suggested by Claudia's lawyer. Why is that not "arm's length?"

The panel then said that even if Matthew had actually had seven days to review the agreement before signing it, the agreement would still be invalid because he did not sign a separate written waiver of the rights he was giving up. Claudia gave it a good shot, arguing that this should not apply to an unrepresented party *who himself proposed the agreement*, but to no avail. Again, the statute says what it says, and means it, regardless of who drafted the agreement.

Can two unrepresented parties ever enter into a valid premarital agreement after January 1, 2002, when the amendments became effective? Yes, if they are knowledgeable enough to know about and read the UPAA and comply with its terms. My guess is that very, very few of the almost-married know enough to do so. They are silly enough to think that their own written agreement will be enforceable, but we know better. *Clarke and Akel* simply points this out.

Commentary

Stacy D. Phillips and Erica Swensson

We all know the adage, but it bears repeating in this case – "a man who acts as his own lawyer has a fool for a client."

Perhaps Mr. Clarke is just the fool the legislature had in mind when it crafted Family Code section 1615(c). Generally, we think of the non-drafting party as the victim in this situation. *Clarke & Akel* presents the opposite fact pattern – Mr. Clarke drafted the agreement himself, all the while insisting that he did not need counsel, and Ms. Akel sought enforcement. In the agreement, Mr. Clarke promised Ms. Akel (among other things) a life estate in Mr. Clarke's separate property residence, regardless of the duration of the marriage. Ms. Akel's attorney expanded the provision to require Mr. Clarke to pay all expenses for the residence through the term of Ms. Akel's life estate. However, the final, revised draft of the prenuptial agreement was presented to Mr. Clarke fewer than seven days before the agreement was signed. Moreover, Mr. Clarke did not execute a separate advisement and waiver of his rights under the agreement.

Section 1615(c) places the burden on the party seeking enforcement ("Proponent") of a prenuptial agreement to show that the agreement was "freely entered." In order to show that the premarital agreement was "freely entered," the Proponent must show that all four subsections of Section 1615(c) were present at the time the premarital agreement was signed. *To wit*, the Proponent must prove that at the time the prenuptial agreement was signed, the party against whom enforcement is sought: (i) was represented by counsel or waived counsel in a separate, signed document, (ii) had not less than seven calendar days between the time he or she first reviewed the agreement and was told to seek legal counsel, and the time he or she signed it, (iii) he or she was proficient in the language of the agreement and negotiations, and was advised in writing of the rights they were giving up, and (iv) the agreement was not obtained by fraud, duress, or undue influence. If the Proponent fails to show any of these four factors, the Court will invalidate the agreement on the basis that it was not "freely entered" into.

Here, the agreement failed for two reasons – Mr. Clarke was not given seven days between receiving and executing the revised agreement and he did not receive or execute a document explaining the rights he was relinquishing by signing the agreement.

The prenuptial agreement contained a recital that provided that the parties each had seven days to review the agreement before signing. This was demonstrably false, as Mr. Clarke received changes from Ms. Akel's attorney two days before the wedding. The Court of Appeal in *Clarke* held that Evidence Code section 622 (declaring recitations in an agreement to be conclusively true) does not apply in transactions which are found not to be made at

arm's-length. As the Court put it, "the seven-day review period may not be circumvented by inserting language into a premarital agreement acknowledging that both sides had seven days to review the agreement, when in fact they did not."

The court further ruled that the seven days began when Mr. Clarke received Ms. Akel's proposed changes. This ruling raises a few important questions: When will a court consider a premarital agreement to be "first presented" if a draft goes through multiple revisions? What changes will be considered "significant enough" to begin the seven-day period? Will *any* changes to a premarital agreement start the clock over? What about cosmetic and spelling revisions? Must the signed agreement be identical to the first agreement presented? Will all premarital agreements be considered not to be arm's-length transactions?

Even if the seven-day waiting period had been met, Ms. Akel would not have prevailed. Mr. Clarke never received and acknowledged a separate written description of the rights he was giving up by signing the agreement. This was a fatal flaw, and Ms. Akel would not have been able to enforce the agreement. The irony is that the court found that "even those provisions drafted by [Mr. Clarke] himself must be deemed to have been *involuntarily executed* as having been unaccompanied by the necessary advisement and waiver" (emphasis added). Without the advisement and waiver, Mr. Clarke was found by the Court not to have "voluntarily executed" an agreement that he himself drafted. It will be interesting to see how the case law continues its evolution in this area. A clear take-away is that drafting attorneys should not enter into negotiations for premarital agreements with unrepresented parties on the other side – the chances are high that the Court will invalidate any resulting agreement. Courts will also be hard pressed to validate prenuptial agreements between two unrepresented parties. Without counsel to advise them of their rights, they could never fulfill the requirements of Section 1615(c).

References: California Family Law Practice and Procedure, 2nd ed., §§ 201.10 (essential contractual elements for premarital agreement), 201.10[2][b] (premarital agreements are made at arm's length).

POINT OF VIEW

Joseph M. Doloboff, Esq., and Stacy Phillips, Esq.***

Tax Law Changes Directly (and Sometimes Indirectly) Related to Divorce

The recently enacted tax law changes made by the Tax Cuts and Jobs Act [P.L. 115-97], (the "Tax Legislation") affect virtually all types of income tax situations, and divorce is no exception. The tax changes to divorce law are so radical that the effective date, which was January 1st, 2018 for most

* Joseph M. Doloboff concentrates his practice in mergers and acquisitions, with a particular emphasis on tax law, and brings over 30 years of experience in both the public and private sectors, including working with clients in the high-technology, healthcare, communications, real estate, retail, and entertainment industries. Joseph is a member of the Board of Advisors for the BNA Series on Corporations, and a former adjunct professor at Loyola Law School. He has been named one of the finest cross-border tax lawyers by International Tax Review magazine and is the author of three BNA Tax Management portfolios covering various federal corporate tax issues. Joseph received his J.D. from Harvard Law School (Cum Laude) in 1985.

