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LACBA E-News Case Summaries (as of December 27, 2019)

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In re Marriage of Bittenson (2019) 41 Cal.App.5th 333, 254 Cal.Rptr.3d 209

In this case, the Second District affirmed a Ventura County trial court that reduced H's FLARPL lien amounts. Opening the opinion by stating that "'Family law practitioners should read this opinion with the following in mind: '[F]amily law court is a court of equity' (E.g., *In re Marriage of Boswell* (2014) 225 Cal.App.4th 1172, 1174.))" and "(a)ppellate attack upon a discretionary trial court ruling is an 'uphill battle.' (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448)," the panel said this:

Mark Bittenson (husband) appeals a pretrial discretionary order limiting his \$250,000 pendente lite lien for attorney fees in a marital dissolution action. (Fam. Code, § 2034, subd. (a).) Husband's trial attorney recorded three Family Law Attorney's Real Property Liens (FLARPLs) on the family residence before it was sold. (§ 2033, subd. (a).) The trial court reduced the lien because the parties were contesting the date of marital separation and the full \$250,000 lien amount could impair the overall equal division of community assets and debts. We affirm and conclude that section 2034, subdivision (c) permits a family law court to reduce or limit a FLARPL after the lien is recorded.

The panel held that

Section 2034, subdivision (c) provides that the trial court has "jurisdiction to resolve any dispute" arising from the FLARPLs. (Italics

added.) "[T]his broad catchall provision gives the court jurisdiction to resolve disputes over the propriety of existing FLARPLs, whenever they may arise. The plain language of the subdivision does not impose any timing requirement or otherwise limit the court's ability to revisit the propriety of a FLARPL. Moreover, as this subdivision is separate from other parts of the statutory scheme relating to the ex parte objection process (§ 2033, subd. (c)), it contemplates disputes apart from the ex parte objection process. . . and . . . contemplates disputes when the FLARPL is already in 'existence.'" (*Turkanis & Price, supra*, 213 Cal.App.4th at pp. 350-351.) That would include disputes after the FLARPL is recorded. A trial court may revisit the propriety of the lien at any time and, in an appropriate case, expunge or limit the lien. (Hogoboom & King, *Cal. Practice Guide: Family Law, supra*, ¶ 1:302, p. 1-115.)

We reject the argument that section 2033, which addresses the ex parte objection procedure before a FLARPL is recorded, restricts the trial court’s discretion to limit the amount of a FLARPL after it is recorded. “To read [section 2034, subdivision (c)] as merely referencing to the ex parte objection process [i.e., section 2033, subdivision (c)] and no other disputes would render it superfluous, and we are to avoid interpretations that render any part of a statute superfluous. [Citation.]” (*Turkanis & Price, supra*, 213 Cal.App.4th at p. 351.)

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In re Marriage of Lee & Lin (2019) 41 Cal.App.5th 698, 254 Cal.Rptr.3d 385

In this case, the Sixth District affirmed a Santa Clara County trial court’s determination in a bifurcated proceeding that the parties “legally separated in May 2012 when respondent moved out of the family home.” It affirmed the application of Family Code §70 to conduct that occurred before the statute was enacted. Holding that “(t)he ‘date of separation’ definition added by section 70 is consistent with caselaw interpreting and applying former section 771,” it said this:

Ruling from the bench and tracking the language of Family Code section 70 defining “date of separation,” the court found “Husband’s intention to end the marriage occurred on May 21, 2012 and his actions since then have been consistent with that.” The court found Husband’s intent to end the marriage was clearly expressed by leasing an apartment, his intent was reinforced by relinquishing the key to the family home and refusing to give Wife a key to the apartment, and his post-move conduct was consistent with that intent.

The court found the parties’ limited interactions after Husband’s move did not show an intent to reconcile and did not “overcome any clear act of ending the marriage by moving out.”

...

