



**2021
FAMILY LAW REVIEW**
by Donald P. Schweitzer

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**CHILD
CUSTODY**

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In re Marriage of Wang and Zhou
62 Cal.App.5th 1098 (2021)
Temporary Emergency Jurisdiction



Marriage of Wang and Zhou

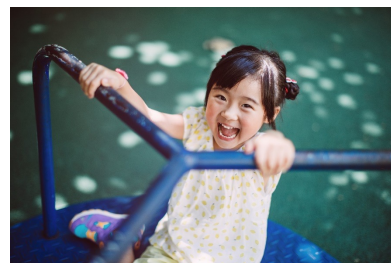
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M and F were married in 2010.

Their only child (C) was born in China in 2013.

They separate in 2016 and F files for divorce.



Marriage of Wang and Zhou

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Meanwhile, M and C live in China, but C makes frequent and extended trips to visit F in California, where he is working.

After M appears in the proceeding, both parties file “requests for various orders,” one of which seeks permission for M and C to return to China.



Marriage of Wang and Zhou

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M asserts that she will promptly file a custody action in China if she is allowed to leave.

T/CT emphasizes that its temporary emergency UCCJEA jurisdiction will not be “long term.”

At a subsequent hearing, the parties stipulate:

- China will have UCCJEA jurisdiction
- They will register the T/CT order in China or create an identical order there, so that there will be enforceable orders in both jurisdictions.

Marriage of Wang and Zhou

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T/CT issues orders assuming temporary emergency UCCJEA jurisdiction, acknowledging that China will be the custodial jurisdiction state, permitting M to return to China with C, with extended periods of visitation for F, and specifying to the creation or registration of custody orders in China.



The parties' stipulated disso judgment incorporates those orders.

Marriage of Wang and Zhou

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In 5/18, M initiates a custody proceeding in China's T/CT, asking for sole custody of C with limited visitation for F.

In response, F describes the T/CT disso proceedings, temporary emergency UCCJEA orders re custody, and the parties' prior adherence to those orders.

F opposes M's having sole custody and seeks extended periods of visitation.

Marriage of Wang and Zhou

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After refusing to admit or implement the California disso judgment, China's T/CT awards sole custody of C to M, with visitation for F on Saturday and Sunday of the third week of every month.



F appeals that order to the Beijing Second Intermediate People's Court.

Marriage of Wang and Zhou

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In 6/18, M files a petition to register China's T/CT order.

In opposition, F argues that China's T/CT order is not yet operative because it was stayed by his appeal.

In a supporting declaration, F includes statements by his attorneys in China attesting to the fact that an appeal stayed the order.

F asks T/CT to vacate registration of China's T/CT judgment and to order M to comply with the existing custody orders made in 2016.

Marriage of Wang and Zhou

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H also asks that M renew C's passport and allow C to spend the rest of F's summer vacation with him.

M counters that the existing orders were only temporary and that China's T/CT order reflects its home state jurisdiction.



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After a hearing, T/CT finds that M had violated the parties' agreement by getting a new custody order from China's T/CT and denies M's request for registration.

T/CT orders M to renew C's passport and to comply with the existing orders.

M appeals

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CA-6 AFFIRMS.



CA-6 finds that

- (1) temporary emergency UCCJEA jurisdiction orders remain in effect until an order is issued by T/CT having UCCJEA jurisdiction;
- (2) evidence showed that China's T/CT order was stayed by F's appeal;
- (3) China's T/CT had authority to stay its appeal commensurate with its UCCJEA jurisdiction; and

Marriage of Wang and Zhou

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- (4) stay of existing custody orders by China's T/CT means that temporary emergency UCCJEA orders are still in effect.

CA-6 holds that T/CT did not err by declining to register China's T/CT order.



Marriage of Wang and Zhou

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Noble vs. Superior Court of Merced

71 Cal.App.5th 567 (2021)

F.C. 3044 presumption

LEGAL NOTICE

Noble v. Superior Court of Merced

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W and H have two minor children together.

12/18: W files a disso petition and request for a DVRO against H.

The DVRO petition is ultimately dismissed for failure to obtain service on H, but, in 4/19, T/CT grants the disso petition by default and awards sole legal and physical custody to W.

W then move to Utah to join their children who had been living there with W's parents.



Noble v. Superior Court of Merced

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The image shows a 'Protective Order' form. It includes fields for 'Case Number', 'County', 'Judge', and 'Case Name'. There are sections for 'Petitioner (person(s) harmed)' and 'Respondent'. A 'Declaration' section contains several checkboxes and text boxes for providing evidence of abuse. The form is partially filled out with handwritten information.

4/23/19: H files a motion to set aside the default judgment, and T/CT sets the hearing on 9/10/19.

5/19: W files for and receives a temporary DVRO against H from a Utah court.

In her response to H’s motion to set aside the default judgment, W files a responsive declaration, providing evidence of abuse, which includes medical records, a police report showing that H was arrested for allegedly hitting W in the mouth, and an e-mail from H in which he stated “yes I hurt you physically, and the reason doesn’t even matter.”

The image shows a 'RESPONSIVE DECLARATION TO PETITION FOR ORDER' form. It includes a 'Declaration' section with several checkboxes and text boxes for providing evidence of abuse. The form is partially filled out with handwritten information.

10/19: T/CT appoints minor's counsel (MC) and asks for a report that includes a review of the Utah proceedings as well as the parties' criminal backgrounds and any safety concerns.

10/22/19: the Utah court issues a 10-year protective order against H.