** Stacy Phillips is a Certified Family Law Specialist who primarily handles high-net-worth and high-profile divorce cases. She has more than 30 years of experience in every facet of family law, including complex divorce actions, high-conflict custody cases, domestic violence cases, same-sex divorce/dissolution matters, paternity cases, and pre-nuptial and post-nuptial agreements. Stacy has written and consulted for a number of legal and consumer publications, including the California Family Law Monthly, Divorce Magazine, Huffington Post, Los Angeles Daily Journal, Los Angeles Business Journal, and C-Suite Quarterly Magazine, and is the author of *Divorce: It's All About Control – How to Win the Emotional, Psychological, and Legal Wars* (ExecuProv Press). She frequently appears as a commentator on matrimonial issues on radio and television shows, including the Today Show, ABC News, 20/20, CNN Headline News, Fox Business News, and the Rachel Maddow Show. Since 2012, Stacy has served on a court-appointed team, mediating complex cases for the Family Law Court.

provisions, was made (absent an election for earlier application) for divorce agreements entered into after December 31st, 2018. In other words, the new tax divorce rules generally are applicable only to divorces occurring on January 1st, 2019, or later.

By far the most substantive change is the current elimination from adjusted gross income ("AGI") of alimony (or spousal support) paid by one ex-spouse to another. For example, assume that husband ("H") is required to pay alimony to wife ("W") of $100 per month. Under current law, H is entitled to exclude that $100 from his AGI. Thus, the tax on that $100 per month is W's problem. W pays tax on that $100 per month at her tax rate.

Under the Tax Legislation, for divorce agreements entered into after December 31, 2018, that rule is turned on its head. H must include that $100 per month in his AGI and pay tax on those payments at his personal tax rate. Meanwhile, W is entitled to exclude that $100 from her AGI. That is a major change to well-established tax law.

Some commentators believe that the effect of the Tax Legislation will be to severely reduce the amount of alimony paid. But that conclusion is not certain, especially when you consider the other changes made by the Tax Legislation. For example, the obligor's income may be from investment partnerships and taxed at only 20%, while the recipient's income may be all earned income taxed at a 35% rate. Moreover, the obligor may live in a jurisdiction with no state income tax (e.g. Texas), while the recipient may live in Los Angeles (and thus be subject to a state tax of 11%, which may be largely non-deductible).

Hence, it seems difficult to make blanket statements that will apply in all cases. But it still may be that alimony payments, looked at as a whole, get reduced. Indeed, some opine that spousal support will be approximately 20% lower. Moreover, some commentators fear that placing the tax on the obligor spouse will discourage the recipient from working at a job and increasing his or her overall tax burden.

The Tax Legislation also provides that divorce instruments entered before December 31, 2018 but modified after that date are grandfathered in. Although parties have the right to choose to be covered by the new rule, what will happen if one party wants to be grandfathered in and the other wants to be covered by the new rule? Can the trial court make that determination?

What we do know is that if it's beneficial to our client to have includible/deductible support, we need to move quickly to resolve the matter in 2018 in order to get the Judgment entered (getting it signed may not be enough) in 2018.

At this time we (and the courts) work with the Dissolution computer program for temporary spousal support. This computer program now needs to be modified to effectuate the tax legislation, although no one knows how the tax regulations will interpret the tax legislation. It is more important than ever to familiarize yourself with the Tax Tips letter included with every version of DissoMaster. To find it, look for Tax Tips in the Help menu.

In addition to the change in the includible/deductible nature of spousal support, the recent tax legislation has changed the magnitude of our mortgage interest and property tax deductions. The resulting spousal (and child) support will be affected by the reduction in the deductibility of mortgage interest and property tax such that the net spendable to the payer/payee may be significantly different than what was anticipated. Will these changes be considered a material change of circumstances to warrant a modification of support? And, of course, that can be very expensive to do.

Finally, lawyers who advise on divorce matters will need to keep an eye on matters not discussed herein (e.g., the child tax credit [now $2,000 instead of $1,000]) the higher education credit (capped at $1,500) and the Lifetime Learning higher education tax credit (which has a maximum of $2,000). Other rules, such as the one-time exclusion for amounts received from the sale of a home (a frequent side effect of divorce) remain available, but sometimes with minor (yet meaningful) changes.

The Tax Legislation introduces a whole new set of problems for lawyers who practice divorce law. Understanding the basic tax rules is just one more complexity in an area of the law that already presents us with plenty of issues.

CHILD SUPPORT

Uniform Interstate Family Support Act

Utah Judgment for Arrearages Due under California Support Order Was Not Controlling Order under UIFSA

In re Marriage of Connolly
(No. C080256 & C083238; Ct. App., 3d Dist., Div. 6. 2/9/18)
— Cal. App. 5th —, 2018 Cal. App. LEXIS 112
By Duarte, J. (Blease, Acting P. J., Hull, J., concurring)

A Utah judgment that determined the amount of combined spousal and child support arrearages due under a California support order was not the controlling child support order for purposes of the Uniform Interstate Family Support Act (UIFSA) [Fam. Code § 5700.101* et seq.*], and the California court had continuing exclusive jurisdiction over both spousal and child support. However, the California court erred in adding California interest to the Utah judgment, which it was required to grant full faith and credit.

Facts and Procedure. Joseph and Diane's marriage was dissolved in California in 2004. Joseph was ordered to pay both child support and spousal support. The parties and their children moved to Utah in 2004. Joseph returned to California in 2005, moved back to Utah in 2010, and returned to California to live in 2013.

