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Family Means No One Gets Left Behind or Forgotten*

We need to restore faith in our courts' ability to meaningfully enforce modern family rights and responsibilities and ensure everyone equal access to justice.








Spotlight



Elder Court: Streamlining the Legal Process to Ensure Access to Justice

The concept of Elder Protection Courts has spread across the state and the country, with Contra Costa County serving as a mentor court.



Helping Support Children

The Dept. of Child Support Services is available to anyone who wants to have paternity for their child established, needs to obtain and enforce child support and health insurance orders or to enforce an existing order.

News & Updates



Children, Families & the Law Certification Program at JFKU Law

JFKU College of Law implemented a specialized curriculum focused on children and families. To train the most effective practitioners, we combined the expanded substantive law covered with a substantial



Laugh for a Good Cause: Food From the Bar Comedy Night

Don't miss our annual Comedy Night with nationally renowned comedian Don Reed headlining this year.

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year - in six print and 12 online issues.

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Inside Guest Editor's Column: April 2014

Tuesday, April 01, 2014



It was with pleasure, though a bit of trepidation, that we undertook the honor of guest editing this issue of the Contra Costa Lawyer on “The Contra Costa Family.” This is the first time that this issue, traditionally covering only family law, was expanded to encompass other areas of law that overlap with family law, and undoubtedly affect our notion of “family” and families in Contra Costa County. We were thrilled with the interest and the outpouring of articles that were received for inclusion in this issue, introduced as follows:

Retired Commissioner Berkow’s article, “Family Means No One Gets Left Behind or Forgotten,” discusses the battles to modernize family rights and responsibilities, and the danger of these being lost without adequate funding for enforcement and to improve current resolution processes.

R. Ann Fallon, Esq., interviews Matt Taddei, a Life Insurance Expert, regarding the

controversial recent appellate court decision, *In re Marriage of Burwell* (2013) 221 Cal. App. 4th 1. The interview discusses the problems that any expert faces in applying the *Burwell* rules.

Melinda Self, Esq., Supervising Attorney of the Contra Costa County Department of Child Support Services, writes regarding the recent successes of the department, including the Smith/Ostler Program commenced in May 2013. Since the inception of the program, DCSS has collected over \$1.5 million in additional support for children and families.

Rhonda Barovsky, PsyD., explores the challenges faced by the family courts concerning the issue of undocumented domestic violence in evaluating custody arrangements. Her article discusses the phenomenon whereby two parents who have experienced Interpersonal Violence (IPV) in a marriage or non-marital relationship, are ordered by the Family Court to share a joint physical custody parenting plan after separation due to the absence of documentation of such abuse.

As a Professional Family Supervisor, Barbara Kelley discusses the children of families in transition and her suggestion to standardize the support that professional custody supervisors can provide to Family Court Services in the best interest of these children.

Retired Judge Cram's article explores the inception and development of the Contra Costa County Elder Court. She examines the particularized need for such a court to serve elderly litigants, and how Contra Costa has made a concerted effort to promote justice for the elderly in a way that maximizes access to the system.

Michael LaMay discusses recent developments in legislation regarding undue influence, as well as a recent case interpreting undue influence. The article goes beyond mere statutory interpretation, explaining the purpose behind the recent changes to the statute, and analyzing undue influence in particular situations, such as between husband and wife.

Daniel Quane writes on the issues that parties face when pre-nuptial agreements are litigated in probate proceedings. This article investigates the interplay between issues of family law and probate law, discussing results arising both from the face of the pre-nuptial agreement, as well as probate remedies available in the event the pre-nuptial agreement fails.

Andrew Verriere's article provides an overview of how plaintiffs can obtain writs of attachment in financial elder abuse cases. This remedy, which is usually only available in certain types of cases, is a valuable tool for plaintiffs pursuing claims of financial elder abuse. The article explains the purpose behind the inclusion of this pre-judgment remedy, and provides a step-by-step explanation of how to obtain and implement a writ of attachment.

Ryan Szczepanik's article explores the difficulties practitioners will face when litigating issues involving financial abuse of a dependent adult. He discusses how the courts have attempted to define the relatively vague term of "dependent adult," and provides guidance to practitioners in the area.

Finally, we look forward to reading the responses to the April Coffee Talk topic: "How does being a lawyer affect your family life?" In coming up with the topic at the editorial board meeting, we had a brief but lively discussion ourselves. Being a lawyer, and being

a member of a family in any form, are two topics on which we all seem to have a great deal to say; the manner in which these are intertwined are no doubt deeply personal to each of us.

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Family Means No One Gets Left Behind or Forgotten*

Tuesday, April 01, 2014

Fifty Years of Expanding Rights and Responsibilities



We start with a brief reminder of just how far we have come in expanding the rights and responsibilities concerning children and families over the past 50 years in key areas of parentage, custody and visitation, family violence, support, marriage and divorce.

Beginning with parentage, we've moved from laws under which a child born outside of marriage had no legal standing to make any claims, to the Uniform Parentage Act, which removed all legal incidences of illegitimacy and significantly expanded legal bases to establish paternity. Artificial reproduction technology has advanced to provide new opportunities to become a parent with legal complications for all involved in the process.

Kin guardianships are now recognized as a more permanent option where adoption is inappropriate or unavailable, and juvenile courts now facilitate earlier assessment of children for adoption. Under a new law effective just this year, where more than two people have claims to parentage, a California court can (if not to do so would be detrimental to the child) recognize that a child may have more than two parents.

Custody awards favoring one parent have evolved to become more consistent with our modern view that children are generally better served by significant time with both parents. Where ending close relations with grandparents, stepparents or previous guardians would cause detriment to a child, we have created limited visitation rights for these significant others.

We've gone from unawareness to training both police and the judiciary to recognize and prevent family violence. We've created protocols to make all divisions of the court work together for effective enforcement of civil and criminal restraining orders. We've also become increasingly more aware of elder abuse by family members and caregivers, and the unique crossover issues litigated in criminal, probate and family divisions of the court.

As to support, we've gone from unpredictable child support awards to the establishment of mandatory uniform guidelines based on the relative financial and custodial situation of both parents. We've also increased the levels of support actually provided to our children by tying a state's welfare grant to its success in collecting child support obligations.

In the area of divorce and marriage requirements, as of 2010, all states now recognize no-fault divorce. For several years, California has required mandatory financial disclosure in all dissolution actions and has confirmed that spouses owe a fiduciary duty to one another. While maintaining the right to regulate marriage as the provenance of the states, states may not deny marriage based on race or failure to pay child support.

Late last year, the Supreme Court ruled in the *Windsor* case that federal law cannot preclude a state's right to *permit* same-sex marriage and will soon have to determine whether a state may constitutionally *prohibit* marriage based on gender or refuse to honor the decree of another state that permits it.

More Rights, More Cases and Fewer Resources

The expansion of family rights and responsibilities has led to concomitant increases in the number and nature of family disputes addressed by the courts. The final report of the Elkins Commission, established by the California Administrative Office of the Courts, was published in 2010 and acknowledged that California courts were seriously understaffed with an unsupportable workload of 1,025 new family law cases per judicial officer. This statistic did not include the significant number of unresolved actions in cases filed in previous years.

The Elkins Commission recommended a 39 percent increase in judicial officers to manage the workload. Although courts have made improvements in developing self-help centers and expediting some aspects of case management, the fundamental challenge of understaffing exposed by the Elkins Commission remains unaddressed today and has been significantly exacerbated by the last three years of brutal budget cuts.

Unlike Juvenile Court, where all parents and children are provided court-appointed counsel, 75 percent of all Family Court litigants are self-represented. The situation has been worsened by the reduction or elimination of many low-income legal assistance programs and budget cuts to the office of the Family Law Facilitator that each county was mandated to establish in 1996, in order to provide self-represented litigants assistance with spousal and child support.

The results have been frustrating for everyone. Without the benefit of representation, litigants make increased demands for information, make more filing errors, and appear for hearings unprepared and with unreasonable expectations based on a lack of knowledge of the law or courtroom protocols. Judges spend far too much of their precious time and resources dealing with these cases.

Those litigants with the means to avoid the delays inherent in this underfunded, understaffed court system find relief outside the courts by hiring private mediators, custody evaluators and judges, creating a two-track system of justice: One for those with the means to purchase a speedy resolution to disputes and one for everyone else. When our hard-won family rights and responsibilities are handled so inadequately, they become illusory and everyone's faith in our system of justice is dangerously undermined.

We Must Fund and Improve

We cannot reverse the expansion of family rights. Dr. King has counseled that "the arc of the moral universe is long, but it bends towards justice." But this justice arc requires community action that uplifts rather than degrades us. We need to restore faith in our courts' ability to meaningfully enforce modern family rights and responsibilities and ensure everyone equal access to justice. Above all, this will require a commitment to provide courts adequate funding for family disputes.

However, funding alone is insufficient. We must also rethink the adversarial system that we've had in place for over a century. New legislation is required to expand the current mandate for pre-hearing mediation of custody issues to all family disputes, with the

exception of family violence. This new resolution process should utilize paralegals for proper triage and mediating attorneys working with collateral experts appointed by the court as neutrals on specific issues involving child development, parenting, accountants, actuaries, property valuation, vocational evaluation, substance abuse assessment, medical examination and more as needed. The new process should draw from existing private cooperative and collaborative practice that is presently beyond the financial reach of most family litigants.

For matters unresolved by mediation, we need legislation that would establish actual consequences for the small percentage of repeat litigants that clog up the process and squander increasingly scarce court resources. One approach to consider in this regard would be to require courts to screen for non-emergency matters filed by “frequent filers.” There are also feasible ways of discouraging frivolous or abusive repeat filers, including the creation of a separate calendaring system (slow rather than fast track) and the imposition of evidentiary and financial sanctions.

It is imperative that we preserve the progress that has been made and secure hard-won rights and responsibilities for our children and families. To remedy the erosion of confidence in our court system and avoid further miscarriages of justice, we must ensure meaningful enforcement of these rights by guaranteeing adequate funding and by acting together to secure more effective dispute resolution processes. The plain truth is that rights and duties are not enough—society must also provide the means to vindicate those rights and enforce those duties. Only then will family truly mean that no one gets left behind or forgotten.

Commissioner Josanna Berkow retired in 2013 from the Contra Costa Superior Court after 20 years on the family law bench and currently works as a private judge offering lawyers involved in family disputes an alternative to standard court process based on mediation. She is also an adjunct professor at the John F. Kennedy College of Law in Pleasant Hill, where she serves as faculty advisor for a new specialized curriculum that she developed titled Children, Families & the Law, and at Golden Gate University School of Law in San Francisco, where she teaches a new course titled Alternative Dispute Resolution for Children & Families.