MC's report that H has abused or committed domestic violence against W, or that there is a substantial likelihood H immediately threatens W's physical safety.



Noble v. Superior Court of Merced

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However, MC also notes that:

- “Both parents appear to be in better shape apart than they were together; neither, alone, was dangerous to the children” and “it appears to be in the children’s best interest for the parents to have a great deal of time with them.”

H also argues that W has not completed services arising out of a child protective service case against her.

Noble v. Superior Court of Merced

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1/31/20: T/CT grants H's motion to set aside the default, grants the parties joint legal and physical custody, and orders the parties to attend custody mediation in order to formulate a custody agreement.

- In making this order, T/CT does not mention Fam C § 3044 [rebuttable presumption exists against custody award to perpetrator of domestic violence].

2/28/20 hearing: T/CT adopts the mediation agreement of the parties, again without mentioning Fam C § 3044.

In 7/20, both H and W file competing motions to modify the custody order.



In H's motion, he alleges that W moved and refused to give him her address or comply with the custody transfer order.

In W's motion, she alleges that she moved because H continued to stalk and harass her and claimed that H had pointed a gun at the children.

8/20: T/CT modifies the custody order only with respect to when each parent would have custody, giving them alternating weeks with the children.

T/CT, however, leaves the joint custody order in place.

W appeals

CA-5 REVERSES

Noble v. Superior Court of Merced

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CA-5 finds that



(1) sufficient evidence exists to show that H was the perpetrator of domestic violence against W, such that the requirements of Fam C § 3044 were triggered;

(2) T/CT erred by failing to provide notice of Fam C § 3044 prior to ordering custody mediation; and

Noble v. Superior Court of Merced

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In re Marriage of Carlisle
 60 Cal.App.5th 244 (2021)
 Restraining Order Renewals



Marriage of Carlisle

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4/15: During ongoing disso proceedings, M requests a DVRO against F to protect her and her daughter

4/24/15 Hearing: T/CT issues a 2-year DVRO

F appeals (but CA-3 affirms in an unpublished opinion issued on 9/29/17)

3/16/17: M files a request to renew the DVRO, which was still pending on appeal.

Marriage of Carlisle

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M's declaration in support of her request for renewal:

- 4/20/15: F was served with the original request for a DVRO
- F was arrested and charged with assaulting a process server and vandalism.
- 8/19/16: F entered a nolo plea to the charges and T/CT ordered diversion, which included participation in anger management classes.

Marriage of Carlisle

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M further describes in her declaration:

- F had continued to harass her despite the existing DVRO, including leaving a 20-foot birthday banner for their daughter at the end of the access road to their house
- Intimidating her at the courthouse parking lot,
- Interfering with her law practice by making disparaging remarks in court and to a client, repeatedly violating court orders, and generally harassing her.



Marriage of Carlisle

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In response, F contends that M is using the DVRO mechanism as a weapon to harass him and setting up situations in which he was forced to violate the DVRO.

F denies having bad-mouthed M to other attorneys, harassed her, physically abused her, or broken into her house.

F claims that M was disparaging him in the local legal community where both practiced and that having a DVRO against him “framed him as a criminal” and harmed his professional reputation.

Marriage of Carlisle

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At the hearing both M and F reiterate allegations in their supporting declarations.

- M details her fear at living alone in a rural area far from police protection, given F’s actions toward her and his abuse of her.
- F denies any physical abuse, explains his side of the incidents, and insists that M has no reasonable fear or apprehension of him.

4/14/17: T/CT grants M’s application and renews the DVRO for a period of 5 years (while original DVRO is still on appeal).

Marriage of Carlisle

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F appeals

- Claiming, among other things, that T/CT lacked jurisdiction to renew the DVRO while his appeal of the original order was pending.

Your call?



Marriage of Carlisle

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CA-3 AFFIRMS RENEWAL ORDER



(1) contrary to F's assertion, a DVRO is a type of injunction;

(2) per City of Hollister (2008) 165 Cal.App.4th 455 , T/CT has the power to extend an injunction of limited duration, pending disposition of an appeal, if an extension would serve the ends of justice;

Marriage of Carlisle

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(3) here, T/CT could conclude that M had met her burden in seeking renewal of the DVRO and renew the order on the basis that it would serve the ends of justice; and

(4) F's contentions re the preclusive effect of a prior T/CT order declining to modify the DVRO while the appeal was pending lack merit.

Marriage of Carlisle

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CA-3 holds that T/CT did not lack jurisdiction to renew the DVRO.

In the unpublished parts of the opinion, CA-3 was not persuaded by F's arguments re T/CT's evidentiary rulings, consideration and knowledge of applicable case law, or sufficiency of the evidence supporting T/CT's renewal order.

Marriage of Carlisle

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In re Marriage of F.M. and M.M.
65 Cal.App.5th 106 (2021)
Admissibility of Evidence



Marriage of F.M. and M.M.

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DOM: 2002

8/18: M files for disso.



Originally from Nigeria, the parties have six children together, whose ages at the time of the disso filing ranged from 3 to 13.

After the disso filing, the parties continue to live together with their children.

Marriage of F.M. and M.M.

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8/15/19: M files a DVRO application, alleging that F called her vulgar names in the presence of the children, took her cell phone from her, demanded that she leave their shared home, threw her personal items out of the house, and made multiple threats to kill her.

T/CT issues a TRO, ordering F not to abuse M and to stay at least five yards away from her.

However, T/CT denies M's requests to add their children as protected parties, require F to move out of their home, and prevent F from traveling with the children.