In December 2012, when Joseph and Diane were both living in Utah, Diane transferred support enforcement from California to Utah. Following a hearing, the Utah Office of Recovery Services (Utah ORS) issued an order and decision finding that Joseph owed Diane $50,492 in combined spousal and child support arrearages, and the Utah court subsequently entered judgment in that amount ("the Utah judgment").

In October 2013, Joseph moved in California court to terminate spousal support. The California court reduced spousal support to zero but did not disturb the Utah judgment on arrearages. In 2014, the Utah ORS terminated its child support services and the El Dorado County Department of Social Services reopened its child support case. The California court issued an income withholding order against Joseph's pension.

Diane applied for a determination of spousal support arrearages and asked that interest be "reattached" to the Utah judgment. In February 2015, Joseph moved to terminate the California court's jurisdiction over support, arguing that Utah was the most appropriate state to enforce the Utah judgment. After a hearing, the trial court denied Joseph's motion for termination of jurisdiction and determined that the Utah judgment was subject to California's statutory interest rate on arrears because the Utah judgment was merely a clarification of the original California support order.

In January 2016, Joseph contested the enforcement of support arrearages, arguing again that California could not modify the Utah judgment to add interest. The trial court denied Joseph's motion with prejudice and denied a stay of enforcement.

Joseph appealed, contending that both orders were invalid because the California court lacked jurisdiction under UIFSA.

UIFSA Background. UIFSA governs the procedures for establishing, modifying and enforcing support orders in cases involving more than one state. Under UIFSA, only one support order may be effective at any given time, even if the parties move from state to state. This is accomplished by giving the state that makes a valid support order continuing exclusive jurisdiction to modify the order, provided the requirements for such jurisdiction are met.

Spousal and child support orders are treated differently under UIFSA. The state that issues a spousal support order has continuing exclusive jurisdiction over that order throughout the existence of the support obligation [Fam. Code § 5700.211(a)]. A state that issues a child support order, by contrast, has continuing exclusive jurisdiction as long as one of the parties or the child resides in that state, or if the parties consent to its jurisdiction [Fam. Code § 5700.205(a)]. Although a child support order may be registered and enforced in another state, it may not be modified until the issuing state loses its continuing

exclusive jurisdiction. When more than one support order has been issued, UIFSA provides rules for determining the controlling order [see Fam. Code § 5700.207(b)].

California Had Continuing Exclusive Jurisdiction over Child Support. Joseph argued that California lost its continuing exclusive jurisdiction over child support when all the parties moved to Utah, and that the Utah judgment on arrearages then became the controlling support order. Joseph premised his argument on the UIFSA definition of "support order," which includes a judgment for arrearages [Fam. Code § 5700.102(28)]. According to Joseph, the Utah judgment was the controlling order in 2013, because Utah was the child's home state at the time [see Fam. Code § 5700.207(b)(2)(A)].

Disagreeing with Joseph, the Court of Appeal concluded that the Utah judgment was not a "child support order" for purposes of UIFSA and therefore could not be the controlling order. The court explained that the definition of "child support order" must be read in the context of the statutory framework as a whole and harmonized with the rest of UIFSA, considering the object to be achieved and the evil to be prevented.

In this case, the Utah judgment did not modify or conflict with the California order, but simply calculated child and spousal support arrearages as of November 2012. The court concluded that the Utah judgment was a judgment of consolidated arrears under UIFSA [see Fam. Code § 5700.207(h)] and not the controlling order. California had jurisdiction over child support in 2015 and 2016 because Joseph was a California resident and Diane consented to jurisdiction. Finally, as the issuing state, California had continuing, exclusive jurisdiction over spousal support.

California Court Erred in Adding Interest to Utah Judgment. Joseph argued that res judicata and the full faith and credit clause of the United States Constitution barred the California court from adding interest to the Utah judgment. Under the Full Faith and Credit clause [article IV, section 1], a judgment issued by a court with jurisdiction has the same validity and effect in every court in the United States as it has in the state of the issuing court.

The Department argued that the Utah judgment was not res judicata on the issue of interest because the issue was not adjudicated in the Utah court. Rejecting this argument, the appeals court explained that it had to accord the Utah judgment "the same credit, validity, and effect" that it would have in Utah. Under Utah law, res judicata precludes relitigation of all issues that *could have been litigated* in the prior action and not just those issues that were *actually litigated* in the prior action. Because the issue of interest could have been litigated in Utah but was not, the Utah judgment was res judicata on that issue and the California court erred in adding interest.

Commentary

Dawn Gray

Determining the controlling order in interstate support matters is the primary purpose of UIFSA. That doesn't mean that it is not sometimes confusing, even for those of us whose job it is to understand it. Here, the controlling order was, and remained, the California child support order, even though Utah calculated arrears in both child and spousal support and issued a judgment for that amount. The Third District held that a judgment for arrearages was not a UIFSA "child support order" and neither changed the amount of the California support order nor otherwise modified it. I'm not certain that this kind of factual situation arises very often, but now we know that an arrearage judgment obtained in another state will not change California's continuing jurisdiction as the issuing state of a UIFSA controlling order.

However, that begged the question of whether or not California could add interest that the Utah order did not impose. Joseph argued that the California court could not add interest to the amount established in the Utah judgment because it was required to give it full faith and credit. That also did not answer the question of whether California could impose interest that was unadjudicated in Utah. The Third District cut through all of these arguments and held that under res judicata principles, "the Utah judgment could have included interest if the amount had been provided to the Utah ORS. Since the issue of interest could have been litigated and was not, the Utah judgment is res judicata on that issue."

Commentary

Vanessa Kirker Wright

I was struck by the fact that one of the orders on appeal was from September 2015. Given the deadlines for appealing orders, I wondered how it took three years to come to resolution. I looked at the Court of Appeal docket for answers. It seems that this was a knock down drag out fight between husband and Child Support Services. There were motions back and forth for sanctions (all denied) and there were multiple continuances sought and granted, some of which were contested. There was even one point when Mr. Connolly objected to a fee waiver request (which objection was politely returned to him when the fee waiver was granted). In short, the court's comment that Mr. Connolly had a "long-running dispute" with his ex-wife was an understatement.