**Quote by David Ogden Stiers*

How To: Writs of Attachment in Financial Elder Abuse Litigation

Tuesday, April 01, 2014

A plaintiff in a financial elder abuse action may seek attachment of the property of a defendant for any damages sought under California Welfare and Institutions Code section 15657.5.[1] Importantly, this includes not only compensatory damages,[2] but also attorney's fees and costs,[3] as well as punitive damages.[4] Thus, when calculating the value of property to be attached, the plaintiff may take into account anticipated attorney's fees and costs, and a reasonable multiplier for purposes of anticipating punitive damages.

There are, in effect, three requirements to obtaining a writ of attachment pursuant to California Welfare and Institutions Code section 15657.01: (1) the action must include a count for financial elder abuse; (2) there must be a readily ascertainable amount in dispute; and (3) the plaintiff must be able to demonstrate that it is more likely than not that the plaintiff will prevail on the claim of financial elder abuse.[5]

If these circumstances exist, a plaintiff may seek the issuance of a writ of attachment by following certain strictly construed procedures.

Step 1: Identify the Property to be Attached

As a preliminary step, a party seeking a writ of attachment should make certain that there exists readily identifiable, non-exempt property that is financially viable to attach.[6] More practically, however, a plaintiff should seek to identify parcels of real property, bank accounts or other property that is not only attachable, but financially viable to attach.

Step 2: Determine Whether to Give Notice or Appear *Ex Parte* Without Notice

Once property is identified, the plaintiff must decide how he or she will go about obtaining a right to attach order—the order that permits the court clerk to issue a writ of attachment. There are, in effect, two ways to obtain a right to attach order: (1) after a noticed hearing[7] or (2) at an unnoticed *ex parte* hearing.[8]

In order for a court to consider issuing a right to attach order *ex parte* without notice, the court must make certain findings, such as that “it may be inferred that there is a danger that the property sought to be attached would be concealed, substantially impaired in value, or otherwise made unavailable ... if issuance ... were delayed until the matter could be heard on notice,” or “[a]ny other circumstances showing that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice.”[9]

In actions involving allegations of fraud or concealment, plaintiffs should take full advantage of this opportunity to attach property at the outset of a case before an opposing party has a chance to hide, dispose of or otherwise make unavailable property necessary to satisfy the possible judgment.

Step 3: Obtain the Factual Showing Necessary to Substantiate a Right to Attach Order

In order for the court to issue the right to attach order, it must determine that the plaintiff has made a showing that it is more likely than not that the plaintiff will prevail on the underlying claim.[10] As with any factual showing, the evidence to support such a claim must be admissible.

Usually, this showing will be made by a declaration from the plaintiff attaching any necessary documents (making certain that the plaintiff can lay a proper foundation for the documents). In instances where the underlying complaint or petition is verified, it is helpful to attach the underlying pleading and incorporate it into the moving papers.

Because the showings are complex and technical, it is usually helpful to use the Judicial Council forms, which track the myriad requirements.[11],[12]

Step 4: Prepare Your Right to Attach Order

Before appearing for your hearing, whether noticed or *ex parte*, the plaintiff should prepare his or her right to attach order.[13] The order varies based on type of hearing, and whether the defendant is a resident or non-resident. However, plaintiffs should make certain the defendant's name appears exactly as it does on accounts, title to real property or any other property sought to be attached, and include as an attachment a list of all property ordered attached.

Step 5: Obtain Your Writ of Attachment

Once the right to attach order is issued, the plaintiff need only take the right to attach order to the clerk for filing, and the clerk will issue a writ of attachment.[14] Writs of attachment should be treated similarly to a summons when drafting: Make certain that all of the information matches perfectly to the right to attach order. The writ should be directed to the sheriff of the county in which the property is located, not necessarily the sheriff of the county where the writ is issued.[15]

It is important to note that an undertaking is necessary for the issuance of a writ of attachment. Without an undertaking, the right to attach order is void.[16] It is generally good practice to have the undertaking issued prior to applying for the right to attach order so the writ may be issued immediately.

Step 6: Contact the Sheriff

Once the writ is issued, the plaintiff should contact the sheriff in the county where the property to be attached is located. Many larger counties have divisions of the sheriff's department dedicated to the implementation of such writs along with form letters of instruction to the sheriff explaining what property should be levied upon.

Smaller counties may lack these procedures and forms, and require the plaintiff to provide his or her own letter of instructions. When providing instructions to the sheriff, make certain to follow the terms of the writ exactly.

Sheriffs will also charge a fee for levying upon property. As a practical matter, this fee can make levying on certain property (particularly vehicles) impossible.[17]

Once the sheriff has levied on the property, a notice of attachment will be served and filed with the court. Depending on the county, this notice may be prepared by the officer or the plaintiff.

Final Considerations

The provisions of the financial elder abuse statutes allow for a plaintiff to shift the power dynamic of the litigation by securing the judgment sought. While the process can be complicated, the result frequently leads to early resolution, as the defendant can be divested of significant assets pending resolution of the proceedings.

Although this procedure can provide great power to plaintiffs, “with great power comes great responsibility.”^[18] If a plaintiff is found to have wrongfully attached property, he or she can be liable for damages to the defendant. This generally occurs when a plaintiff loses the claim sued upon, or, even if they do win, the plaintiff failed to follow technical procedures.

While this article can create a good foundation for a practitioner, the underlying statutes should be carefully reviewed, as an article of this length cannot possibly convey all of the nuanced procedures necessary to properly attach property in a financial elder abuse action.

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[1] *Id.*

[2] Cal. Welf. & Inst. Code § 15657.5(a).

[3] *Id.*

[4] *Id.* at §§ 15657.5(b), (d).

[5] *See Novus Optimum Labs v. Tamayo*, 2013 WL 3354566, at *10 (N.D. Cal., July 2, 2013).

[6] Cal. Civ. Proc. Code § 487.020.

[7] Cal. Civ. Proc. Code § 484.040.

[8] Cal. Civ. Proc. Code § 485.010.

[9] Cal. Civ. Proc. Code §§ 485.010(b)(1), (5).

[10] Cal. Civ. Proc. Code § 481.190; *Kemp Bros. Const., Inc. v. Titan Elec. Corp.*, 146 Cal. App. 4th 1474, 1476 (2007).

[11] The form for an application for a right to attach order can be found at AT-105. These forms are also designed to streamline the application for a temporary protective order, which provides interim relief before the sheriff can levy upon attached property. Hearings

on TPOs can occur simultaneously to right to attach order proceedings.

[12] It should be noted that even though the burden may be carried by the plaintiff, and a right to attach order is issued, the court's determination that it is more likely than not that the plaintiff will prevail in the issuance of the right to attach order has no effect on the main proceeding. Cal. Civ. Proc. Code § 484.100.

[13] Judicial Council form AT-120, AT-125 or AT-130, depending on circumstances.

[14] Judicial Council form AT-135.

[15] Because there are frequently multiple pieces of property to be attached in multiple counties, more than one writ may need to be issued.

[16] *Vershow v. Reiner*, 231 Cal. App. 3d 879, 882 (1991). The undertaking is statutorily set at \$10,000, but can be increased at the discretion of the Court. Cal. Civ. Proc. Code § 489.220. This undertaking is designed to permit the defendant an avenue to obtain damages in the event the attachment is deemed wrongful.

[17] Generally, there will be a fee to levy on the vehicle, a fee to tow the vehicle, then a daily fee for storage of the vehicle. Unless judgment is quickly entered, these fees will quickly overtake the value of even the most exotic cars.

[18] Voltaire, *Oeuvres de Voltaire*, Vol. 48 (1832); *see also* Stan Lee, *Amazing Fantasy* #15 (August, 1962).

The Burwell Burden – New Criteria for Valuing Term Life Insurance

Tuesday, April 01, 2014



In re Marriage of Burwell (2013) 221 Cal. App. 4th 1, after judgment bifurcating marital status, while the Automatic Temporary Restraining Orders (ATROS) were still in effect, husband changed the beneficiary on his term life insurance policy to his new spouse, then died by suicide. Both spouses sought the life insurance proceeds.

The trial court found the policy was an omitted asset, husband had violated the ATROS and the change of beneficiary was void. The Appellate Court vacated the trial court's ruling and remanded for further fact findings and application of the rules set forth by the *Burwell* Court. Request for Review was denied; request for depublication was denied.

Holding

The rules governing characterization of term life insurance proceeds depend on multiple factors, including:

- Who paid the premium for the final term of the policy.
- Whether the insured became medically uninsurable during a term of the policy that the community paid for.
- Whether post-separation premiums were artificially low due to a cap on premiums paid for in part by the community.

Interview with a Life Insurance Expert

Below is R. Ann Fallon's interview with Life Insurance Expert Matt Taddei.

Burwell's first criteria for the characterization of term life insurance is who paid the premium for the "final term" of the insurance coverage and from what source.

Term life insurance is viewed in different ways:

- Series of Renewable Policies: A term policy can be viewed as not one policy, but a series of annually renewable policies, renewable at the option of the owner.
- One Policy Approach: It could be argued that a policy such as a 20-Year Level Term policy is one whole contract for that entire period of time, i.e., 20 years.

Burwell finds that each renewal period creates a separate contract, and some contract terms create enforceable property rights for the community that remain viable until the death of the insured under that policy.

So under Burwell, even if the community did not pay the final premium, it may still have enforceable contractual rights?

Right. *Burwell* specifies that the expert examine the right of renewal when the insured is medically uninsurable and examine the right to continue lowered premiums under a premium cap policy.

Who would qualify as an expert to testify as to when an insured became medically uninsurable and how would such a determination be made?

Determining insurability is an exercise that can only be definitively addressed by an underwriter as part of a formal underwriting process.

In the case of the insured dying many years after the original policy was underwritten, a court may not be able to determine if an individual was insurable at the date of separation? Or if so, at what classification and price?

Correct. Level term policies are popular, so it might take 20 or 30 years to have finality on such policies. There are also Universal Life policies that look and act very much like “level premium term policies for life.” It is difficult to imagine how the court could make an allocation using the *Burwell* formula without an insurance company underwriter, and that begs the question of how comparisons could be done years after the insured had medical exams associated with the original policy and/or after the death of the insured.

Whether the insured became medically uninsurable during a term for which the community paid the premium appears to necessitate obtaining medical records. But even with such records, what are the odds of being able to determine when an individual went from being insurable to uninsurable?