Marriage of F.M. and M.M.

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9/5/19: T/CT conducts the first of three hearings related to the DVRO request.

At the first hearing, T/CT states that it isn't that concerned with the request for the restraining order because "the allegations you've made in this request have to do with the fact that the two of you are living together."

M replies that she will move out of the shared home by the end of the month.

Marriage of F.M. and M.M.

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T/CT orders M to move out of their house by the end of the month and directs M to present a court order to the Elk Grove police to obtain a civil standby to retrieve the children and personal items from the house.

T/CT continues the hearing and reissues the TRO.

By the next hearing date on 11/6/19, M has moved out of the shared home and is living in a motel with most of the children.



Marriage of F.M. and M.M.

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At this hearing, T/CT inquires about an incident that had occurred the previous month in which M went over to the former residence to pick up one of the children and personal items during which time a physical altercation occurred, and M called the police.

F was arrested and jailed for the incident.

F states that this incident occurred after M appeared at the house without a civil standby.

Marriage of F.M. and M.M.

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T/CT admonishes M, stating that M didn't demonstrate good judgment by returning to the former residence without a civil standby and that T/CT would consider this incident as a factor weighing against her request for DVRO.

- T/CT continued the hearing and reissues the TRO.

12/16/19: T/CT conducts the final hearing on M's DVRO request.

- T/CT interrupts M several times during her testimony about the October altercation and other post filing events to inform her that any incidents that occurred after the filing of her DVRO application are irrelevant.

Marriage of F.M. and M.M.

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While M attempts to testify about a death threat that F allegedly made the previous week, T/CT stops M and states, "You need to support this request with what took place before you filed this request. What happened Friday is not relevant to this request."

Limiting her testimony to events that occurred prior to her DVRO filing, M testifies that F called her vulgar names in front of their children and that F threatened to kill her if she didn't leave the house.



Marriage of F.M. and M.M.

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F then testifies, denying that he ever abused M.

[At the time of the final hearing, criminal charges had not been filed against F for his arrest arising out of the physical altercation in October.]

T/CT denies M's DVRO request, finding that M failed to provide corroborating evidence for her testimony.

M appeals

Marriage of F.M. and M.M.

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CA-1 REVERSES and REMANDS.



CA-1 finds that

- (1) T/CT erred by refusing to consider evidence of post filing abuse;
- (2) DVPA does not require petitioner to provide heightened specificity or corroboration of her testimony;

Marriage of F.M. and M.M.

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(3) per FC § 6300(a), T/CT may issue an order “based solely on the affidavit or testimony of the person requesting the restraining order”; and

(4) T/CT erred by using residential separation as a substitute for a DVRO. For these reasons, CA-1 reversed and remanded the matter for a new hearing.

CA-1 also noted that although F died prior to the publication of its opinion, it exercised its discretion to publish its opinion “in light of the important public matters raised in this appeal.”

Marriage of F.M. and M.M.

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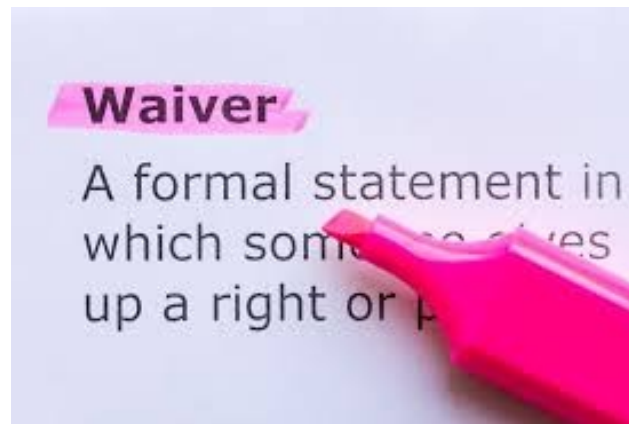


MARITAL AGREEMENTS

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Knapp v. Ginsberg
67 Cal.App.5th 504 (2021)
Waivers



Knapp v. Ginsberg

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3/25/04: H and W sign a premarital agreement (PMA) that focuses in relevant part on a marital home (Perugia property).

- W is represented by an attorney and CFLS (A-1)
- H does not have apparent legal representation during the negotiation or execution of the PMA
- The PMA contains a provision that both parties are represented by counsel.



Knapp v. Ginsberg

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Other relevant portions of the PMA states:

- The couple will jointly own the Perugia property
- If H predeceased W, W will receive H's one-half interest in the residence free and clear of any encumbrance, lien, or other debt.
- If H dies while an encumbrance remains on the Perugia property, W shall have a lien against H's estate in an amount sufficient to promptly pay the full amount of such lien or encumbrance so as to ensure that W receives the property free and clear of any such liens or encumbrances.

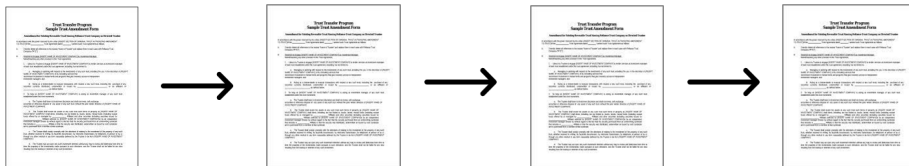
Knapp v. Ginsberg

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4/5/04: After the execution of the PMA, the couple marry.

In subsequent years, H executes several amended versions of his trust, which frequently acknowledge the PMA and includes provisions for carrying out its terms.