One of my favorite sentences in this opinion is "[b]ecause the parties had filed multiple motions raising the same issues multiple times, the court asked the parties why they were in court and addressed only the issues they identified then even if those issues were not the same as those in the written motions." No doubt that was an interesting colloquy.

But to the main point – after going back and forth between Utah and California, and bickering the whole way, it turns out that Utah made a determination of arrearages on an order originating in California and then when it was California's turn to enforce the order, the Department of Child Support Services convinced the trial court to add interest to the Utah order, which is a no-no.

While unraveling this "long-running dispute," the court went through a fairly exhaustive analysis of the history of UIFSA and how it is applied. I will refer to this case whenever I have the need to review how UIFSA has changed over the years in California.

In addition, the court made it plain that while child support is governed by UIFSA, spousal support is not. And finally, this is another cautionary tale for those of us who litigate support in more than one state – if you want 10% interest on a lump-sum support arrearage that is determined by another state, make sure you make the claim for that rate of interest when you litigate the amount of arrearages.

References: California Family Law Practice and Procedure, 2nd ed., §§ 151.51 (continuing, exclusive jurisdiction to modify child support orders), 151.54[1] (rules for determining controlling order in UIFSA proceeding).

JUVENILE COURTS

Evidence

Briefly Noted

J.H. v. Superior Court
(No. B284802; Ct. App., 2d Dist., Div. 6. 2/15/18)
— Cal. App. 5th —, 2018 Cal. App. LEXIS 123
By Tangeman, J. (Gilbert, P. J., Yegan, J., concurring)

The Second Distinct held that the limitations on admitting expert testimony articulated in* People v. Sanchez *(2016) 63 Cal. 4th 665 do not render social service reports inadmissible in status review hearings held pursuant to the Welfare and Institutions Code.

Procedural Posture. The juvenile court terminated a father's reunification services upon determining that there was not a substantial probability of reunification [Welf. & Inst. Code § 366.21(g)(1)]. The father petitioned for extraordinary writ review of the juvenile court's order.

Overview. The Court of Appeal rejected the father's claim that the court violated his due process right to cross examine witnesses when it considered the 12-month report without giving him the opportunity to cross-examine its author. Welfare & Institutions Code section 281 permits the juvenile court to receive and consider social service reports in matters affecting the custody or welfare of a minor; the reports are admissible regardless of whether the authors are available for cross-examination [Welf. & Inst. Code § 358(b)(1)]. The juvenile court did not violate the father's due process right to cross-examine witnesses when it considered the report because the father had notice that another witness would testify instead of the report's author, he extensively cross-examined that witness, and he had ample opportunity to challenge the report. Moreover, when he learned that the

report's author would not be available at the hearing, he did not subpoena her. Although *Sanchez* holds that there is a confrontation clause violation when an expert seeks to relate testimonial hearsay unless there is a showing of unavailability and the defendant had a prior opportunity for cross-examination [Sanchez at 686], that holding does not extend to civil proceedings, because due process in civil proceedings is not measured by the rights accorded defendants in criminal proceedings.

References: California Family Law Practice and Procedure, 2nd ed., §§ 33.80 (custody evaluation reports); 110.20[4] (cross-examining opposition witnesses); Seiser & Kumli on California Juvenile Courts Practice and Procedure, Ch. 2 (dependency) (Matthew Bender 2017). This summary was derived from the California Official Reports Summary [see 2018 Cal. App. LEXIS 128].

Indian Child Welfare Act

Briefly Noted

In re R.H.
(No. B282855; Ct. App., 2d Dist., Div. 6. 1/31/18)
20 Cal. App. 5th 31, 2018 Cal. App. LEXIS 78
By Perren, J. (Yegan, Acting P. J., Tangeman, J., concurring)

A court had good cause to depart from the placement preferences of the Indian Child Welfare Act (ICWA), when the mother refused to provide information about any of her relatives, none of the child's paternal relatives were willing to provide a permanent placement, and the child's tribe represented that it was looking into possible placements for the child but failed to make an appearance.

Procedural Posture. The juvenile court terminated a mother's parental rights to her child, who had Native American ancestry, and selected adoption by his foster parents as his permanent plan [*see* Welf. & Inst. Code§ 366.26].

Overview. The Court of Appeal affirmed the order. The mother forfeited her contention that the juvenile court erred in finding good cause to depart from placement preferences of the Indian Child Welfare Act of 1978 [25 U.S.C. § 1901 et seq.] Even if the mother had preserved her claim, it would have failed. Because the mother willfully obstructed a county human services agency's efforts to place her child with a maternal relative, she could not be heard to complain that those efforts were insufficient. Furthermore, the Department made numerous attempts to use the services of the child's tribe to secure placement within the order of placement preference [*see* Welf. & Inst. Code § 361.31(g)] and the tribe represented that it was looking into the placement issue, right up until the section 366.26 hearing, but ultimately failed to make an appearance. Under the circumstances, the agency had no duty to independently determine whether the child could be suitably placed with an Indian family from another tribe. The court denied the mother's request to consider a letter from the child's tribe letter as additional evidence. In light of the fact the tribe never appeared in the matter, the juvenile court could implicitly conclude that the tribe had no present interest in participating in the determination of the child's permanent plan.

References: California Family Law Practice and Procedure, 2nd ed., § 176.08[2] (ICWA placement preferences); Seiser & Kumli on California Juvenile Courts Practice and Procedure, Ch. 2 (dependency) (Matthew Bender 2017). This summary was derived from the California Official Reports Summary [see 2018 Cal. App. LEXIS 78].