That cannot be an exact science from a practical standpoint. We have had many experiences when some companies have deemed an applicant uninsurable and other companies have deemed the applicant insurable. We have also often experienced wide ranges in policy prices offered by different companies. It seems to me that the court’s reasoning, while perhaps theoretically plausible, would not be practical in the real world.

Burwell employs the term “lessened insurability” where, over time, a spouse may remain insurable but becomes more expensive to insure. In light of “lessened insurability,” the right to continue coverage under a policy which has a “cap” on premiums has value.

Historically, term life insurance or “Annual Renewable Term” life insurance (ART) closely mirrored mortality tables. As we age, premiums increase. ART was the predominant term life insurance policy sold for generations.

For the past two decades “guaranteed level term” has replaced ART as the most popular form of term life insurance. Level terms are such as 10-year level, 15-year level even 20- and 30-year levels. A 20-year guaranteed level term life insurance policy will have a level premium for the first 20 years the policy is in force.

Guaranteed level term policies artificially flatten what should be an annually increasing cost and lock in a level premium over a period of time. As one would understand, in the early years of the policy, the premium for level term is higher than what might be reflected on the mortality tables. At some point an age midline is reached after which the premiums become lower than what might be charged under the mortality tables. This is likely what the court means by the “cap” on premiums.

Alternatively, the term “cap” may mean that the contract reflects a right to have a cap on

the premiums that might be charged after the 20-year level premium term is over. This is typically referred to as a “guaranteed maximum premium.”

The court attributes a community interest to the term life insurance if there is some perceived value between the actual premium paid and some presumed market price if the insured were to reapply for like coverage in a given year. By this provision, I assume the court is suggesting that we compare the actual price (premium cost in a given year) of the current policy to like coverage for the individual at the age of the insured in that year of comparison.

But in the early years of a level term policy, the premium for level term is higher than what might be reflected on the mortality tables. So comparing “like” with “like” level term policies may be a distortion. Would the court allow the expert to use the mortality table approach to ascertain the highest premium likely at the insured’s age, especially since the premium for a new long term level premium plan may be “artificially high?”

I have the same questions. Would the court have us compare the current policy cost to a one year ART policy or to the same plan of coverage as the policy in place?

Any comparison is difficult without the benefit of a formal underwriting process and key sources of information such as the original paramedical exam.

But also, mortality assumptions and competition are very fluid in the life insurance industry and so rates in effect in 2014 for term insurance are different than those that were in effect, say, in 2008. Underwriting standards can also vary widely by carrier at any point in time and tend to evolve industrywide over time.

The underwriting treatment for conditions such as cancer and heart disease has become increasingly more liberal. Would we need to utilize 2008 underwriting standards for such a comparison?

These are problems that any expert faces in applying the *Burwell* rules.

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Matt Taddei is the Co-Founder and President of Taddei, Ludwig and Associates, Inc., a San Rafael-based independent Wealth Advisory Firm. As a Financial Advisor for 31 years, his client focus has been in the area of life insurance. He is a Certified Financial Planner and Chartered Life Underwriter and is a member of the Marin Estate Planning Council and the Association for Advanced Life Underwriting.

Shared Parenting after Undocumented Abuse

Tuesday, April 01, 2014



A significant challenge for the family courts in evaluating custody arrangements is the issue of undocumented domestic violence. Many families with histories of domestic violence have no objective documentation of the abuse by, for example, witnesses, police reports, or medical reports.

This article discusses the phenomenon that occurs when two parents, who have experienced Interpersonal Violence (IPV) in a marriage or non-marital relationship, are ordered by the Family Court to share a joint physical custody parenting plan after the parents separate, due to the absence of documentation of such abuse. The term "Intimate Partner Violence" describes physical, sexual or psychological harm by a current or former partner or

spouse. This type of violence can occur among heterosexual or same-sex couples and does not require sexual intimacy.

Undocumented IPV is defined as familial, physical, verbal, sexual or emotional abuse that has not been documented by witnesses, police reports, medical records or other formal records. Co-parenting is defined as the ongoing involvement of both parents with each other on issues concerning their children after a divorce.

A history of IPV between parents seriously compromises critical aspects of co-parenting because of the high likelihood that conflict will continue between the parents post-separation. Parental conflict exposes children to disagreements, tension and inconsistency. Conflicts between the parents can have long-lasting results for their children. In nearly 25 percent of the children studied in Judith Wallerstein's groundbreaking research, memories of violent scenes between their parents were vivid and detailed.

Wallerstein's research found that the fear and sense of hopelessness experienced by a child during periods of IPV by his/her parent(s) were fully retained in the child's adult consciousness. This article cites research which shows that adverse childhood experiences usually lead to significant detrimental long-term effects.

Family Code §3044 states that when the court has made a finding of domestic violence "within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child." But the protections of Family Code §3044 give a false sense that joint custody will not be awarded to families with a history of domestic violence, because problems occur for many families when there is no documentation of domestic violence.

Courts are bound by rules of evidence to base their orders on facts. But very often, the facts do not support that there has been a history of IPV because the victimized parent does not report the abuse, and may actively hide it. Without documentation of IPV, the

courts have a difficult and challenging task of making a finding of domestic violence.

Thus, a serious problem develops when there is no or very little documentation of abuse because then the couple's history of abuse is not taken into consideration, and orders are frequently made for joint custody. This leads to an unhealthy situation for the victimized parent and his/her children.

For a full version of this article, please [click here](#).

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The Enforcement of Premarital Agreements upon Death

Tuesday, April 01, 2014

Spouses often enter into premarital agreements to define their respective property and support rights in the event their marriage terminates by way of dissolution. The premarital agreement will also usually define the parties' rights to share in each other's estate upon death by requiring specific inheritance provisions to the surviving spouse and/or waivers of statutory inheritance rights.

The surviving spouse may learn that the deceased spouse neglected to include terms in his or her estate plan which their premarital agreement required. It is critically important that the estate planning attorney work in conjunction with the family law attorney preparing the premarital agreement to ensure that the parties' estate plans are created or updated to be consistent with the terms of the premarital agreement. Too often, the surviving spouse will be surprised to learn that the deceased spouse's estate plan fails to comply with the terms of the premarital agreement.

The surviving spouse has a few options available to effectuate the terms of a premarital agreement's inheritance provisions. First, the surviving spouse can sue the estate of the deceased spouse as an omitted spouse if the deceased spouse's estate plan was executed prior to marriage and it neglected to include the surviving spouse.[1] An omitted spouse is entitled to receive:

- (1) one-half of the deceased spouse's interest in community and quasi-community property, and
- (2) a share of the deceased spouse's separate property equal in value to which the surviving spouse would have received if the decedent had died without executing a testamentary instrument, but in no event more than one-half the value of the separate property.[2]

The surviving spouse will not qualify as an omitted spouse if the deceased spouse intentionally omitted the surviving spouse from the will and that intention appears in the will or other testamentary instrument.[3] The surviving spouse is also not considered an omitted spouse if he or she received a transfer outside of the deceased spouse's testamentary instruments and the deceased spouse's intention that the transfer be in lieu of a provision in the deceased spouse's testamentary instruments can be demonstrated.[4] Finally, the surviving spouse may not be deemed an omitted spouse if the surviving spouse waived his or her right to share in the deceased spouse's estate.[5]

The most typical way for a spouse to waive his or her rights as an omitted spouse is by way of a waiver included in the premarital agreement. Too often, premarital agreements include a boilerplate section whereby the spouses agree to waive their probate rights pursuant to California Probate Code sections 140 through 147. The waivers set forth in Section 140 *et seq.* include the surviving spouse's right to take the statutory share of an omitted spouse.[6]

In determining whether the surviving spouse waived his or her right to take as an omitted spouse, the courts first must determine whether the premarital agreement is valid.[7] The validity of a premarital agreement executed on or after January 1, 1986, is governed by

California Family Code sections 1600 through 1617. The premarital agreement must be in writing signed by both parties[8], include the substantive terms of the agreement[9] and be voluntarily entered into by the party against whom enforcement is sought.[10]

The premarital agreement will be determined to have not been voluntarily entered unless the party against whom enforcement is sought:

- (1) was represented by independent counsel or after being advised to seek independent counsel waived such representation;
- (2) had not less than seven days between the time the party was first advised to seek independent counsel and the agreement was signed, and
- (3) if unrepresented, was fully informed of the terms and basic effect of the agreement and the rights and obligations he or she was giving up in the agreement.[11]

The premarital agreement will also not be enforceable if unconscionable when executed [12] or the result of duress, fraud, undue influence or lack of capacity.[13]

If the court determines that the premarital agreement was valid under the Family Code, the court will enforce the waiver of inheritance rights and the surviving spouse will not be treated as an omitted spouse.[14] However, in the event the court determines that the premarital agreement is not valid under the Family Code, the invalid premarital agreement may still be an effective waiver of inheritance rights under the Probate Code.[15]

California Probate Code section 140 *et seq.* governs a spouse's waiver of inheritance rights. Section 142(a) requires a waiver of inheritance rights to be in writing and signed by the surviving spouse. Section 143 provides that a waiver will generally be enforceable against the surviving spouse unless:

- (1) a fair and reasonable disclosure of the property and obligations of the deceased spouse was not provided prior to signing the waiver (unless disclosure waived with independent counsel) or
- (2) the surviving spouse was not represented by independent counsel when signing the waiver.

If the waiver is unenforceable due to Section 143, the court may still enforce the waiver if:

- (1) at the time of the signing, the waiver made a fair and reasonable disposition of the rights of the surviving spouse or
- (2) the surviving spouse had, or reasonably should have had, an adequate knowledge of the property and obligations of the deceased spouse and the deceased spouse did not violate his or her California Family Code section 721 fiduciary duties.[16]

It is important to note that spouses can enter into an invalid premarital agreement that is not enforceable in the event of dissolution but still be an enforceable waiver of their inheritance rights.[17]

If the surviving spouse fails to qualify as an omitted spouse, he or she may sue the deceased spouse's estate on a contract cause of action in the event the deceased spouse failed to include inheritance provisions required by the premarital agreement.[18] It may also be more beneficial for the surviving spouse to bring a contract action even if

he or she qualifies as an omitted spouse where the premarital agreement provides for inheritance provisions that are greater than the survivor would receive as an omitted spouse.