Knapp v. Ginsberg

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12/22/04: while represented by an attorney, H executes a Second Amended Trust that acknowledges the existence of the PMA and provides that a successor trustee is to set aside \$450K for property taxes, assessments, insurance, maintenance, and ordinary repairs on the Perugia property.

4/29/15: H, again represented by an attorney, executes a Fifth Amended Trust, which states that the PMA required his estate to pay off any encumbrance on the Perugia property at the time of his death and, like the Second Amended Trust, provides that \$450K should be set aside to carry out the PMA requirement.

Knapp v. Ginsberg

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7/15/15: H executes a Sixth Amended Trust, which revokes a Residence Trust that was created concurrently with his Fifth Amended Trust.

- This sixth and final amendment again provides for \$450K for the payment of expenses related to the Perugia property.



Knapp v. Ginsberg

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11/28/16: H dies, leaving behind a \$3.9 million mortgage on the Perugia property.



After H's death, W sells the Perugia property for \$10.2 million and uses the proceeds to pay off the mortgage, purchase a new home, and fund a newly created trust.

Knapp v. Ginsberg

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7/24/17: H's children files a probate petition to set aside the Sixth Amended Trust, alleging that W exerted undue influence over H.

11/28/17: W files a \$4 million creditor's claim against H's estate after H's son and executor refuse to reimburse W for her payment of the Perugia mortgage.

During litigation of their claims, the parties become aware that the PMA may be invalid because H did not execute a signed waiver of legal representation per Fam C § 1615.

Knapp v. Ginsberg

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After learning about the potential issue with the PMA, W addresses her concern with A-1, who continues to provide representation relating to the Perugia property to W throughout the years.

10/11/18: W and A-1 enter into a tolling agreement whereby A-1 denies any wrongdoing in the drafting and execution of the PMA but agrees to toll the running of the statute of limitations until 4/30/19.

Knapp v. Ginsberg

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10/19/18: H's children and W settled their claims against each other.

This settlement agreement requires W to forgo certain estate assets, pay attorney's fees, and amend her trust to provide that \$2 million of W's estate will pass to H's four children at the time of her death.



Knapp v. Ginsberg

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4/2/19: W files a malpractice action against A-1, alleging that the PMA that she hired him to prepare was void because H was not represented by counsel and did not sign a separate waiver of counsel per Fam C § 1615.

- In her suit, W alleges that her damages included \$111K that she was forced to forgo in the probate action, \$500K in attorney's fees, and the present value of the loss of transferability of \$2 million of her estate at the time of her death.

Knapp v. Ginsberg

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In response, A-1 files a motion for summary judgment.

- Among other arguments, A-1 contends that W could not prove causation of her malpractice claim because H later ratified the terms of the PMA through his several trust amendments, each of which cured his purported lack of consent.

Knapp v. Ginsberg

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8/5/20: T/CT grants A-1's motion for summary judgment on the ground that H ratified the PMA by "repeatedly acknowledging the existence and terms of the PMA and failing to rescind it."

W appeals

CA-2 REVERSES

Knapp v. Ginsberg

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CA-2 finds



(1) boilerplate language in the PMA that provides that the parties were represented by independent counsel does not conclusively establish that H was represented during the execution of the PMA;

(2) where a PMA is executed by an unrepresented party who did not sign a waiver of legal representation per Fam C § 1615, such PMA is void and cannot be ratified as a matter of law; and

Knapp v. Ginsberg

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(3) W's claims against A-1 are not barred by the statute of limitations where W and A-1 entered into an agreement that tolled the statute of limitations until 4/30/19 and W filed her action against A-1 on 4/2/19.

Accordingly, CA-2 reverses the judgment of T/CT.

Knapp v. Ginsberg

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PROPERTY DIVISION

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In re Marriage of Wozniak
59 Cal.App.5th 120 (2021)
Transmutations



Marriage of Wozniak

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W owns SP property in La Mesa

Sometime during marriage, W converts title of the property to joint tenancy with H.



Marriage of Wozniak

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2006: H executes an interspousal transfer deed, transferring his CP interest in the property to W and presents it to W,



Marriage of Wozniak

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. , but W rejects it

After that, the deed sits in a drawer within the family residence for the next six years



Marriage of Wozniak

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Following a 2012 incident in which W is arrested for domestic violence.

H obtains a protective order, which excludes W from the family residence.

However, W sneaks into the family residence, removes the deed, and promptly records it.

Marriage of Wozniak

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After the couple begin dissolution proceedings, they disagree over the characterization of the La Mesa property.

- W claims it is SP
- H claims it is CP

6/18: Two Day Trial

M testifies she placed H's name on the title to the property only for purpose of refinancing the loan

Marriage of Wozniak

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F testifies:

- He had executed the interspousal transfer deed in the hope that arguments and conflict between them would end if the property was M's SP once more.
- However, M "out right and immediately rejected the deed," saying that she wanted everything to be CP.
- With that in mind, F added M's name to the title to one of his SP properties in 2007

Marriage of Wozniak

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T/CT finds:

- No transmutation occurred when F presented M with the 2006 deed because M rejected the deed and
- F no longer had intent to make a transmutation when M recorded the deed in 2012

T/CT awards the La Mesa property to M as her SP and orders an equalizing payment reflecting the CP interest in the property.

Marriage of Wozniak

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M appeals
Your call?

Marriage of Wozniak

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CA-4 AFFIRMS.