PARENTAGE ISSUES

Presumptions

Child's Physical Presence in Alleged Father's Home Is Not Enough to Satisfy Receiving Requirement of Family Code Section 7611(d).

W.S. v. S.T.
(No. H042611; Ct. App., 6th Dist. 2/1/18)
20 Cal. App. 5th 132, 2018 Cal. App. LEXIS 87
By Premo, Acting P. J. (Bamattre-Manoukian, Grover, JJ., concurring)

The Sixth District Court of Appeal rejected a biological father's contention that the trial court

misinterpreted the "receiving" requirement for being a Family Code section 7611(d) presumed parent. The appeals court agreed with the trial court that "receiv[ing] the child into [one's] home" requires regular visitation and the "assumption of parent-type obligations and duties," and not simply physically receiving the child into one's home, as the father contended.

Facts and Procedure. S.T. began a relationship with W.S. while she was separated from her husband, Martin. S.T. subsequently moved back in with Martin, without telling him that she was still romantically involved with W.S. When S.T. became pregnant in 2008, she told W.S. that he was not the father. Martin attended prenatal classes with her, attended the birth, and participated in the day-to-day work of parenting.

Shortly after the birth, an over-the-counter DNA testing kit confirmed that W.S. was the child's biological father. S.T. did not tell Martin.

According to W.S., he saw the child ("Daughter") almost every day between 2009 and 2010. Daughter spent the night at his apartment, which he shared with his mother, once or twice a week, often without S.T. W.S. bought a crib for Daughter and his apartment was full of her toys. W.S. stated that he made bottles for Daughter by mixing formula with warm water and that he fed her cut-up cooked vegetables when she began eating solid foods at six to nine months.

In 2013, Daughter was enrolled in preschool using W.S.'s last name. W.S. paid her tuition for a year, frequently picked her up at school, and participated in school activities and parent-teacher conferences. Daughter's teacher recalled that Daughter called W.S. "Daddy" and that she believed that S.T. and W.S. were "in a normal relationship." She could not recall ever seeing Martin at the school.

W.S. stated that he held parties for Daughter's birthdays; that he celebrated holidays with Daughter; and that he and S.T. took Daughter on trips. He did not, however, know the name of Daughter's doctor or dentist and never attended Daughter's medical appointments, and Daughter was not on his health insurance.

S.T. related a different version of events. According to S.T., W.S. exaggerated the closeness of his relationship with Daughter. S.T. said she brought Daughter to visit W.S. once or twice a week during her first year, and that Daughter stayed overnight at W.S.'s home only once while she was an infant. She also disputed W.S.'s account of feeding Daughter, saying she would not have permitted him to give Daughter formula made with water that hadn't been boiled first and that Daughter did not begin eating solid foods until she was more than a year old.

S.T. stated that when Daughter was in daycare, she took her for occasional short visits with W.S. S.T. acknowledged that W.S. paid half of Daughter's preschool tuition, that he frequently went with her to pick up and drop off Daughter at school, and that Daughter occasionally went to W.S.'s apartment to play after preschool. She remembered Daughter staying overnight at W.S.'s apartment three or four times, although text messages indicated that, in fact, Daughter stayed there 10 or more times. S.T. stated that she brought Daughter to W.S.'s house on her birthday, Christmas and Halloween, and that she had gone on trips with Daughter, W.S., and W.S.'s mom.

S.T. finally told Martin about her relationship with W.S. in July 2014. Although Martin initiated divorce proceedings, they reconciled within a month.

In August 2014, W.S. filed a petition to establish a parental relationship with Daughter, and requested joint legal and physical custody and equal visitation. In her response, S.T. stated that Martin was conclusively presumed to be Daughter's father, because she was born during S.T.'s marriage to Martin while they were living together [*see* Fam. Code § 7540]. W.S. argued in his brief that the conclusive presumption of paternity should not apply, because S.T. had filed for divorce from Martin in 2006 and S.T. and Martin were not cohabiting at the time Daughter was conceived. W.S. argued that both he and Martin were presumed fathers under Family Code section 7611(d) and that his presumption of parentage should prevail over Martin's presumption [*see* Fam. Code § 7612(b)]. S.T. filed a declaration stating that she was cohabiting with Martin at the time Daughter was conceived and argued that the marital presumption of paternity has precedence over the section 7611(d) presumption.

The trial court found that there was a conclusive presumption that Martin was the father, based on marriage and cohabitation, and that W.S. was not a presumed father. The court stated that W.S. had not received Daughter into his home, as required by section 78611(d), because he had not met the standard

of "regular visitation," which requires the "assumption of parent-type obligations and duties." Because he was not a presumed parent, W.S. was not entitled to custody or visitation. W.S. appealed.

Trial Court Did Not Misinterpret Receiving Requirement. Section 7611(d) is part of the Uniform Parentage Act (UPA) [Fam. Code § 7600 *et seq.*], which accords presumed fathers greater rights than biological and alleged fathers. Section 7611(d) creates a rebuttable presumption that a person who "receives the child into his or her home and openly holds out the child as his or her natural child" is a presumed parent. However, the statute does not specify what constitutes receipt of a child into one's home.

On appeal, W.S. argued that the receiving requirement of section 7611(d) requires only that the parent physically take the child into his or her home, and that the trial court therefore erred when it concluded he did not "receive" Daughter into his home. However, W.S. did not argue that the court erred in finding that the evidence did not satisfy the more demanding "regular visitation" standard used by the trial court.