The contract action is brought against the surviving spouse's estate seeking to enforce the terms of the premarital agreement. The surviving spouse may instead choose to file a creditor's claim or sue for declaratory relief.[19] Additionally, if the premarital agreement provided for the conveyance of property and is specifically enforceable, an action to compel performance may be brought in the probate setting to effectuate the transfer of the property pursuant to the terms of the premarital agreement.[20]

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[1] Cal. Prob. Code § 21610.

[2] *Id.*

[3] Cal. Prob. Code § 21611(a).

[4] Cal. Prob. Code § 21611(b).

[5] Cal. Prob. Code § 21611(c).

[6] Cal. Prob. Code § 141(a)(8).

[7] *Estate of Gagnier*, 21 Cal. App. 4th 124, 129 (1993).

[8] Cal. Fam. Code § 1611.

[9] *In re Marriage of Shaban*, 88 Cal. App. 4th 398 (2001).

[10] Cal. Fam. Code § 1615(a)(1).

[11] Cal. Fam. Code § 1615(c).

[12] Cal. Fam. Code § 1615(b).

[13] Cal. Fam. Code § 1615(c)

[14] *Estate of Gagnier*, 21 Cal. App. 4th at 129.

[15] *Id.* at 130.

[16] Cal. Prob. Code § 144(a).

[17] *Estate of Will*, 170 Cal. App. 4th 902, 908 (2009).

[18] See *Hall v. Hall*, 222 Cal. App. 3d 578 (1990).

[19] Cal. Civ. Proc. Code §§ 1060-1062.5.

[20] Cal. Prob. Code § 850(a)(2).

Forging into Uncharted Territory with the Law on Abuse of Dependence...

Tuesday, April 01, 2014

The California Attorney General's Office estimates that 200,000 elder and dependent adults are abused in California every year. [1] Forgery, such as imitating an elder or dependent adult's signature on a check or a change of beneficiary form, is one of the leading forms of this public health problem.

Often overlooked is that laws prohibiting elder abuse also apply to younger disabled persons who are equally vulnerable. California's Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) provides enhanced civil remedies against an individual alleged to have taken advantage of an elder or "dependent adult" for financial gain.[2]

The California Penal Code, in turn, provides enhanced penalties (fines up to \$10,000 and imprisonment up to four years) against an individual who is not a caretaker who commits forgery with respect to the property or personal identifying information of an elder or "dependent adult." [3]

The law is clear on which victims qualify as an elder—the person must be 65 years of age or older.[4]

The law is less clear on which victims qualify as a "dependent adult." Section 15610.23 of the Welfare and Institutions Code and Section 368(h) of the California Penal Code provide the following definition of "dependent adult" applicable to a civil cause of action under EADACPA and the crime of forgery:

- (a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
- (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

The few courts that have interpreted the language of section (a) have interpreted it rather narrowly. In *Cabral v. County of Glenn*, plaintiff alleged abuse of a dependent adult in violation of the EADACPA for injuries he sustained while detained in jail.[5] Plaintiff alleged that he was diagnosed as psychotic, mentally ill, suicidal and suffering from a major depressive disorder at the time he sustained the injuries.[6]

The plaintiff in *Cabral* alleged that he had drenched himself in kerosene while clothed in nothing but Saran Wrap and tried to set himself on fire; he heard voices from God instructing him to kill his girlfriend and then he attacked her; he scooped water and waste from his jail cell toilet and rubbed it on his body; and he ran into the wall of his jail cell, breaking his neck and paralyzing himself.[7]

The Court granted defendants' motion to dismiss the EADACPA cause of action.[8] The Court reasoned that plaintiff had not adequately alleged that he was a "dependent adult":

[T]his Court agrees with the reasoning in *Jay v. Kubly*, an unpublished appellate court opinion in which the court stated, “the statutory definition [of dependent adult] is fairly broad, but must be read in the light of the relevant legislative history, and of reason. In *Delaney v. Baker*, 20 Cal. 4th 23, 82 Cal. Rptr. 2d 610, 971 P.2d 986 (1999), the [California] Supreme Court reviewed the history of section 15657, concluding one of its major objectives ‘was the protection of residents of nursing homes and other health care facilities.’[9] While the definition of ‘dependent adult’ is not limited to persons living in such facilities, it reasonably should extend only to persons whose disabilities and needs are comparable to persons who are compelled to live in nursing homes and other health care facilities.”[10]

[T]he *Jay* court determined that the plaintiff in the case before it was not a “dependent adult” despite the fact he was “56 years of age, was blind in one eye and partially blind in the other eye, suffered from post-traumatic stress disorder, was disabled due to his medical and psychiatric problems, suffered from neurological ‘sequelae’ from a rifle wound to the head, was facially disfigured and had been rated as 100 percent disabled by the United States Department of Veterans Affairs.”[11] That Court reasoned that “[a]t most these allegations support a conclusion that decedent had some physical and mental disabilities. They [did] not show that decedent, who admittedly lived independently, nonetheless suffered from restrictions in the ability to carry out normal activities or protect his rights comparable to those suffered by the decedent in *Estate of Shinkle*.”[12]

In *Estate of Shinkle*, the court found that a decedent was a dependent adult. The decedent was in her late 70s during the time period at issue; she was diagnosed with paranoia, sepsis, gangrene and arterial occlusive disease; she “complained of pain daily and told [her nursing assistant] she wanted to die”; she was incontinent; her house smelled of urine; she was known to hallucinate; her legs were full of fluid and she could no longer walk; she had ulcerations and seeping wounds; “[s]he had a hard time collecting her thoughts and expressing herself”; “[s]he needed assistance with most activities of daily living, including cooking, bathing and toileting”; and “[s]he no longer did her own banking and needed help paying her bills.”[13]

In *People v. Matye*, the court found that a decedent was a dependent adult under Section 368(h) of the Penal Code. The decedent suffered a stroke that left her with partial paralysis in the right side of her body; she could not speak or comprehend very well and had problems with her memory; she could only walk with a brace or cane; and she depended on her son to drive her, make her bed, do her laundry and prepare her meals.[14]

Practitioners should keep a watchful eye on the evolution of the case law on the definition of “dependent adult” under the EADACPA and Penal Code. The courts’ reticence to broaden that definition may recede as the public sharpens its focus more evenly between dependent adults and elders.

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[1] Elder Abuse Issue Brief, Center of Excellence on Elder Abuse and Neglect, U. of Cal. Irvine, Mar. 2013.

[2] Cal. Welf. Inst. Code § 15610.07.

[3] Cal. Pen. Code § 368(d).

[4] Cal. Welf. Inst. Code § 15610.27; Cal. Pen. Code § 368(g).

[5] *Cabral v. County of Glenn* (2009) 624 F.Supp.2d 1184, 1194.

[6] *Id.*, at 1195.

[7] *Id.*, at 1188-1189.

[8] *Id.*

[9] *Id.*

[10] 2008 WL 77572 *5 (1st Dist. 2008).

[11] *Id.*

[12] *Id.*

[13] *Estate of Shinkle* (2002) 97 Cal.App.4th 990, 993-1000, disapproved on other grounds in *Bernard v. Foley* (2006) 39 Cal.4th 794, 816.

[14] *People v. Matye* (2008) 158 Cal.App.4th 921, 925-926.

Children of Families in Transition

Tuesday, April 01, 2014

If newborn babies could speak to their parents, they might say something like this:

During the last nine months, all my needs were met without me having to do anything. I learned to trust that anything I needed to survive and thrive would be provided for me. I am uncertain and a bit afraid of this new world that you brought me into. Can I trust both of you to love and care for all my needs like before you brought me here? I really need love, support and patience from both of you. I also need to trust that both of you will teach me all the things I need to learn so I can thrive and eventually take care of myself.



Working as a professional family supervisor, I have observed many families in the process of crumbling, as parents become more deeply involved in their own personal, unresolved issues. Parents blame one another when things don't go right for one of them individually, or for one parent's lack of quality/quantity time spent with the child. They then end up in Family Court where all allegations are taken seriously. Judges don't have the opportunity to experience life with each parent, so convincing the court on which one is the better parent becomes a process of persuasion, and the children are caught in the middle.

When parents become preoccupied with their own emotional needs and negativity toward the other parent, rather than focusing on their child's emotional and developmental needs, they deny their children the opportunity to reflect upon their own feelings and establish a secure sense of autonomy.

When I hear the parent of a 10-year-old say to the child, "You have to tell [the other parent] that you want to spend more time with me—you have to stand up for yourself," or when a 6-year-old child tells the visiting parent, "Talk to the judge to see if you are good or bad to see who I will be with," it is distressful to witness the innocence of these children being ripped away from them.

Between the ages of 18 months and 12 years old, (the predominant ages of children I have supervised), children are still learning the basics—how to establish an attachment bond with their parents; how to develop a sense of independence, autonomy and a sense of self; how to take initiative and control impulses; how to learn skills that will help them be competent and industrious; and how to gain a sense of comfort with their own relationships. It is unfathomable to expect these children to have any notion of how to emotionally or psychologically deal with their parents' personal issues.

Based on my experience as a professional family supervisor during the past 10 years, I offer a suggestion for improving family court services to support the best interest of the children. I believe that professional family supervisors should work to create a standard reporting form to document parent behavior during supervised visitations.

This form, which could be based off the guidelines presented in the *Parent Orientation*

Handbook under *A Child's Rights in Divorce*, would present judges with a more accurate and clear picture of parent behavior during supervised visitations. As a result, judges would have something more substantial on which to base their custody decisions than undocumented and dubious allegations from parents.

The last “right” that is listed in the document, *A Child's Rights in Divorce* is, “I have the right to not ever be forced or encouraged to choose between my parents. This is a decision for wise adults.” Parents however, can’t always be trusted to wisely make their children a priority while they are battling it out with one another. Family Court Services, therefore, must take steps to increase parent accountability and make well-informed decisions that are truly in the best interest of the child.

Barbara Kelley is a Professional Family Supervisor, working with Family Court Services of Contra Costa County to provide supervised visitation services in court ordered child custody cases.

Elder Court: Streamlining the Legal Process to Ensure Access to Jus...

Tuesday, April 01, 2014



In the preamble to the Elder Abuse and Dependent Adult Civil Protection Act, (Welfare & Institutions Code Section 15600 et seq.) enacted in 1992, the Legislature acknowledged that the elderly constitute a significant and identifiable segment of the population, are more subject to risks of abuse, neglect and abandonment, and that the state has a responsibility to protect these persons.

They further found and declared that infirm elderly persons and dependent adults are a disadvantaged class; that cases of abuse of these persons are seldom prosecuted as criminal matters and few civil cases are

brought in connection with this abuse due to problems of proof, court delays and the lack of incentives to prosecute these suits. The Legislature's stated intent by enacting EADACPA was to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.