CA-4 finds that T/CT correctly determined that there was not a valid transmutation because:

- (1) in addition to other Fam C §850 requirements, a valid transmutation must be accepted by the spouse to whom the transfer is made;
- (2) it would make no sense to find that acceptance is not necessary and, thus, deny the recipient the right to refuse the transfer;

Marriage of Wozniak

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- (3) substantial evidence supports finding that M rejected the deed;
- (4) F would have to redeliver the deed and M to accept it in order to have a valid transmutation; and
- (5) issue of undue influence does not arise here because there was no valid transfer

Marriage of Wozniak

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In re Marriage of Nevai and Klemunes
59 Cal.App.5th 108 (2020)
Reimbursement Rights



Marriage of Nevai and Klemunes

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1998: M buys an empty lot at Lake Tahoe and builds a cabin on the property for \$289

2003: DOM

M and F make the mortgage payments of \$1,800/mo (including property taxes) from a joint bank account

2005: C is born

Marriage of Nevai and Klemunes

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2008 - 2015: they rent out the cabin during ski season (December through April) and at times during the summer

- They deposit the rental funds into the same joint account from which they made the house payments



8/15: DOS:

- Cabin is worth \$525 (per stipulation), but has a mortgage

Marriage of Nevai and Klemunes

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5/16: F's attorney sends M's counsel a letter setting forth his list of the parties' joint and separate assets and liabilities and asks M to respond re any omitted assets or liabilities and to correct any misstated facts

- F's list estimates the mortgage on the Tahoe cabin at \$299K at DOM and \$202K at DOS
- F also states that there had been no refi on the property during their marriage

9/17: Trial

M testifies:

- She, F, and C used the Tahoe cabin approximately twice a month during the summer; she and C would stay for a week and F would come up on weekends.
- The family usually spent the 4th of July there
- W estimated the FMV of the cabin to be between \$475K and \$495K, based on a local realtor's estimate; but if she listed it for sale, she would ask \$525K to \$550K

F testifies:

- M and C spent a lot of time at Tahoe during the summer, but he managed to spend only four holiday weekends there between 2007 and 2014

F's appraiser (RS) testifies:

- The cabin is worth \$735K in 8/17, based on comparable sales
- F stated that he and M had added a hot tub and electrical outlet to the property, at a cost of \$7K, which improved its rental value

Marriage of Nevai and Klemunes

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A forensic expert (DS) testifies as to the CP and SP interest in the cabin:

- Per Moore-Marsden, DS estimates the CP interest is \$180K
- DS calculates the reimbursement due to CP, including mortgage interest and property taxes paid, but deducts the tax benefit received by the community, to arrive at a figure of \$176K

M requests \$7K/mo for spousal support

M and F each request attorney's fee awards

Marriage of Nevai and Klemunes

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T/CT's ruling regarding the cabin:

- Values the cabin at \$735K
- Makes several adjustments in calculating CP reimbursement, but offsets \$105K of CP reimbursement for mortgage interest and property taxes

Marriage of Nevai and Klemunes

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T/CT retains jurisdiction over spousal support but keeps the temporary orders in effect based on XSpouse printout and asks the parties to attempt to reach an agreement and orders each party to pay his/her own attorney's fees

12/29/17: T/CT's ruling regarding spousal support:

- F to pay \$3,584/mo to M for spousal support, based on the DissoMaster calculation attached to and incorporated into the judgment

Marriage of Nevai and Klemunes

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M appeals:

- Claims T/CT erred by ordering CP reimbursement that included mortgage interest and property tax payments

Your call?



Marriage of Nevai and Klemunes

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CA-3 AFFIRMS IN PART AND REVERSES IN PART.



CA-3 finds that

(1) CP reimbursement for CP contributions to SP asset does not include payments for mortgage interest or property taxes because those things do not increase the equity value of the property or contribute to the capital investment;

(2) payments for mortgage interest or property taxes should be considered expenses incurred to maintain the investment; and

Marriage of Nevai and Klemunes

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(3) T/CT erred by determining that the community was entitled to reimbursement for mortgage interest and property taxes paid on the cabin.

CA-3 reverses that determination and remands for T/CT to recalculate the equalizing payment.

Marriage of Nevai and Klemunes

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In the unpublished parts of the opinion, CA-3 reverses T/CT's order for permanent spousal support because it was erroneously based on computer calculation and remands for recalculation, and reverses order for each party to pay his or her own attorney's fees

CA-3 affirms the rest of the judgment.

Marriage of Nevai and Klemunes

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In re Marriage of Ramsey v. Holmes
67 Cal.App.5th1043 (2021)
Burden of Proof



Marriage of Ramsey v. Holmes

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H purchases home in January 2005 as his separate property

DOM: 10/27/07

Parties lived in home from 2/1/05 until DOS

DOS: 4/27/15

Marriage of Ramsey v. Holmes

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10/16: W files for disso

At trial, Moore/Marsden interest in the home is at issue

W introduces into evidence various facts related to the mortgage payments made during marriage but leaves out several key factors used in the calculation, such as the portions paid toward interest, taxes, and insurance payments.



Marriage of Ramsey v. Holmes

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In closing, H argues

- Because the house clearly was H's separate property, W had the burden to prove the amount of the community interest.
- W failed to meet her burden of proof, because she had not presented any evidence of what the balance of the mortgage was on the date of the marriage or how much the principal was reduced, and that she had provided only her own opinion as to the current value of the house, without laying a foundation for her opinion.

Marriage of Ramsey v. Holmes

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TRIAL COURT'S MOORE/MARSDEN CALCULATION

To determine the amount by which the CP payments reduced the principal on the mortgage, T/CT uses the total amount of mortgage payments from the date of marriage to the date of separation.