The appeals court explained that the section 7611(d) "receiving" requirement came from Civil Code former section 230, which provided that a father could legitimize a child born out of wedlock by publicly acknowledging the child as his own and receiving the child into his family. W.S. relied on cases decided under this provision, which held that even brief visits by the child could satisfy the "receiving" requirement [*citing* In re Richard M. (1975) 14 Cal. 3d 783, 794 (requirement satisfied by father's acceptance of child into home for occasional visits); Estate of Peterson (1963) 214 Cal. App. 2d 258 (father received daughter into home when she spent two weekends there)]. Since the UPA abolished the concept of "illegitimacy," cases have held that the child's physical presence in the alleged father's home is not enough to satisfy the receiving requirement of section 7611(d) [*see, e.g.,* In re D.M. (2012) 210 Cal. App. 4th 541, 553 (section 7611(d) requires "abiding commitment to the child"). Instead, the appeals court explained, a presumed father must have a parental relationship with the child based on assuming parental responsibilities, demonstrating commitment to the child, and providing support. This is the standard the trial court applied here, said the appeals court.

The appeals court rejected W.S.'s argument that the cases the trial court relied on, including *In re A.A.* (2003) 114 Cal. App. 4th 771 and *In re Cheyenne B.* (2012) 203 Cal. App. 4th 1361, limited their holdings to dependency proceedings. Although determining presumed parent status in a dependency proceeding serves a different purpose than in a parentage proceeding, the appeals court reasoned that it would not make sense to interpret the section 7611(d) "receiving" requirement differently in different types of proceedings.

W.S. Not Entitled to Visitation under Family Code section 3100. W.S. also contended that as Daughter's biological parent, he had a right to visitation under Family Code section 3100, notwithstanding his failure to achieve presumed parent status. Section 3100(a) provides, in relevant part, that when making a joint custody order, "the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child."

The appeals court rejected W.S.'s argument for two reasons. First, the court found that section 3100 was inapplicable to this case, because no joint custody order was made. Second, the court reasoned that a biological father such as W.S. is not a "parent" for the purpose of section 3100(a). Section 3100 applies to both dissolution proceedings and proceedings brought under the UPA. Although section 3100 itself does not define "parent," the UPA defines parentage as "the legal relationship existing between a child and the child's natural or adoptive parents" [Fam. Code § 7601(b)] and provides that the parentage relationship may be established by meeting the requirements of section 7611(d). In other words, a biological father is not a "natural parent" unless he is a presumed parent. Here, the trial court found that W.S. did not establish that he was a section 7611(d) presumed parent, which meant that he was not a "natural parent" as defined under the UPA and was not entitled to visitation as a parent.

Commentary

Vanessa Kirker Wright

Family relationships are not neat and clean, and this case is a perfect example of the difficulties that

face trial judges in complex parentage actions. (As an aside, I love that bio-mom and bio-dad are referred to by their initials – presumably for the sake of confidentiality – but that bio-mom's husband [legal dad] is just plain "Martin").

I was heartened to see an appellate court grapple with the meaning of the phrase "receives the child into his or her home." But I am not satisfied that I understand what the court meant. In the "Statement of Facts" portion of the opinion, specifically in sections 1.b. and 1.c., the court recites evidence presented to the trial court, including W.S.'s and S.T.'s competing assertions and testimony by third party witnesses. Unfortunately, the court never lets us in on what evidence the trial court found credible, which creates confusion. W.S. and some witnesses testified (in part) that:

- His apartment was full of daughter's toys;
- For the first year of her life, he saw her almost every day;
- Daughter stayed with him overnight once or twice a week;
- He fed her and cared for when she stayed with him;
- He took her on birthday trips (sometimes with S.T.);
- Daughter was enrolled in pre-school using W.S.'s last name;
- Daughter called him "Pa" or "Daddy";
- W.S. paid for preschool, and
- He participated in school activities and parent-teacher conferences.

If all of those things were true, then it is difficult to see how the trial court found that W.S. did not "receive [Daughter] into his home". If only some of those assertions were true (e.g. if the child did not stay with W.S. or if he did not care for or feed her, or if she only stayed with him once or twice in five or six years) then the resultant finding (no "receipt") is understandable. But the court never tells us which of the above assertions the trial court found to lack credibility.

Further, the opinion supports the trial court's finding that there was no "receipt" because W.S. failed the trial court's discretionary standard. Frankly, the trial court made a fragmented analysis and the Court of Appeal affirmed it. The "receipt" and "holding out" of a child as your own are intended to focus the court on the relationship between the hopeful parent and the child, and, frankly, it is the child that we should be focused on. Here, the trial court held W.S. to a pretty high (and ambiguous) standard – we never really find out what W.S. could have done to convince the court that he received this child into his home. But worse, the child clearly thought of W.S. as "Pa" or "Daddy," and was clearly attached to him as a parental figure. But that salient fact was completely ignored in the opinion and apparently by the trial court. A child's needs and best interests should come first, middle and last. Here, Daughter's perspective was overlooked in favor of a highly technical, piecemeal analysis of a single statutory phrase.

Commentary

Marshall S. Zolla

Here we go again. The conundrum of parentage issues: Biological father. Natural father. Alleged father. Adoptive father. Presumed father. We have learned that the Uniform Parentage Act [Family Code Section 7600 *et seq.*] distinguishes presumed fathers from biological and alleged fathers. A father is not elevated to presumed father status unless he has demonstrated a commitment to the child and the child's welfare, regardless of whether he is biologically the father. The determination of legal status directly affects custody and visitation rights, child support, heirship and estate planning, citizenship; the list goes on.

A bio-dad is thus not automatically a legal dad. To achieve presumed parental status, a person must fulfill the requirements of Family Code section 7611. One of these requirements is that the man (or woman) seeking presumed parent status "receives the child into his or her home and openly holds out the child as his or her natural child." But the statute does not define what actions constitute "receiving" a child into a home. This is the focus of *W.S. vs. S.T.*

The opinion impressively reviews prior judicial analysis of the "receiving" element. It rejects the contention that merely physically taking a child

into one's home satisfies the requirement. Instead, the "receiving" component involves such factors as whether the man actively helped the mother with prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; and whether and how long he cared for the child, including such pedestrian details as feeding and cleaning up after child, changing her clothing, bathing her, seeing to her naps, putting her to bed, taking her for outings, playing games with her, disciplining her, and buying her clothes, toys and food and other essentials. The father in *W.S.* was not accorded presumed father status because he did not satisfy the receiving into home criteria required by Section 7611(d).