In subsequent years, courts have fashioned different responses to the needs of the elderly. The first Elder Protection Court was established in Alameda County in 2002, to hear elder abuse restraining orders. In 2006, that court expanded to become the direct calendar court for all felony elder abuse cases in Alameda County. In addition to the specialized calendar, individualized attention was given to the needs of the elderly litigants, with referrals to Adult Protective Services, Legal Assistance for Seniors and Victim-Witness programs or law enforcement when appropriate.

The Contra Costa Model

In early 2004, Contra Costa County began the process of establishing a similar court. The planning process was an enormous collaborative effort between the court and its justice partners. A task force consisting of representatives of the District Attorney, the Public Defender, County Counsel and the local Bar, together with the Area Agency on Aging, the probation department, city and county law enforcement, county mental health department, and JFK University College of Law met frequently to outline their needs and concerns. The result was an Elder Court unique in the nation.

The initial concept was to follow the model of Alameda County. But from discussions with task force members, it became clear that complete justice for seniors had to include not only criminal cases and restraining orders, but any case involving an elderly victim: Civil, probate conservatorship, landlord/tenant, and even in one case, an adult adoption matter. Any case involving physical, financial or emotional abuse of an elder was to be heard by the same trained, dedicated judge from start to finish.

The Benefits of Elder Court

One goal of Elder Court was to provide a supportive environment for older litigants, recognizing the physical, sensory and mental or cognitive changes prevalent in the aging population. As a result, evidentiary hearings were scheduled for later in the morning when the elderly were more likely to be at their best in terms of mental functioning; grant funding was found for a document reader to make exhibits readable by those with visual impairments and a wheel chair was provided for those with mobility issues.

The court also became a magnet for other services, provided at little to no cost to the court. First, the Senior Peer Counselor program, through County Mental Health, asked if they could staff the court. This resulted in weekly support in the form of volunteers, themselves seniors, to meet with the litigants in advance of the hearing, explain the process, review the papers and give the victims the confidence to appear in court. They also followed up with a reassurance call after the hearing, to be sure orders were properly filed and complied with, and to walk them through the emotional fallout from the hearings.

Shortly thereafter, Contra Costa Senior Legal Services offered to provide a Senior Self-Help Center during Elder Court hours. The cost to the court was a computer, a file cabinet, and the use of a room once a week, in exchange for three hours of free drop-in consultation to seniors who wanted to represent themselves. They have taken on the additional task of holding monthly workshops, free of charge, in the law library, walking self-represented litigants through the complicated process of establishing a conservatorship (adult guardianship) for those who cannot care properly for themselves or their finances.

Finally, Elder Court was able to consolidate ancillary cases involving the same older victim, in order to provide a consistent, efficient and therapeutic outcome. Recognizing that particularly with the elderly, justice delayed would truly be justice denied, all parties were urged to reach early resolution, which would be a factor in sentencing and recognizing that complex family relationships were often involved, emphasis was placed on a comprehensive settlement that preserved those relationships to the extent possible.

Compelling Results

In practice, this global model had compelling results. The first case involving both criminal and civil aspects was heard within the first week the Elder Court was established. A criminal action for elder financial abuse was pending against an elderly woman's son. It was alleged that he had fraudulently obtained her signature on a document adding his name to title on her home, and that he had borrowed heavily to support his business, depleting all of the equity. When his business failed and he was unable to make the mortgage payments, the house went into foreclosure, and the woman was facing eviction. With minimal income, she was about to become homeless.

Typically, a case such as this would take years to resolve. Felony cases can take up to a year or even longer, and civil cases are generally stayed until the criminal case is over, to avoid self-incrimination issues. Once resumed, the civil case would likely take one or two years to conclude. Given the victim's dire circumstances, she could not wait this long.

With intensive collaboration between all interested parties, she did not have to. Multiple meetings were held in chambers, and within a matter of a month or two, a global settlement was reached. The defendant pled guilty to the felony elder abuse matter, a

stipulated judgment was reached on the civil case, the probation order required the son to pay his mother's housing costs, and his probation was monitored to ensure the payments were made.

A similar global resolution was reached on a crossover conservatorship/restraining order case. An elderly man was finding it increasingly difficult to run his auto repair business. An employee and the employee's wife began to assist him. They then began to take advantage of him, by having him transfer his business and bank accounts into their names. They isolated him from family members, who became concerned enough to petition for conservatorship and to then request a restraining order against the employee and his wife. Settlement negotiations resulted in a return of the business and bank accounts to the victim, establishment of a conservatorship, and a stay away order, avoiding the possibility of either criminal or civil prosecution.

Both these cases, and the others that reached global resolution, had in common the willingness of all sides to work toward a speedy resolution. But this type of case faces a number of hurdles. First, the method for transferring a civil case into Elder Court is cumbersome. Unlike criminal cases, which are vertically prosecuted by an Elder Abuse Unit and are clearly marked on filing, and Elder Abuse restraining orders that are also clearly referenced, civil, family and probate cases have no means for early identification, and depend on other judicial officers to recognize them as such.

Generally, transfer in a civil case does not occur until the first Case Management Conference, which is not held until at least six months after the case is filed. Probate and family law cases are transferred only if there is a hearing where elder abuse is raised as an issue and in civil, family and probate, the transfer is always at the discretion of the judge.

Another hurdle is resistance from attorneys. Because of its designation as "elder court," some attorneys may believe there is a bias in favor of the elder party. Others simply prefer the familiar judges and processes of the civil, family or probate division. And there are also those who believe their cases will benefit from delay, and want to avoid a court where the goal is early, global resolution.

Such hurdles are, however, not insurmountable, and as attorneys and judges see the benefits of Elder Court, it is anticipated that earlier and more frequent transfers to that court will take place.

The Future of Elder Court

The concept of Elder Protection Courts has spread across the state and the country, with Contra Costa County serving as a mentor court. Ventura County now has a very strong Elder Court, and other counties are considering doing the same. Other states, including New York and Georgia, have also expressed interest in the concept, and Chicago recently created an Elder Law and Miscellaneous Remedies Division, where eight judges are now assigned to preside over all elder abuse, neglect and financial exploitation cases, in criminal, domestic violence and civil matters.

Contra Costa County has reason to be proud of its leadership in creating a holistic model that provides swift and comprehensive resolution to the legal problems of the elderly.

Judge Joyce Cram (ret.). presided over the Contra Costa County Elder Court from its

inception in 2004 until her retirement in 2013.

Helping Support Children

Tuesday, April 01, 2014

The mission of the Contra Costa County Department of Child Support Services (DCSS) is to promote the well-being of children and the self-sufficiency of families by delivering effective child support services to help meet the financial, medical and emotional needs of children.

DCSS, in performing its mission:



- Establishes paternity—genetic testing is free.
- Establishes child support orders.
- Establishes health insurance orders.
- Enforces child support, health insurance and spousal support orders.[1]

Our services are available to anyone who wants to have paternity for their child established, needs us to obtain and enforce child support and health insurance orders or to enforce an existing order. Our services are "almost" free. Depending on the type of case and the amount collected each year, there may be an annual \$25 fee assessed to the custodial party; however, that is the sole cost for our services.

Enforcement

We have many enforcement tools in our tool chest. We enforce support orders via income withholding orders and health insurance orders via the National Medical Support Notice. For those cases where the obligor is not paying ordered support, or has arrears balances, we also use additional enforcement tools, including:

- License suspensions, including professional licenses.
- Credit reporting.
- Passport denials.
- Tax refund intercepts.
- Real and personal property liens.
- Levies on financial institution accounts, including 401(k) and retirement accounts.
- Workers compensation liens.

Smith/Ostler Program

As of May 2013, DCSS began enforcing child and spousal support orders for additional support (commonly known as Smith/Ostler or Ostler/Smith orders). Since the inception of the Smith/Ostler program, DCSS has collected over \$1.5 million in additional support for children and families.

We encourage you to refer your clients to our program. If there is a possibility your client

will or may be opening a DCSS case for enforcement, when drafting your Smith/Ostler orders, please keep in mind some challenges we have in interpreting and enforcing these orders. Our biggest challenges include:

- The order does not define what income is to be used to calculate the additional support. Are we to use all income earned? Only overtime income? Only bonus income? Only commissions? Any combination? The orders we see often only refer to a bonus table or an overtime table, which is defined by the support calculation program that was used and does not necessarily define what additional income is used to calculate the additional support.
- The order does not specify the frequency of reporting additional income and when payment of the additional support is due. Please define if the reporting and payment is monthly, quarterly, semi-annually, annually, or some other frequency. Give us "teeth" to enforce compliance.
- Attaching a table, chart or report to an order does not create an additional support order. Be sure to include the terms of the additional support order in the actual order.

The more specific you can be in drafting your order terms, the easier it will be for DCSS to enforce. If you have any questions or require assistance with drafting language for your orders, please contact us. See below for our "Attorneys Only Hotline" and Smith/Ostler Program contact information.

Frequently Asked Questions

We have an Attorneys Only Hotline set up for you and your staff to call an attorney at DCSS for questions about your client's child support case. The following are the most frequently asked questions we receive on the Attorneys Only Hotline:

Do I need DCSS to sign off on a stipulation or judgment?

Yes. If DCSS is the petitioner/plaintiff or an intervenor in the action, the court requires that we approve the support provisions.

My client is the obligor with arrears and cannot get a passport; or has a passport, but is concerned about traveling. What can he/she do?

See 42 U.S.C. §652(k) for the statutory authority for the passport denial program. In short, there is very little we can do unless your client (a) pays arrears in full; (b) was added to the program erroneously, or (c) can certify a life and death situation.

I am unavailable to appear at a hearing. Can I get it continued?

It depends on whether all parties will agree. DCSS will not oppose a continuance, however, the other party must agree to it. Call us and we can assist with contacting the other party.

The current support order is filed in another county's superior court, but my client received a notice that Contra Costa DCSS is now managing the case. Does this mean that the legal action is now in Contra Costa Superior Court?

Not necessarily. The child support portion of another county's legal action will change to Contra Costa only if we register it in Contra Costa Superior Court. If we have not registered it, you can continue to file motions in the other county. To confirm where to file your motion, give us a call.

The parties' dissolution judgment orders the custodial parent to provide health insurance. Does DCSS need to get an order for the other parent to provide coverage?