Wife contends that the trial court misapplied the law by presuming that Husband’s move to an apartment was sufficient to establish the date of separation, and by requiring Wife to rebut that presumption. But no such presumption appears in the trial record. In fact, Husband argued in his trial brief that no presumption applied to either party’s proposed separation date, citing *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487 (date of separation is determined by a preponderance of the evidence standard because the parties’ economic interests in selecting between two dates are inverse but equal). Husband presented evidence that in May 2012 he expressed his intent to end the marriage and that his conduct while the parties were living apart was consistent with that intent. Wife presented evidence not to rebut any presumption, but for the court to weigh against Husband’s evidence in determining whether the May 2012 separation date had been shown by a preponderance of the evidence. The trial court’s date of separation finding was based on the evidence presented, not on the application of a presumption.

Citing the requirement in section 70 that the intent to end the marriage be communicated to the other party, Wife complains that the trial court did not find Husband had verbally informed her of his intent to end the marriage.

The statute requires evidence that “[t]he spouse has expressed to the other spouse his or her intent to end the marriage” and also directs the court to “take into consideration all relevant evidence.” (§ 70, subs. (a)(1), (b).) The statute does not require express findings as to a declaration of intent or conforming conduct. In any event, Husband testified that he told Wife the marriage was over when he announced he was moving out, and the trial court found him credible. Husband’s testimony, even without an express finding, is evidence that supports the trial court’s decision and satisfies the statute.

* * * * *

County of Los Angeles v. Christopher W. (2019) 41 Cal.App.5th 827, 254 Cal.Rptr.3d 565

In this case, an action by the County against C’s biological father for child support, the Second District reverses a Los Angeles County trial court’s determination that M’s boyfriend was C’s legal parent and his biological father was not. It held that Family Code §7555’s presumption, which arose because genetic testing showed that the biodad was C’s biological parent (which he admitted), shifted the burden of proof to him to overcome that presumption “for purposes of the requirement that parents support their children.” It held that the biological father could not use the presumption stated in section 7611(d) that a person is presumed to be the natural parent of a child if he or she “receives the child into his or her home and openly holds out the child as his or her natural child” against another man to rebut the presumption of paternity under section 7555.

Here, Colin did not seek parental status, and rebuttal of the section 7611, subdivision (d) presumption would not render M.D. fatherless or deprive him of the support of a second parent; Christopher would be his father and obligated to support him. Moreover, there is no evidence to suggest that rebutting the presumption and declaring Christopher to be M.D.’s father would adversely affect Colin’s relationship with M.D. or be contrary to M.D.’s interests. Indeed, Colin and Mother—the two people who have been the most interested in M.D.’s well-being—requested that Colin not be declared M.D.’s father.

As for devolving the obligations of parenthood on an unwilling candidate, there are two such candidates here: Christopher and Colin. Initially, we reject the possibility that neither alleged father should be responsible for M.D.’s support. It would be contrary to the state’s interest, as well as M.D.’s interest, to allow both alleged parents to avoid responsibility for M.D.’s support. (See *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 1423 [public policy “favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility”].) At least one of them must bear that burden. As between them, the issue is resolved by applying the fundamental principle that the burden of child support should be borne by those who are directly responsible for the child’s existence, and the general rule that “the obligations of parenthood should not be forced upon an unwilling candidate who is not biologically related to the child” or otherwise responsible for the child’s existence. (*Elisa B., supra*, 37 Cal.4th at pp. 123-124, citing *Nicholas H., supra*, 28 Cal.4th at p. 70; see also *Miller, supra*, 34 McGeorge L.Rev. at p. 646 [allowing “a man who has not fathered a child to avoid serving as the . . . financial father of the child . . . corresponds to the sensibilities of most people—it is unfair to require a man who is not the father of a child to raise and support the child against his will”].) The obligations of parenthood in this case, therefore, should be borne by Christopher, M.D.’s biological father, and not forced upon the unwilling Colin.