T/CT determines the market value of the house at the time of marriage by calculating the average monthly appreciation from the time of purchase to the time of trial and multiplying that monthly appreciation by the number of months between the date of purchase and the date of marriage and adding that amount to the purchase price.

T/CT then applies the Moore/Marsden formula and determines the CP interest in the home is **\$426,680**

Marriage of Ramsey v. Holmes

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H objects, arguing

- The T/CT erred by using the total amount of mortgage payments made during the marriage because those payments included principal, interest, real estate taxes, and homeowner's insurance.
- The CP interest in the home is only **\$45,466**

Marriage of Ramsey v. Holmes

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T/CT responds:



“All the court had to go off was the fact that monthly payments of \$3,200 were made. Period, end of story. Either side could have presented the correct amount. Neither did. The court went with what it had and that's all there is.”

H Appeals

Your call?

Marriage of Ramsey v. Holmes

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CA-2 REVERSES



(1) After it is established that a community property interest exists, the family court is obligated to determine the value of that interest and divide it equally;

(2) Both spouses had an equal interest in ensuring the court had sufficient information with which to fulfill its judicial responsibility.

(3) As the mortgagor, H was in the best position to provide the evidence needed to establish the reduction in principle;

Marriage of Ramsey v. Holmes

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(4) Forfeiture is not appropriate here because at trial H clearly pointed to the absence to establish the community-funded reduction in principal.

(5) In light of the T/CT's obligation to determine the value of the community property interest in the house, and its recognition that there was an "absence" of evidence, the court should have required the parties to furnish the additional evidence it needed to make the determination.

Marriage of Ramsey v. Holmes

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CA-2 reverses the judgment and remands with directions to the T/CT to hold a limited retrial to determine the amount of community funds used to reduce the mortgage principal and to recalculate the community property.

Marriage of Ramsey v. Holmes

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QUOTABLE QUOTE:

"Such a requirement, especially when the information is readily available to one of the parties, is consistent with the Legislature's stated public policy to favor the reduction of the adversarial nature of marital dissolution and the attendant costs."

Marriage of Ramsey v. Holmes

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SANCTIONS

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In re Marriage of Erndt and Terhorst
59 Cal.App.5th 898 (2021)
Pro Per Litigants



Marriage of Erndt and Terhorst

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DOM: 1986

2010: W file for divorce.

1/18: H and W participate in a 3-day settlement conference

- Reach a stipulated settlement, recited in open court



Marriage of Erndt and Terhorst

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Settlement Agreement Provides:

The CP part of W's FERS [Federal Employees Retirement System] retirement benefits is divided between the parties, except for the additional service years that W bought, which is awarded to her, with H waiving his right to a CP share of them.

- There is no mention made of the survivor benefit that was part of W's FERS retirement package.



Marriage of Erndt and Terhorst

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The parties orally stipulate that they understand the settlement agreement, are entering into it freely and voluntarily, and had time to confer with counsel before agreeing to it.

T/CT directs H's counsel to prepare a stipulated judgment

- H and W subsequently spend several months haggling over its content

Marriage of Erndt and Terhorst

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H ultimately sends W a proposed stipulated judgment that includes a division of the FERS survivor benefit as an omitted asset, per Fam C §2556, but W refuses to sign it

Each party files a request for T/CT to resolve the issue

- H reiterates his contention that the survivor benefit was an omitted asset
- W asks T/CT to enter judgment per the parties' oral stip (no mention of the survivor benefit)

Marriage of Erndt and Terhorst

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3/14/19 Hearing: , T/CT hears testimony from H concerning the discussions at the settlement conference

- H is in pro per
- W is represented by an attorney

Marriage of Erndt and Terhorst

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H testifies he knew nothing about the survivor benefit until his attorney included it in the proposed stipulated judgment that W refused to sign

W testifies she kept quiet about the survivor benefit because she wanted it for herself and believed that H's right to the benefit would cease on entry of judgment, as long as it had not been mentioned during negotiations

T/CT rules that H was entitled to his CP share of the survivor benefit and directed the parties to meet and confer and to submit a stipulated judgment that incorporated that ruling.

Marriage of Erndt and Terhorst

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4/3/19, T/CT hears W's contention that as an alternative it should set aside the judgment

T/CT denies W's motion and orders her to sign and resubmit the court-ordered stipulated judgment within a few days

W then makes handwritten changes to the judgment and signs it as modified

Marriage of Erndt and Terhorst

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H files a motion for a court elisor to sign the judgment and also seeks \$6,102 for attorney's fees and \$180 for court costs as Fam C §271 sanctions for W's repeated refusal to comply with T/CT's orders

5/15/19 Hearing:

- Both parties appear in pro per

T/CT finds no basis for changing its prior orders and W signed the court-ordered stipulated judgment in open court

Marriage of Erndt and Terhorst

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T/CT also awards H \$180 for costs and \$800 for reasonable attorney's fees as sanctions re the current hearing

W appeals

- Claims T/CT erred by awarding fees as sanctions to pro per litigant to H

Marriage of Erndt and Terhorst

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CA-1 AFFIRMS IN PART AND REVERSES IN PART



In the published part of the opinion, CA-1 finds that

- (1) the issue of a fee award to a pro per litigant under Fam C §271 is one of first impression;
- (2) award of §271 fees as sanctions must be “‘tethered’ to attorney fees and costs”;

Marriage of Erndt and Terhorst

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(3) pro per litigant is not entitled to award of fees and, thus, fee award here is not tethered to attorney fees and costs; and

(4) T/CT erred by awarding \$800 in attorney’s fees to H and reverses that part of the order (costs award is OK).