Yes. We are required to obtain a health insurance order for the support obligor, even if coverage is being provided by the custodial parent. If the custodial parent is covering the minor child on his/her health insurance, we will not enforce the health insurance order against the support obligor unless the custodial parent no longer has insurance coverage available for the minor child.

We have a motion pending for a modification of custody, visitation and child support set in the trial department. Will the trial judge be able to decide the support modification issue?

Generally, no. The court currently resolves the non-support issues and then schedules the support issue for hearing in Department 52.

My client's bank account was levied, but he/she has been paying current support and the court-ordered arrears payments. Why did this happen?

Obligors who owe arrears are required to be submitted to the Financial Institution Data Match System and the California DCSS will issue the appropriate levy, depending on whether the obligor is in compliance or not. Family Code §17453 explains the program and types of levies that may be issued. Call us for further assistance.

Contact Us

Our department prides itself on providing excellent customer service. We may not be able to resolve all issues because we **are** in the business of collecting support, but we are willing to work with you as you assist your clients in their legal matters. Please feel free to call on us at any time.

Contra Costa County Department of Child Support Services
50 Douglas Drive, Suite 100
Martinez, CA 94553
<http://www.co.contra-costa.ca.us/1374/Child-Support-Services>

Attorneys Only Hotline: 925-957-2390
Attorneys Fax: 925-335-3604

Smith/Ostler Program

Phone: 925-957-2332

Fax: 925-957-2332

Email: Bonus.Program@dcss.cccounty.us

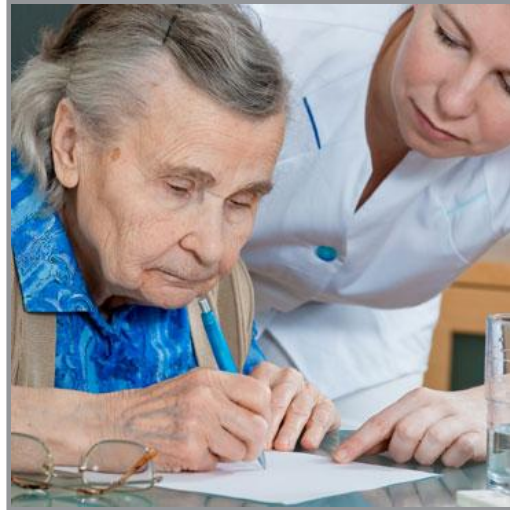
Melinda R. Self is the Supervising Attorney for the Contra Costa County Department of Child Support Services. She has been in the child support enforcement program since October 2001. Prior to that, Melinda was a Certified Family Law Specialist in private practice in Lafayette.

[1] Spousal support orders are enforced so long as DCSS is enforcing a current child support order for any amount greater than \$0.

Undue Influence Defined: New Statutory Definition and Recent Case Law

Tuesday, April 01, 2014

Effective January 1, 2014, California adopted statutes that provide a new definition for undue influence that incorporates modern knowledge of how elders are unduly influenced and taken advantage of by those they trust. AB 140 was signed into law and is codified in new California Probate Code section 86 and California Welfare and Institutions Code section 15610.70. The prior definition of undue influence was enacted in 1872 and had never been revised. That definition was set forth in California Civil Code section 1575, [1] which was in the context of contract law. There has been a longstanding need for a clear definition of undue influence for California probate courts.



California Probate Code Section 86 and California Welfare and Institutions Code Section 15610.70

New California Probate Code section 86 now states that “undue influence” has the same meaning as in California Welfare and Institutions Code section 15610.70 and that “the intent of the Legislature is that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.”

California Welfare and Institutions Code section 15610.70(a) defines undue influence generally as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.” California Welfare and Institutions Code sections 15610.70(a)(1)-(4) go on to enumerate factors to be considered. They include:

1. The victim’s vulnerability, evidence of which may include “incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.”
2. The influencer’s apparent authority, evidence of which may include “status as a fiduciary, family member, care provider, healthcare professional, legal professional, spiritual advisor, expert, or other qualification.”
3. The influencer’s conduct, evidence of which may include “(a) Controlling necessities of life, medication, the victim’s interactions with others, access to information, or sleep; (b) Use of affection, intimidation, or coercion; (c) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.”
4. The equity of the challenged result, evidence of which may include “the economic

consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship."

The foregoing are factors that the trier of fact must consider when determining whether a decision was obtained by undue influence. An inequitable result alone is not sufficient. Circumstantial evidence may be used to prove undue influence, as it can be difficult to prove undue influence by direct evidence because it often occurs behind closed doors and without witnesses.

Steven Riess, an attorney in San Francisco whose practice specializes in elder financial abuse and related matters, sponsored and wrote the text of the legislation for the new definition of undue influence. In discussing the origin of the term "excessive persuasion," Mr. Riess stated, "The courts have long recognized that influence is commonplace in interpersonal relations. However at some point, influence may become 'undue.' In two leading cases, the [California] Court of Appeal characterized influence that crosses this line as 'over persuasion' or resulting from 'excessive pressure.' The new statute echoes these case law phrases by combining them into the new term 'excessive persuasion.'"

Mr. Riess mentioned that when a colleague first heard the term, he commented that "it sounds like a perfume." (If it were a perfume, it would be a bad smelling one). Excessive persuasion appears to be an excellent broad term for assessing undue influence.

Undue influence is a particularly insidious form of financial elder abuse. Significantly, undue influence doesn't necessarily go hand in hand with lack of mental capacity; one can be unduly influenced while still retaining capacity. Historically, this situation was insufficiently recognized by statute. The new definition decouples the concept of undue influence from cognitive impairment. The vulnerability of the victim is central to undue influence, as well as the apparent authority of the influencer and the use of manipulation.

Many elders do not have significant cognitive impairment, yet are still highly susceptible to undue influence and being taken advantage of by someone they trust. Some common examples of undue influence are when a family member, friend or caregiver convinces an elderly adult to change a trust or will in his/her favor or when a financial power of attorney mishandles the financial affairs of a senior, taking assets out of the elder's estate and putting them in the individual's own name.

The new contemporary definition of undue influence that is now set forth in the probate code will bring greater clarity to the determination of when excessive persuasion has become exploitive.

Lintz v. Lintz

The recent case of *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346 is an action that was brought by the decedent's daughters against defendant, the decedent's third wife. The decedent was an elderly multi-millionaire retired developer. The decedent amended his trust several times after his marriage to the defendant, first naming her as a 50 percent beneficiary, then repeatedly amending the trust each time, giving defendant a larger share of the decedent's estate while increasingly disinheriting decedent's children.

Finally, decedent and defendant, as joint settlors and trustees, executed a new trust,

prepared at the defendant's direction by defendant's attorney. In the new trust, all of decedent's property was characterized as community property, defendant was given an exclusive life interest in decedent's estate, and given the right to disinherit decedent's youngest child and leave any unspent residue to decedent's two children from a prior marriage. Decedent died a year later. Decedent's children filed a lawsuit against defendant alleging financial elder abuse and undue influence, among other causes of action.

The probate court at trial found defendant liable and ruled that, while decedent had testamentary capacity to execute the trust documents, defendant had procured them by undue influence and the court invalidated them. The court of appeal, in affirming the probate court's decision, considered the requirements for undue influence as to both financial elder abuse and the invalidation of testamentary instruments.

The court of appeal also found that, although the probate court applied the incorrect standard for legal capacity and failed to apply a presumption of undue influence to the inter-spousal transactions at issue, the judgment was amply supported by the evidence. In doing so, the court of appeal found that there was sufficient circumstantial evidence to support a finding that the execution of the testamentary instruments had been obtained by undue influence. The court found that the widow exerted undue influence specifically "to procure estate plans and control over assets, according to her wishes and contrary to the wishes of decedent."

While the *Lintz* decision applies to pre-January 1, 2014, matters, the court looks at undue influence in the context of financial elder abuse and sets forth a wider encompassing view of the case law definitions in the testamentary context.

Interestingly, in a footnote to the case, the court notes that during the pendency of the appeal, the Legislature added new Section 15610.70 to the California Welfare and Institutions Code with the new definition of undue influence, as well as adding Section 86 to the California Probate Code. They stated that while the new legislation does not affect their analysis, "it eliminates any doubt that the two standards are now the same." Therefore, the *Lintz* case is a significant bridge from what the law has been in the past to the law under the new definition.

Attorneys need to determine if their clients are free of undue influence in matters such as powers of attorney, trusts, wills, testamentary gifts and validity of deeds, all of which, when contested, may involve allegations of undue influence. These should be important considerations for both litigation attorneys and drafting attorneys.

The new more expansive statutory definition and recent case law, including the *Lintz* case, should lead to greater protection for elders who are taken advantage of by undue influence.

Michael LaMay, an attorney in Walnut Creek, specializes in trust and estate litigation, financial elder abuse litigation, contested conservatorship litigation, trust administration, probate, conservatorships and estate planning, and serves as Vice-Chairman of the Board of Directors of the CCCBA Elder Law Section. You can contact the author at michaellamay@msn.com.

[1] California Civil Code section 1575: Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over

him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Coffee Talk: How does being a lawyer affect your family life?

Tuesday, April 01, 2014

My wife says I sound angry when I just think I am being emphatic or clarifying.

Mark W. Frisbie

Before I took up boxing and kickboxing, being a lawyer meant bringing a lot of stress and distractions back to my family life, but not any longer. Exercise before coming home relaxes me and since everything at work is privileged and/or confidential, I am able to process physically what I can't say verbally at the gym. It is nice to switch from being in my brain, to focusing on my body. I leave being a lawyer at work and come home from boxing and Muay Thai as a relaxed human once again.

Jessica A. Braverman, Esq., Braverman Mediation & Consulting

My husband has been incredibly supportive. Our adult children have adapted well. The cat remains unimpressed...

Susan L. Aglietti

I work from home so other than annoying my wife with an extremely messy office, it works out perfectly. I am almost always around when our daughter gets home from school and when work is slow, the housework gets done (sometimes).

David S. Pearson, Law Offices of David S. Pearson

What family life?

Dominic Signorotti

As a new lawyer and a new single mom it's tough, but I love the challenge!

JoAnne Biernacki, Esq., JB Legal Counsel

Saves my family a lot of legal expense.

Wayne Smith

Children, Families & the Law Certification Program at JFKU Law

Tuesday, April 01, 2014



In 2012, JFK University College of Law implemented a specialized curriculum for students interested in a practice focused on children and families. The Children, Families & the Law (CFL) Program is designed to ensure that these graduates are truly ready to practice in this challenging field. The CFL Program follows JFK's well-established tradition of providing law students the "practice-based, experiential learning designed to develop practice competence" recently adopted by State Bar's Board of Trustees.