The court makes an interesting (and often misunderstood) point in acknowledging that there is some overlap in the factors used to determine whether a man is a presumed father under section 7611 and whether he is a father within the meaning of *Kelsey S.* As explained in *In re Elijah V.* (2005) 127 Cal. App. 4th 576, a *Kelsey S.* father is a biological father who came forward to assert his parental rights at the first opportunity after learning of his child's existence, but was prevented from becoming a presumed father under section 7611(d) by the unilateral conduct of the mother or a third party.

These cases are equally fact intensive and emotional. Some cases involve a father seeking parentage and enhanced legal rights. Others involve a mother's trying to exclude the father from the child's life. Alternative scenarios see different men competing for presumed father status. This is why familiarity with the statutes, evolving case law, policy considerations, and the complex mix of fact and emotions create a scenario which calls for careful and compassionate legal analysis. *W.S. v. S.T.* is a good place to start.

References: California Family Law Practice and Procedure, 2nd ed., §§ 31.12[4] (discussing § 7611(d) presumption), 31.06[2] (jurisdiction to grant visitation).

TAXATION

Spousal Support

Voluntary Spousal Support Payments Held Nondeductible

Devaleria (David Alan) v. Commissioner
(No. 18396-16S, U.S. Tax Ct., 1/31/18)
T.C. Summary Opinion 18396-16S
By Guy, Special Trial Judge

Payments to a former spouse after the end of the obligation period fixed by court order were found to have been voluntarily made and therefore did not qualify for alimony tax treatment.

Facts and Procedure. David and his former wife were married for 19 years before their separation and divorce in 2008. Under a court order, David was obligated to pay spousal support for a period set to end in August 2013. A subsequent court order made adjustments for arrearages and interest but left blank the termination date for payment obligations. David made payments to his ex-wife in irregular amounts and often not as scheduled. In 2013, he paid her sums throughout the entire year. In 2014, he notified her that he would not be paying any further support as his obligation had terminated in August of the prior year.

On his 2013 federal income tax return, David deducted the full amount of the spousal support he had paid during the entire year. The Internal Revenue Service disallowed the deduction for payments made after July 31, 2013, and David took the case to the Tax Court.

Voluntary Alimony Payments Are Not Deductible. Payments that qualify for alimony tax treatment are deductible by the payor and taxable to the payee [former I.R.C §§ 71, 215 (applicable to support orders entered before January 1, 2019)]. To qualify for the deduction, the payments must have been made pursuant to a divorce or separation instrument [former I.R.C. § 71(b)(1)].

The Tax Court held that payments made after the date David's obligation under the court order expired were voluntary and therefore non-deductible. David

argued that the modification that left the termination date blank effectively extended his obligation indefinitely. The Court rejected this position, noting that David himself had notified his ex-wife that his obligation had expired in August 2013. David further argued that all of the payments were intended for spousal support and that his ex-wife had accepted them as such. The Court rejected this position also, as intent is not a factor in determining the application of alimony tax treatment.

Commentary

Robert Polevoi

It isn't clear why David continued making payments after his obligation expired. Most likely he simply lost track and continued paying until he realized his error and informed his ex-wife not to expect more payments. "Voluntary" support payments must be quite unusual, but it's worth knowing that they cannot be deductible because alimony tax treatment can only apply to legal obligations under a divorce or separation instrument. Other payments, even if intended for support, are treated as gifts for tax purposes.

Note that this case was decided as a Summary Opinion under the Small Tax Case procedures of the Tax Court. Although these decisions may not be cited as precedent, they typically reflect uncontroversial applications of settled law to simple facts, and are therefore illustrative of how the federal tax law is applied in practice.

References: California Family Law Practice and Procedure, 2nd ed., § 160.03 (requirements for alimony tax treatment).

Innocent Spouse Relief

Taxpayer Entitled to Innocent Spouse Relief in Regard to Unreported Income from Ex-Spouse's Retirement Account

Bishop (Colin C.) v. Commissioner
(No. 22108-16S, U.S. Tax Ct., 1/4/18)
T.C. Summary Opinion 2018-1
By Cohen, Judge

An ex-husband was granted innocent spouse relief with respect to his ex-wife's withdrawal from her separately-owned retirement account. The Tax Court found that he lacked actual knowledge of the transaction, despite the fact that the funds were deposited in the couple's joint account.

Facts and Procedure. Colin and Lisa were married on October 31, 2007. They were temporarily separated twice during 2014, finally separated in June 2015, and divorced in 2016. During 2014, Lisa withdrew over $15,000 from her retirement account, deposited $6,000 in the couple's joint bank account, and used the remainder for her daughter. The withdrawal was not reported on the couple's 2014 joint federal income tax return. When the Internal Revenue Service discovered the unreported income, Colin sought innocent spouse relief with respect to the full amount. When the IRS denied relief, Colin took the issue to the Tax Court.

Innocent Spouse Provisions. Both spouses are generally held jointly and severally liable for any tax liability with respect to a year for which a joint return was filed. However, a spouse may be relieved of liabilities attributable to the other spouse under the innocent spouse provisions of Internal Revenue Code Section 6015. In the case of divorced or separated spouses, relief is available where the requesting spouse lacked actual knowledge of misreporting [I.R.C. § 6015(c)].