On remand, T/CT is directed to enter a new order awarding \$180 costs as sanctions to H.



Marriage of Erndt and Terhorst

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In the unpublished parts of the opinion, CA-1 affirms T/CT's rulings re H's entitlement to CP share of survivor benefit as an omitted asset and its refusal to set aside stipulated judgment and also denies H's motion for sanctions on appeal for filing a frivolous appeal.

Marriage of Erndt and Terhorst

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**SPOUSAL
SUPPORT**

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In re Marriage of Pletcher
68 Cal.App.5th 906 (2021)
Cash Flow Available for Support



Marriage of Pletcher

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7/18: W files for divorce

35-year marriage

9/18: W files for temporary spousal support



During the marriage, the parties operated an investment firm together. H owned the firm and W worked as a bookkeeper.

Marriage of Pletcher

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INCOME DURING MARRIAGE:

- W's salary was 200K/yr.
- H's salary was \$240K/yr but he also received an annual bonus that fluctuated drastically each year.

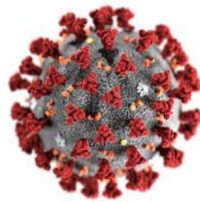
In the preceding six years, H's lowest bonus was \$490K while his highest bonus was \$1.6 million, which he received in 2019.



Marriage of Pletcher

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At the hearing regarding temporary support, H testifies he does not anticipate receiving a bonus on the high end of this range in the current year because his bonuses were triggered only if the assets he manages exceed their historic highs, which would be difficult to accomplish due to the Coronavirus.

Marriage of Pletcher

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H's expert supported a methodology that averages H's bonuses going back to 2008, which resulted in H's income averaging \$58K/mo.

T/CT rejects this approach, calling it "an obvious and unpersuasive attempt to lower the income available for support by going far enough back in time to bring in the period of the great recession.' "

Marriage of Pletcher

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Alternatively, H's expert analyzed H's historical income but deducts \$770K in losses that H incurred over a three-year span from building a theater that he intended to operate.



T/CT similarly rejects this approach since the theater business was "not related" to the investment firm.

Marriage of Pletcher

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W's expert supports a methodology that accounts only for H's 2019 income, his highest grossing year.

- This resulted in H having an income of \$132K/mo.

T/CT issues ongoing spousal support based on 2019 income:

- Spousal support = 31,717 per mo.
- Arrears = \$474,140
- Attorney's fees = \$250,00

H appeals, arguing:

- T/CT erred in basing his ability to pay on a single year that happened to be by far his best year ever, in spite of the fact his income varies from year to year; and
- T/CT erred in disregarding the money he invested and the losses he incurred in the theater business in assessing his ability to pay.



CA-4 REVERSES.


(1) T/CT erred by using a single year of H's income, which happened to be his highest grossing year on record by far, in order to calculate his average income for purpose of temporary spousal support;

(2) although the use of a 12-month period to determine income available for support is appropriate in most cases, evidence here was clear and undisputed that H's income varied dramatically, and he was unlikely to make a bonus on the high end again;

Marriage of Pletcher

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(3) any error related to the failure to deduct theater losses were harmless since these were one-time losses associated with building the theater and are not likely to be ongoing expenses; and

(4) T/CT has discretion to deduct business expenses from income available for spousal support, if T/CT finds substantial evidence that the payment "reasonably and legitimately" reduces H's ability to pay spousal support.

Marriage of Pletcher

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Accordingly, CA-4 reverses and remands for T/CT to recalculate temporary spousal support.

Marriage of Pletcher

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CA-4 proposes two different approaches the T/CT may take on remand to calculate H's income:

- First, T/CT could “expand its data set to include additional years that capture the volatility of [H’s] income.” For example, T/CT could include the past five years of income data.
- Or second, T/CT could award a percentage of H’s future bonuses in addition to his \$240K salary, per *In re Marriage of Ostler and Smith* .

Marriage of Pletcher

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In re Marriage of Kahan v. Diamond
Cal.App.5th (2021)
Modification



Marriage of Kahan and Diamond

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H and W have three Cs together and had been married for 17 years when they divorce in 2014.

In their stipulated disso judgment, H's income was \$196K/yr., and he was ordered to pay \$4,326/mo. in spousal support and \$3,674/mo. in child support.

Marriage of Kahan and Diamond

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2017: H files a request to modify his child and spousal support.

- T/CT finds H's gross annual income had declined to \$185K and, thus, reduces his spousal support to \$3,800/mo.
- T/CT also finds per Fam C § 4326 [termination of child support constitutes a change in circumstances for purposes of spousal support] that the reduction in child support to be a material change of circumstances for purposes of H's request for modification of spousal support.

11/22/19: H files another request to modify spousal support.

This time, H argues that three material changes had occurred:

- Their second child had aged out of child support;
- His income had decreased; and
- W had failed to make good faith efforts toward becoming self-sufficient.

In response, W argues that H's own I&E Declaration showed his annual income had increased to \$288K/yr.

W also argues that H's motion was an example of his litigious conduct, arguing that this was the fourth time H has filed a motion to modify spousal support.

Marriage of Kahan and Diamond

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1/17/20: one week before the scheduled hearing on his motion to modify spousal support, H files another I&E Declaration revising his income to \$224K/yr.

1/24/20: T/CT concludes H's revised I&E Declaration is untimely.