There are three fundamental components of the CFL Program. Practice in this area has grown exponentially with the evolving definition of family. In recognition of these developments, we have expanded the traditional family law coursework to incorporate the "crossover" issues now important for modern practice such as juvenile dependency, domestic violence, adoption, artificial reproduction and resultant parentage issues, guardianship, immigration and elder law.

Second, to train the most effective practitioners, we combined the expanded substantive law covered with a substantial practice skill component. Our students learn about interviewing vulnerable clients (both adults and minors), client counseling skills and about preparing expert witnesses for specific CFL applications such as custody, counseling, parenting education, substance abuse evaluation and treatment, family violence, business and property valuation, retirement, tracing and other accounting issues, and vocational evaluation. The skills component includes writing exercises to address the increasingly complex pleadings and agreements in this field as well as negotiation skills learned through exercises involving common family disputes.

The third component of CFL focuses on the use of alternative dispute resolution processes for children and families including mediation, cooperative and collaborative law. Our students develop ADR skills through class exercises and by assisting self-represented clients prepare for court settlement conference at a monthly evening clinic run in partnership by JFK University, the Family Law Section of the Contra Costa County Bar Association (CCCBA) and the Contra Costa Superior Court.

The CFL Program accomplishes these goals through mandatory course work in an enhanced basic class followed by a seminar held concurrently with students working with real litigants with real disputes in approved CFL externships. CFL externships have included the Family Law Division of the Superior Court, the Department of Child Support Services, Legal Aid Dependency Programs in Contra Costa and Alameda counties (representing parents and children), BayLegal restraining order clinics and its new Re-entry Program for individuals returning from incarceration.

CFL students must also take elective courses in related areas choosing from Elder Law, Tax and Estate Planning, Juvenile Dependency and Delinquency, Domestic Violence Law, Immigration Law and other ADR options. Many CFL students do their elective work through JFK's re-envisioned Legal Clinic for Elders that combines substantive elder law coursework with the specific needs of litigants such as Durable Powers of Attorney, Advance Health Care Directives, simple wills, (in some instances Revocable Trusts), complicated Medi-Cal and or public benefits issues, probate matters, conservatorships and special needs trusts.

Our first two students graduated with a CFL certificate in June 2013; we anticipate an additional five students will receive certificates upon graduation this year. We are confident that the CFL Program will continue to educate skilled practitioners dedicated to protecting the rights and responsibilities of children and families. Several attorneys seeking additional knowledge in the field have audited CFL classes and we welcome them as well. Please contact us to share your ideas for future CFL externships and seminars; we look forward to hearing from you.

Dean E. Barbieri is the Dean of the John F. Kennedy University College of Law, and Vice President for Academic Affairs at JFK. Dean also serves on the Bar Association's Board of Directors. Contact Dean at dbarbieri@jfk.edu or at (925) 969-3562.

Commissioner Josanna Berkow retired in 2013 from the Contra Costa Superior Court after 20 years on the family law bench and currently works as a private judge offering lawyers involved in family disputes an alternative to standard court process based on mediation. She is also an adjunct professor at the John F. Kennedy College of Law in Pleasant Hill, where she serves as faculty advisor for a new specialized curriculum that she developed titled Children, Families & the Law, and at Golden Gate University School

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Shared Parenting after Undocumented Abuse

[Full Article]

Tuesday, April 01, 2014

Interpersonal Violence (IPV) that is documented between two parenting adults (whether they are in a marital or non-marital relationship) is obviously an important concern for the Family Court when considering issues of custody of minor children from that relationship. When the IPV is not documented, however, the Family Court has no documentation upon which to rely, and orders of a joint physical custody time-share plan are common. This can create a situation that is not only unhealthy, but possibly dangerous for both the parents and the children.



In 1989, Wallerstein & Blakeslee published a longitudinal study that showed that the healthiest arrangement for children post-divorce is to replicate the intact family arrangements as closely as possible, and for children to see each parent as frequently as manageable. For these reasons, a 50/50-timeshare plan can be best for children, as this facilitates maximum time with each parent.

At the same time, the study showed that the worst situation for children after their parents separate is to be victims of or witnesses to parental conflicts. In those situations, a 50/50-timeshare plan may be the worst scenario for children because there are too many opportunities for continuing conflict between parents.

Many people assume that a joint physical custody arrangement is the simplest timeshare plan because the exchanges of the children can be conducted in such a way that the parents infrequently see or talk to each other. On the contrary, joint custody provides numerous opportunities for parents to either work together, or to engage in conflict. Whether a joint physical custody plan is the best or worst schedule for children depends in part on each child's age, developmental needs and temperament. However, the success of the time-share plan is determined *mostly* by how the parents act toward one another, including but not limited to:

- Whether the parents expose their children to conflict, victimize their children by their conflict or buffer their children from conflict.
- How the parents communicate with each other about events, issues and concerns in their children's lives.
- Whether the parents can cooperate with one another regarding the children.
- Whether the parents can compromise with each other, and whether they have the courage to let go of their own needs and demands, for the health and well-being of their children.

Parental conflict exposes children to disagreements, tension and inconsistency. Conflicts between the parents can have long-lasting results for their children. In nearly 25 percent of the children studied in Judith Wallerstein's groundbreaking research, memories of

violent scenes between their parents were vivid and detailed. The fear and sense of helplessness at that time were fully retained in the child's adult consciousness.[1]

The effects of children witnessing IPV can be intense and long lasting. Children growing up in abusive homes (including chronic emotional abuse where no physical abuse occurred) may be affected emotionally, cognitively, socially and physically.[2] A recent study by Gustafsson, et al, 2013, described how IPV may have a negative effect on multiple domains of children's memory development.

McFarlane, Groff, O'Brien, and Watson (2003) asked women who attended a health clinic to complete the Child Behavior Checklist (CBCL) on one of their randomly selected children between the ages of 18 months and 18 years. Of the total, 258 were abused mothers and 72 were an ethnically similar sample of nonabused mothers. Their results showed that children of abused mothers, between the ages 6 to 18 years old, exhibited significantly more internalizing problems, (anxiety, withdrawal and depression), externalizing problems, (attention problems, aggressive behavior and rule-breaking actions), and total behavior problems than children for the same age and sex of nonabused mothers.

David Finkelhor and his colleagues described the National Survey of Children's Exposure to Violence (NatSCEV) as "the most comprehensive nationwide survey of the incidence and prevalence of children's exposure to violence to date." [3] Sponsored by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and supported by the Centers for Disease Control and Prevention (CDC), researchers conducted interviews with a nationally representative sample of 4,549 children and adolescents age 17 and younger.

The NatSCEV survey estimated that 9.8 percent of the children who were interviewed had witnessed violence in their home. The results of this survey described the effects on children who have been exposed to violence, including witnessing IPV: "All too often children who are exposed to violence undergo lasting physical, mental and emotional harm. They suffer from difficulties with attachment, regressive behavior, anxiety and depression, and aggression and conduct problems. They may be more prone to dating violence, delinquency and further victimization. Moreover, being exposed to violence may impair a child's capacity for partnering and parenting later in life, continuing the cycle of violence into the next generation." [4]

They recommend that to protect children, it is important "to ensure protective environments and caregivers." [5] The research is clear that adverse childhood experiences usually lead to significant detrimental long-term effects. [6]

Often there is an assumption that in families with a history of IPV, the abuse will come to an end when the marriage ends, especially after the first year has passed. However, research has shown that both physical violence and emotional abuse continue long after the divorce is finalized. [7] "Even when the physical aggression has ceased, there may be a continuation of the psychological aggression in subtle forms of coercion and control. Time alone does not necessarily heal the wounds from IPV, and there may be continuing residual effects from past IPV." [8]

Abuse continues in the form of continuing controlling, intrusive behaviors, economic control/abuse, accusatory emails, rigidity in small changes in the parenting time schedule and intimidating nonverbal behaviors when attending joint activities of the child. [9] Also, "research has demonstrated that there are common characteristics of power and control

and a substantial overlap between interpersonal violence and child maltreatment in the family. In fact, if one of these occurs in an intimate or family relationship, there is a high likelihood that the other has occurred or may occur as well.”[10]

In light of this, research on the subject is clear that it is not in children’s best interests for parents to share parenting and joint custody when there has been high conflict with a primary instigator.[11] This belief is what led to the passage of laws prohibiting joint custody when the court has made a finding of domestic violence, such as California’s Family Code §3044.

In California, decisions of legal custody and visitation of children are guided by the principles that children’s health, safety and welfare is the court’s primary concern and that it is important that children have frequent and continuing contact with both parents after their parents have separated or divorced.[12] Furthermore, parents are encouraged to share the rights and responsibilities of child rearing (except where the contact would not be in the children’s best interests).[13]

Although the Family Code encourages “sharing” the children, it does not specifically state how the exact schedule of contact between parents and children should be designed.[14] That is left up to the parents, or if the parents cannot agree, it is left up to the court to make orders.

Family Code §3044 states that when the court has made a finding of domestic violence, “within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child.”[15] This is supported by extensive research. Early domestic violence researchers[16] focused their studies on male violence used to control women in relationships. Janet Johnston and Linda Campbell broadened the description of domestic violence to include four other typologies of violent relationships within the context of high-conflict divorcing families.[17]

Johnston and Campbell described and analyzed two studies of high-conflict divorcing families that were involved in child custody disputes. They identified four profiles of interparental violence: (1) ongoing or episodic battering by males; (2) female-initiated violence; (3) interactive violence controlled by males; and (4) violence engendered by separation or post-divorce trauma. They also identified a fifth profile, where the batterer was characterized by psychotic and paranoid reactions. Johnston and Campbell’s article had significant impact on child custody mediators, evaluators and the court in assessing families and issuing recommendations and orders regarding child custody.[18]

Accurate identification and classification of IPV leads to better decision making during child custody mediation by recommending counselors, and custody evaluators who make recommendations to the court, for clinicians who treat the families, and for the individuals who experienced IPV.[19] Since Johnston and Campbell’s 1993 article, there have been efforts to expand the typology of interpersonal violence, and efforts to improve assessment tools and assessing dangerousness.[20]

One significant challenge for the courts evaluating custody arrangements is the issue of undocumented domestic violence. Many families that have histories of domestic violence have no objective documentation of the abuse, for example, by witnesses, police reports or medical reports.

Courts are bound by rules of evidence and must base their orders on evidence, but very often the evidence does not support that there has been a history of IPV because the victimized parent does not report the abuse, and may even actively hide it. Why would they do this?