Colin Entitled to Relief because He Lacked Actual Knowledge of Lisa's Withdrawal. While acknowledging his own fault for failing to consult the joint bank account statements, whereby he might have discovered the deposit, Colin argued that Lisa had deceived him by not informing him of the retirement account withdrawal. He had known of the retirement account and had reported much smaller withdrawals Lisa made in prior years. Lisa, intervening in the case, argued that no deceit was involved and that she had simply forgotten the transaction when the tax return was being prepared. She insisted that Colin must have known about the deposit in the joint account because he made subsequent payments from that account.

The Court held that, on this evidence, and in spite of arguable constructive knowledge, Colin was not shown to have had actual knowledge of the retirement

account withdrawal. Thus he was granted innocent spouse relief with respect to the tax on this amount.

Commentary

Robert Polevoi

This case could easily have gone the other way, as the Court could have dismissed the possibility that Colin was unaware of the deposit in a joint bank account of a sum that was large from the couple's perspective. The fact that the couple had separated twice during the year at issue likely made a difference, as it suggested at least the possibility that Lisa had a deliberate intention to deceive Colin. A large fraction of the withdrawal was not deposited in the bank account, and as Lisa did not tell Colin of it, he could not possibly have known about it. This is a good example of a case in which the stricter standard of "actual knowledge" protected the taxpayer, where the alternative standard of "reason to know" might not have. The Court as much as acknowledged that Colin should have known about at least the bank deposit and the obligation to report it, but conceded that he very likely didn't know in fact.

Note that this case was decided as a Summary Opinion under the Small Tax Case procedures of the Tax Court. Although these decisions may not be cited as precedent, they typically reflect uncontroversial applications of settled law to simple facts, and are therefore illustrative of how the federal tax law is applied in practice.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., § 160.60[6] (innocent spouse relief).

CUMULATIVE SUBJECT INDEX

The following is an index of the subject matter covered in the California Family Law Monthly for the current volume (January 2018 forward). This table directs the subscriber to the page on which each subject is discussed.

Page

CHILD CUSTODY
Modification 7
CHILD SUPPORT
Uniform Interstate Family Support Act 10, 46
COMMUNITY PROPERTY
Equalization Payment 10
Management and Control 14, 23
DOMESTIC VIOLENCE
Renewal of Restraining Order 1
JUVENILE COURTS
Disposition 15
Evidence 48
Indian Child Welfare Act 15, 29, 49
MILITARY SPOUSES
Servicemen's Group Life Insurance Act of 1965 16
PARENTAGE ISSUES
Presumptions 49
PREMARITAL AGREEMENTS
Procedural Requirements 39
Review Period 30
PROCEDURE IN GENERAL
Federal Court Abstention 31
Statement of Decision 19
Statutes of Limitations 33
TAXATION
Deductibility of Attorney's Fees 20
Innocent Spouse Relief 54
Spousal Support 21, 35, 53
Transfers Incident to Divorce 36

CUMULATIVE TABLE OF CASES

The following is a cumulative list of the cases summarized in the California Family Law Monthly for the current volume (January 2018 forward). This table directs the subscriber to the page on which each case is discussed. Readers should check the subsequent history for each case in the official advance sheets before relying on any case appearing in this table.

Page

A.F., In re, — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1141 15
Alexzander C., In re, — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1108 15
Barry (William M.) v. Commissioner, T.C. Memo. 2017-237 20
Bishop (Colin C.) v. Commissioner, T.C. Summary Opinion 2018-1 54
Cima-Sorci v. Sorci, 17 Cal. App. 5th 875, —Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1043 10
Clarke & Akel, Marriage of, In re, — Cal. App. 5th —, — Cal. Rptr. 3d —, 2018 Cal. App. LEXIS 57 30
Clarke & Akel, Marriage of, In re, 19 Cal. App. 5th 914, 2018 Cal. App. LEXIS 57 39
Connolly, Marriage of, In re, — Cal. App. 5th —, 2018 Cal. App. LEXIS 112 46
Cook v. Harding, — F. 3d —, 2018 U.S. App. LEXIS 887 31

Dalgleish and Selvaggio, Marriage of, In re, 17 Cal. App. 5th 1172, — Cal. Rptr. 3d—, 2017 Cal. App. LEXIS 1068 10

Devaleria (David Alan) v. Commissioner, T.C. Summary Opinion 18396-16S 53

E.R., In re, 18 Cal. App. 5th 891, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1142 29

Elizabeth M., In re, — Cal. App. 5th —, — Cal. Rptr. 3d —, 2018 Cal. App. LEXIS 42 29

F.P. v. Monier, 3 Cal. 5th 1099, — Cal. Rptr. 3d —, 2017 Cal. LEXIS 8923 19

Garcia v. Escobar, 17 Cal. App. 5th 257, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1005 1

J.H. v. Superior Court, — Cal. App. 5th —, 2018 Cal. App. LEXIS 123 48

Kamgar, Marriage of, In re, — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1092 14

Kamgar, Marriage of, In re, 18 Cal. App. 5th 136, 226 Cal. Rptr. 3d 234, 2017 Cal. App. LEXIS 1092 23

Koester (J. Drew) v. Commissioner, T.C. Summary Opinion 2017-88 35

Logue (Courtland L., Jr.) v. Commissioner, T.C. Memo. 2017-234 21

Priscila N. v. Leonardo G., 17 Cal. App. 5th 1208, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1069 3

R.H., In re, 20 Cal. App. 5th 31, 2018 Cal. App. LEXIS 78 49

Stapleton (David W. & Melinda) v. Commissioner, T.C. Summary Opinion 2017-87 36

Steiner, Marriage of, In re, 17 Cal. App. 5th 1165, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1062 16

Vargas and Ross, Marriage of, In re, 17 Cal. App. 5th 1235, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1080 7

W.S. v. S.T., 20 Cal. App. 5th 132, 2018 Cal. App. LEXIS 87 49

Yeh v. Tai, — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1145 33