* * * * *

In re the Marriage of Scott E. and Tanya McKean (2019) 41 Cal.App.5th 1083, 254 Cal.Rptr.3d 726

In this case, filed on October 16, 2019, but ordered published on November 8 at the request of ACFLS, the Fourth District reversed an Orange County Superior Court’s order

granting sole legal and physical custody of her two younger children in favor of their father, Scott McKean. Tanya claims the court abused its discretion by modifying the parties’ custody order absent sufficient evidence of changed circumstances. Specifically, Tanya asserts the court erred when it determined that by granting her sole legal and physical custody of her severely disabled daughter, she was rendered incapable of maintaining joint legal and

physical custody of her two younger children. We agree with Tanya, reverse the court's order, and remand the matter for proceedings consistent with this opinion.

...

Nothing in the record demonstrates the trial court weighed Sa.'s and W.'s interests in the stability of their current custodial arrangement. The court did not address the potential harm to Sa. and W. from losing Tanya as a custodial parent. The court lacked any evidence Tanya's care for Si. and her serious medical needs resulted in deficient care of Sa. and W.

Tanya also contends the trial court erred because it failed to properly consider the siblings' bond before separating the children. We agree.

We recognize California public policy that "the sibling bond should be preserved whenever possible." (*In re Marriage of Heath* (2004) 122 Cal.App.4th 444, 449-450 (*Marriage of Heath*)). Absent evidence of compelling circumstances, including extraordinary emotional, medical or educational needs, an order separating siblings between custodial households ordinarily will be reversed as detrimental to the children's best interest. (*Marriage of Williams* (2001) 88 Cal.App.4th 808, 814-815 (*Williams*)). The trial court must consider the children's interest in having a meaningful opportunity to share each other's lives and the potential detriment to them from being separated.

The trial court determined Si.'s medical condition was evidence of compelling circumstances warranting separation of the siblings. It ignored established precedent that a disability is not automatically evidence of compelling circumstances. The court determined because Si. could not recognize her siblings as such, the sibling bond was inapplicable. It further expressed concerns about the "parentification" of Sa. and W.

However, the evidence did not support these concerns. To the contrary, Si.'s neurologist testified she has the cognitive ability to appreciate her social surroundings, recognize her parents, and the ability to feel emotions such as fear and happiness. Ample testimony supported the children's bond with one another. The evidence also showed both Sa. and W. do funny things for Si. just to make her laugh. Similarly, there was no evidence presented as to the "parentification" of Sa. and W. No custody evaluation was ordered. The 2017 order instead appeared to be supported by the court's speculation about the dynamics between the siblings. This was insufficient.

...

Similar to *Marriage of Heath*, the record is devoid of any negative impact on Sa. and W. caused by Si. and her medical conditions. Instead, there are numerous references to the strong bond between the three children. Contrary to the trial court's comments, there was no evidence Si. could not participate in a sibling relationship. Admittedly, such a relationship would not function as a "traditional" older sister with her younger siblings, but that is not, and should not, be the test. The court is not to judge a familial relationship based upon a preconceived notion of what a "normal" sibling relationship looks like. Testimony demonstrated the siblings had mutual bonds and Si.'s cognitive state was akin to that of a one-year-old to 18-month-old child. Children of that age indeed have relationships with their families, and dismissing the impact of separating the siblings based purely on Si.'s disability was error. Furthermore, there was insufficient evidence of the supposed "parentification" of Sa. and W. Given the court's failure to apply the proper legal standards and its application of assumptions unsupported by the evidence, we reverse the 2017 order.

* * * * *

In this case, the Third District reversed and remanded a Sacramento County trial court's order denying H's request for an order terminating spousal support. It held that the judge abused his discretion by denying the motion without taking any evidence. The court held that there had been no change of circumstances at the beginning of a scheduled two-day trial and before hearing any testimony. The Third District held:

The family court is bound by the rules of evidence. (See *In re Marriage of Boblitt* (2014) 223 Cal.App.4th 1004, 1022 [family proceedings governed by same statutory rules of evidence and procedure applicable in other civil actions]; Fam. Code, § 210 ["the rules of practice and procedure applicable to civil actions generally . . . apply to, and constitute the rules of practice and procedure in, proceedings under [the Family Code]"]; Cal. Rules of Court, rule 5.2(d).) Declarations filed in support of a request for order are intended only to give notice to the opposing party of the basis of the request. (*In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1271 (Shimkus); Cal. Rules of Court, rule 5.92(b)(1).) They are not, as Zoe apparently assumes, automatically admitted into evidence. (*Shimkus*, at p. 1271.) Thus, unless the parties' declarations are offered as evidence, marked, and subject to objections, they are not evidence the court may consider in resolving disputed factual issues.