There are many reasons a victimized parent would both remain in an abusive relationship and not report the abuse. For instance, feelings of fear and shame can be strong motivators. Many victimized parents are too afraid to report the abuse for fear that the abuser will further harm them or their children, fear that if they separate they will not always be present to protect their children, or fear that if they report the abuse, they won't be believed or there will be no consequences for the abuser.[21] They may also be too ashamed or embarrassed to tell friends or family.

The victimized parent may stay in the relationship because they may lack financial resources and the options to be safe with their children once they leave the relationship. They may feel incapacitated by psychological and physical trauma, and may be unable to think through an exit strategy or safety plans, or make general plans for himself/herself and the children's future. There may be strong cultural, familial or religious values discouraging the dissolution of the family, or the victimized parent may continue to hope and believe the perpetrator's promises to change.

Whatever the reason, without documentation of IPV, the courts have a difficult and challenging task of making a finding of domestic violence. Thus, a serious problem develops when there is no or very little documentation of abuse, because then the couple's history of abuse is not taken into consideration and orders are frequently made for joint custody. This leads to an unhealthy situation for both the victimized parent and their children.

Failure to document IPV leads to a distinct disadvantage to the victimized parent because the courts have difficulty telling the difference between true allegations of domestic violence not backed up by objective data, and allegations made based on false claims of violence.[22] Most judges give very little, if any, weight to domestic violence allegations if there are no criminal charges or convictions.[23] Thus, family courts struggle when there is no factual evidence of interpersonal violence, because then the basis for the court's determinations lies with the most credible parent.

The court must balance allegations of domestic violence against the court's preference for frequent and continuing contact between both parents and joint legal and physical custody as prescribed in California Family Code §3040. "The ultimate challenge for judges in Interpersonal Violence-Child Custody cases is how to balance different types of potential harms to the child and parents with the need to promote quality relationships between the child and both parents." [24]

Sorenson, et al, (1995) examined the relationship between allegations of maltreatment (spousal and child abuse) and substance abuse, and custody awards in 60 cases in Florida. Judges appeared responsive to allegations of abuse with regard to awards of primary physical residence, despite the lack of substantiated evidence, but maltreatment allegations had no apparent impact on awards of shared versus sole custody. The results of this study indicated that judges believe that parents still can work together parenting in spite of suspected abuse. It is also possible to conclude that judges were not willing to severely limit one parent's function in childcare based on unsubstantiated allegations.

Recent research indicates that the reticence to believe allegations of undocumented IPV is not limited to judges. Studies have found that many court-connected and private mediators minimize domestic violence allegations because they are overly concerned that women have exaggerated their stories of past violence to manipulate the court system, or they are concerned that mothers will alienate the children from their fathers.[25]

There has been a long-standing belief or myth that embittered divorced mothers will turn children against their fathers. These beliefs have led to situations where the court prioritizes joint custody over safety issues, but research shows the opposite is true[26] and that men who have been violent toward their wives during marriage systematically degrade and diminish the mothers of their children in an attempt to continue to punish, control, or have power over their ex-wives.[27]

Because of the lack of documentation of interpersonal violence that the courts can rely on, there are many separated families with histories of domestic violence that have been court ordered to share joint legal and/or physical custody, leading to very unhealthy situations for all involved and may even lead to a more dangerous situation than before the parents separated. "The fact that a formerly battered mother and her former batterer are not able to co-parent effectively is not at all surprising. One wonders why the court ever expected people in this situation to suddenly be able to cooperate."[28]

Fischer, Vidmar & Ellis (1993) argue that separation from the abuser may enhance the likelihood and seriousness of power and control dynamics in the relationship because abuse is one of the few tools left to dominate and control the victimized parent. After a court orders joint custody because there is no documentation of IPV, the abuser's use of power and control to punish the victim for leaving the relationship often gets acted out within their co-parenting relationship.

Batterers typically exhibit important problems in their parenting. These can include a heightened risk of physical, sexual or psychological abuse. In addition, various stylistic problems typical of the parenting of batterers that may not rise to the level of abuse nevertheless can have profound consequences for children and their development. These include tendencies to authoritarianism, neglect, role reversal, and undermining the other's parenting.

These parenting weaknesses can have sharpened effects on the children because of being combined with the trauma that they already face from their exposure to acts of violence. In addition to the emotional effects that batterers have on their children, the batterer's modeling shapes the belief systems of children in the home, including their outlook on abuse in relationships, personal responsibility, violence and aggression, and sex role expectations.[29]

As discussed in this article, the literature referenced herein is clear that children are injured when they are exposed to domestic violence and parental conflict post-divorce.[30] However, little has been studied or written on what happens after a family with a history of undocumented abuse, whose history was not taken into consideration by the court in ordering custody, on how the family cope with conflict after the court has ordered joint custody plans.

More research is needed to truly understand the effects of co-parenting or joint custody awards in families with undocumented abuse. To attempt to fill this gap, this author is

interviewing families with this situation to understand more about the impact of this unique situation on children and parents from an emotional, psychological and physical perspective, and is asking family law attorneys with clients in this situation to refer them to be interviewed.

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[1] Wallerstein & Lewis, 2004.

[2] O'Daugherty Wright, 2007.

[3] Finkelhor, et al, 2009.

[4] Finkelhor, et al, 2009.

[5] Finkelhor, et al, 2009, p. 3.

[6] Felitti et al., 1998; Geffner, Igelman & Zellner, 2003; Geffner, Jaffe, & Sudermann, 2000.

[7] Hardesty, Khaw, Chung, & Martin, 2008; Hardesty, 2002; Shalansky, Ericksen, & Henderson, 1999.

[8] Austin & Drozd, 2012, p. 102.

[9] Austin & Drozd, 2013.

[10] Geffner, et al, 2009, p. 192.

[11] Kelly, 2003; Jaffe, Lemon & Poisson, 2003; Maccoby & Mnookin, 1992.

[12] Cal. Family Code 3020.

[13] Cal. Family Code 3020.

[14] Family Code §3022 defines "joint custody" to mean joint legal and joint physical custody. Family Code §3003 defines "joint legal custody" to mean that both parents shall share the right and the responsibility to make decisions relating to the health, education and welfare of a child. Family Code §3004 defines "joint physical custody" to mean that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to ensure the child's frequent and continuing contact with both parents, subject to Sections 3011 and 3020. Family Code §3080 declares that it is a presumption that joint custody is in the best interests of a minor child. Many parents think that "joint physical custody" means an equal time-share schedule when the children live the same amount of time with each of their parents, but that would not be completely correct. Joint physical custody could mean that children spend substantial time living with both parents, but not always exactly equally.

[15] FC §3044.

[16] Martin, 1976; Walker, 1979.

[17] Johnston & Campbell, 1993.

[18] Other researchers have discussed classifications of IPV, specifically, Hanks (1992), Austin (2000) and Beck, et al (2013), but none have had the widespread influence as Johnston and Campbell.

[19] Beck, et al, 2013.

[20] Austin & Drozd, 2013, Beck, et al, 2013; Austin & Drozd, 2012; Beck & Raghavan, 2010, Kelly & Johnson, 2008; Drozd & Oleson, 2004; Austin, 2000, 2001; and Stahl, 1999. Campbell, 2007.

[21] Fleury, et al, 1998.

[22] There is little doubt that there are some exaggerated or inappropriate allegations of IPV made by parents to better their position in a legal court proceeding (Saunders, Tolman, & Faller, 2013; Bow & Baker, 2003), but there is very little empirical data to support this assumption.

[23] Lemon, 2001.

[24] Austin & Drozd, 2013, p. 113.

[25] Saunders, Tolman, & Faller, 2013; Haselschwerdt, Hardesty, & Hans, 2011; Jaffe, Crooks, & Poisson, 2003a.

[26] Hardesty, Khaw, Chung, & Martin, 2008, Edleson & Williams, 2007, Bancroft & Silverman, 2002, Johnston, Kline, & Tschann, 1989.

[27] Bancroft & Silverman, 2002.

[28] Lemon, 2001, p. 609.

[29] Bancroft, Silverman, & Ritchie, 2012, p. 67.

[30] Bancroft, Silverman, 2002; Jaffe & Crooks, 2007; Johnston, and Roseby, 1997; Johnston, Kline, & Tschann, 1989.

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Laugh for a Good Cause: Food From the Bar Comedy Night

Tuesday, April 01, 2014



This year's **Annual Food From the Bar Drive** benefitting the **Food Bank of Contra Costa and Solano** will be kicked off with **Res Ipsa Jokuitor XIX**, our annual Comedy Night with nationally renowned comedian **Don Reed** headlining this year. Well-known local comedian **Ben Feldman** will also be joining in, with **Justice James Marchiano (Ret.)** as MC. Don't miss it - and don't forget to bring your checkbook for a chance to win valuable raffle items!

Thursday, May 1, 2014 | 6 pm - 10 pm | Back Forty BBQ

Click here to register! | Download the Flyer

BBQ Buffet: 6:30 pm - 7:30 pm

Show starts at 8 pm

Thank you to our generous sponsors:

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Welcome to Our Newest Members!

Tuesday, April 01, 2014

Please welcome our newest members that have recently joined the CCCBA:

John L. Adams Rebecca Hooley Robert S. Robinson Tamina Alon Ali Huda Derrick
Roehn Brooke Natalie Barnum-Roberts Andrew Jones Elizabeth Rumsey Ariel Brownell
Mark Katz James Shepherd Patrick Cannon Courtney Krause Adam Sloustcher
Shoshana Chazan Julien C. Levadoux Nicole Smith Elizabeth Cinque Star Lightner
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Family Means No One Gets Left Behind or Forgotten*
We need to restore faith in our courts' ability to meaningfully enforce modern family rights and responsibilities and ensure everyone equal access to justice.



Spotlight



Elder Court: Streamlining the Legal Process to Ensure Access to Justice
The concept of Elder Protection Courts has spread across the state and the country, with Contra Costa County serving as a mentor court.



Helping Support Children
The Dept. of Child Support Services is available to anyone who wants to have paternity for their child established, needs to obtain and enforce child support and health insurance orders or to enforce an existing order.

News & Updates



Children, Families & the Law Certification Program at JFKU Law
JFKU College of Law implemented a specialized curriculum focused on children and families. To train the most effective practitioners, we combined the expanded substantive law covered with a substantial



Laugh for a Good Cause: Food From the Bar Comedy Night
Don't miss our annual Comedy Night with nationally renowned comedian Don Reed headlining this year.

Not for Resale