Marriage of Kahan and Diamond

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T/CT also finds:

- H and W's second child aging out of child support was a material change of circumstances that triggered application of Fam C § 4320.
- H's annual income had actually increased since the last order setting spousal support and
- W had made efforts to become self-sufficient by taking the steps that were suggested by the vocational expert.

T/CT denies H's request to modify spousal support.

Marriage of Kahan and Diamond

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W requests attorney fees due to H's "litigious conduct."

In response, H provides "a largely incomprehensible explanation" for his litigious behavior.

- H testifies that his daughter had accused him of giving W breast cancer and threatened never to speak to him again if he requested attorney fees.

Marriage of Kahan and Diamond

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Finding the issues raised by H to be irrelevant, T/CT refuses to consider them and instead denies H's request for a full hearing with live testimony from W.

T/CT further sanctions H and orders him to pay W's attorney fees of \$5K.

- "Husband's litigation conduct is not what is contemplated by the family code."

Marriage of Kahan and Diamond

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H appeals, arguing, inter alia:

- T/CT erred by failing to consider each of the factors set out in F.C. section 4320
- Denying his request on the ground that his son aging out of child support was insufficient by itself to warrant a downward modification.
- The sanctions order must be reversed because W did not give adequate notice and H did not have a sufficient opportunity to respond.

Marriage of Kahan and Diamond

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AFFIRMS. CA-2 finds that



(1) Fam C § 4320 sets out the factors that a court must consider when deciding whether to modify spousal support;

(2) A court is not required, although it is better practice, to identify each factor enumerated in Fam C § 4320 and set out in writing or on the record how the court has weighed each factor;

(3) T/CT expressly considered the three applicable factors that H identified and did not abuse its discretion by not articulating its consideration of any other factors in its statement of decision;

Marriage of Kahan and Diamond

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(4) T/CT did not abuse its discretion by denying H's request to cross-examine W on the issue of sanctions; and



(5) W was not required to file a formal noticed motion seeking sanctions in order to satisfy the notice and opportunity to be heard requirement of Fam C § 271(b) where W requested sanctions in her opposition to H's motion to modify spousal support.

Accordingly, CA-2 affirms T/CT's judgment.

Marriage of Kahan and Diamond

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In re Marriage of Maher v. Strawn
63 Cal.App.5th 356 (2021)
Equitable Factors



Marriage of Maher & Strawn

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18-year marriage

Two adult children

- Son, age 20, is attending college
- Daughter, age 18, graduating high school, who will be attending college



Marriage of Maher & Strawn

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H's Personal Information:

- 60 years old
- Ph.D. in biochemistry and is also a lawyer
- Used to work as a patent attorney
- Primary bread winner in early years of marriage
- Earned \$215K in 2004; \$100K in 2006
- Purchased a home in 2004 for \$1.8 million
- Stopped working in 2008 because of "health issues"

Marriage of Maher & Strawn

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W's Personal Information:

- Holds a Ph.D. and since 2004 been employed by a pharmaceutical company
- Earns 28K per month.



Marriage of Maher & Strawn

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DOS: 6/16

12/16: W ordered to pay temporary spousal support to H = \$6,218

- \$1,733 per month imputed to H, finding he “has the ability and opportunity for earn minimum wage.”

7/19: Five-day trial begins

Marriage of Maher & Strawn

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H's testimony regarding his need for spousal support:

- Sleep apnea, insomnia, PTSD, severe depression
- Anxiety problems related to large crowds
- Remains alone in his apartment and has to force himself to "socialize"

On cross examination H admits:

- Traveled to Las Vegas in 2018 to attend an indoor rock concert
- Attended a few concerts at the Del Mar fair with a social group and at the House of Blues
- Takes valium a couple of times a day
- Drinks three to four glasses of wine nightly
- Works part-time as a high school track coach

Marriage of Maher & Strawn

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W's testimony regarding why she should not pay support:

- H repeatedly committed DV on her during the marriage
- In 2016 the family court issued a DVRO against H
- W pays about 35K per year for adult son's college tuition and living expenses
- Intends on paying daughter's private university tuition and living expenses at 50K per year.

Marriage of Maher & Strawn

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T/CT's findings:

- H is not credible
- H can become fully employed if he applies himself to overcoming his limitations
- W has significant income to pay spousal support, however, she will be spending substantial after-tax sums for H's children's adult education.
- W ordered to pay spousal support with a substantial step-down:
 - Year 1 - 4K
 - Year 2 - \$3.5K
 - Year 3 - \$2.5

H Appeals

Marriage of Maher & Strawn

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CA-4 AFFIRMS



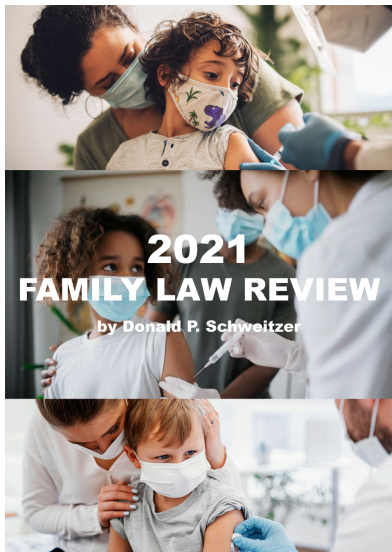
(1) T/CT may appropriately consider a supporting spouse's payment of adult children's college expenses in determining ability to pay support;

(2) A spousal support order based in part on the supporting spouse's payment of reasonable college expenses for adult children is not indirect adult child support.

Marriage of Maher & Strawn

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