...

In sum, the trial court based its decision on Richard's request for an order solely on the argument of counsel and Zoe's unsworn statements in response to the court's questions. The court did not consider any actual evidence. This was an abuse of the court's discretion.

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Briganti v. Chow (2019) 42 Cal.App.5th 504, 254 Cal.Rptr.3d 909

In this defamation case, the Second District said that "(w)e publish to draw attention to our concluding note on civility, sexism, and persuasive brief writing." This is what it said:

C. A Note on Civility, Sexism, and Persuasive Brief Writing

Having resolved the merits of this appeal, we would be remiss if we did not also comment on a highly inappropriate assessment of certain personal characteristics of the trial judge, including her appearance, in the opening paragraph of Chow's reply brief. We do so not to punish or embarrass, but to take advantage of a teachable moment.

The offending paragraph states: "Briganti . . . claims that . . . Chow defamed her by claiming she was 'indicted' for criminal conduct, which is the remaining charge [in the case] after the [trial judge] . . . an attractive, hard-working, brilliant, young, politically well-connected judge on a fast track for the California Supreme Court or Federal Bench, ruled for Chow granting his anti-SLAPP Motion to Strike Respondent's Second Cause of Action but against Chow denying his anti-SLAPP Motion against the First Cause of Action With due respect, every so often, an attractive, hard-working, brilliant, young, politically well-connected judge can err! Let's review the errors!" [Original capitalization preserved.]

When questioned at oral argument, Chow's counsel stated he intended to compliment the trial judge. Nevertheless, we conclude the brief's opening paragraph reflects gender bias and disrespect for the judicial system.

As two of our judicial colleagues noted recently, "[d]espite the record numbers of women graduating from law school and entering the legal profession in recent decades, as well as the increase in women judges and women in leadership positions - not to mention the [#MeToo] movement - women in the legal profession continue to encounter" discrimination.⁴ Unfortunately, "unequal treatment does not cease once a woman joins the judiciary."

(*Ibid.*) Calling a woman judge - now an Associate Justice of this court - "attractive," as Chow does twice at the outset of his reply brief, is inappropriate because it is both irrelevant and sexist. This is true whether intended as a compliment or not. Such comments would not likely have been made about a male judge. (*Ibid.*)

As Presiding Justice Edmon and Supervising Judge Jessner observed in their article, gender discrimination is a subcategory of the larger scourge of incivility afflicting law practice. (*Ibid.*) Objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other such characteristics, is uncivil and unacceptable. Moreover, the comments in the brief demean the serious business of this court. We review judgments and judicial rulings, not physical or other supposed personal characteristics of superior court judges.

The California Code of Judicial Ethics compels us to require lawyers in proceedings before us "to refrain from . . . manifesting, by words or conduct, bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation" (Cal. Code Jud. Ethics, canon 3B(6)(a).) That goes for unconscious as well as conscious bias. Moreover, as judicial officers, we can and should take steps to help reduce incivility, including gender-based incivility. One method is by calling gendered incivility out for what it is and insisting it not be repeated. In a more extreme case we would be obliged to report the offending lawyer to the California State Bar. (*Martinez v. O'Hara* (2019) 32 Cal.App.5th 853, 854.)

We conclude by extending our thanks to the many talented lawyers whose excellent briefs and scrupulous professionalism make our work product better and our task more enjoyable. Good brief-writing requires hard work, rigorous analysis, and careful attention to detail. Moreover, we recognize "every brief presents opportunities for creativity- for imaginative approaches that will convey the point most effectively." We welcome creativity and do not require perfection. We simply did not find the peculiar style and content of this brief's opening paragraph appropriate, helpful, or persuasive.

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