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## LACBA E-News Case Summaries (as of May 26, 2019)

### DAWN GRAY

*Menezes v. McDaniel* (2019) 44 Cal.App.5th 340, 257 Cal.Rptr.3d 356: In this case, published on January 15th at the request of ACFLS, the Fourth District reversed and remanded a San Diego County trial court's post-judgment order sanctioning W \$200,000 under Family Code §271. Among other things, it held that an attorney fee award under section 271 is appropriate for prospective (unearned) fees. It held that "(t)he court's inclusion of anticipated attorney fees and costs generated from Wife's noncompliance would deter her from creating additional delays leading to new charges. This deterrence supports section 271's stated goal of encouraging cooperation. (§271.)" However, it also held that section 271 only authorizes sanctions for attorney fees and not incidental costs associated with enforcing court orders, and remanded for further consideration "(b)ecause there is not sufficient evidence demonstrating \$200,000 tethered to charged or anticipated attorney fees and costs." The panel also denied H's motion to dismiss the appeal under the disentitlement doctrine, based upon W's surreptitious recording of court proceedings in violation of Rule of Court 1.150.

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*George v. Shams-Shirazi* (2020) 45 Cal.App.5th 134, 258 Cal.Rptr.3d 476: In this child custody case, the First District affirmed a San Francisco County trial court's award of \$13,000 in attorney fees as sanctions under Family Code §271. The panel held that Rule of Court 3.1702(b), which applies in civil cases to claims for statutory attorney's fees, does not apply to postjudgment motions. The sole basis for the appeal was "that the trial court erred in awarding sanctions to respondent because her March 21, 2018 request was untimely under rule 3.1702(b)." The First District reviewed the issue de novo. Kayvon argued that "respondent filed her request for sanctions 226 days after the trial court served its August 7, 2017 order denying his request to set aside or modify the January 2017 custody order," and Nicole "argues that rule 3.1702 does not apply to her sanctions request because the attorney fees in question were incurred after entry of the trial court's January 2017 custody order—an order properly characterized as a final judgment." Holding that "Respondent has the better argument," the panel said that the Rule "says nothing about postjudgment fees."

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*In re Marriage of Brewster & Clevenger* (2020) 45 Cal.App.5th 481, 258 Cal.Rptr.3d 745: In this case, the Sixth District affirmed a Monterey County trial court’s denial of W’s request for permanent spousal support because she had not overcome the presumption against such an award under Family Code §4325. It determined what “documented evidence” means for purposes of rebutting the presumption and held that W’s testimony regarding H’s domestic violence against her was not “documented evidence” of abuse. It also affirmed the trial court’s characterization of post-separation payments from H to W as temporary spousal support, holding that she was judicially estopped from so arguing. Finally, it modified the trial court’s valuation of a community asset to reflect the parties’ stipulation as to its value.

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*Kinsella v. Kinsella* (2020) 45 Cal.App.5th 442, 258 Cal.Rptr.3d 725: In this malicious prosecution case arising out of a voluntarily-dismissed *Marvin* action, the Fourth District reversed the trial court’s granting of W’s anti-SLAPP motion. It held that “the trial court erred in determining that he did not establish the requisite probability of prevailing on the merits of his claim against defendant Tamara Kinsella.” After reviewing the direct and circumstantial evidence on which Kevin relied to demonstrate that Tamara knew the evidence she gave in support of her claim of an express oral agreement in the *Marvin* action was false, the court held that

Kevin met his burden of establishing that the trial court erred in ruling that he did not present a prima facie case for the application of the fraud exception to the interim adverse judgment rule. Based on our de novo review, we conclude that, for purposes of prong two of the anti-SLAPP statute (§425.16, subd. (b)(2)), if we credit the evidence that Kevin submitted in opposition to Tamara’s anti-SLAPP’s motion, including favorable inferences from that evidence (*Cuevas-Martinez, supra*, 35 Cal.App.5th at p. 1117), Kevin set forth a sufficient prima facie showing of facts that he will prevail in proving that Tamara lacked probable cause to initiate or maintain the *Marvin* Action. (*Sweetwater, supra*, 6 Cal.5th at p. 940.) By this ruling—indeed, by any statement contained in this opinion—we express no view as to whether Kevin will or will not be able to prove to the satisfaction of a trier of fact any of the three elements of his cause of action for malicious prosecution.

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*In re Marriage of Grimes & Mou* (2020) 45 Cal.App.5th 406, 258 Cal.Rptr.3d 576: In this case, the Sixth District affirmed a Santa Clara County trial court’s order holding that certain funds in W’s brokerage account were a loan to the community from her relatives and awarding spousal support. The panel held that the property order was not appealable under the collateral order doctrine because it “was not immediately operative and did not direct immediate division or payment of funds in the account.” Although the appeal was premature, the panel saved it by treating the notice of appeal as filed immediately after entry of the final judgment per rule 8.104(d)(2).

The panel affirmed on substantial evidence the trial court's finding that funds in W's account were a loan to the community based on the way in which the parties treated the funds during marriage and the court's rejection of W's testimony, and rejected W's argument that "the trial court was obligated to award spousal support in an amount that would have supported Mou at the marital standard of living."

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*In re Marriage of Deal* (2020) 45 Cal.App.5th 613, 259 Cal.Rptr.3d 1: In this case, the First District affirmed an Alameda County trial court's reaffirmation of a 2005 determination that H was a vexatious litigant. It held that the original orders adjudicating him a vexation litigant were not void because the court commissioner who issued them was later disqualified from the case; that the respondent or defendant in a case, as opposed to only the petitioner or plaintiff, can be designated a vexatious litigant under CCP §391; and that the record demonstrated substantial evidence supporting the court's orders.

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*Monasky v. Taglieri* (USSCT, February 25, 2020): In this Hague Convention case arising out of Ohio, the U. S. Supreme Court construed the term "habitual residence" in the Hague Abduction Convention. Justice Ginsburg wrote for the majority that 'habitual residence' is a mixed question of law and fact that requires the trial court to consider all of the circumstances in a particular case. Agreement of the parents is not a requirement. The court also held that appellate courts should use a deferential standard of review of trial court habitual residence decision. The opinion notes that domestic violence can be the basis to assert the "grave risk" defense to return under the treaty and that the country of habitual residence can consider DV in adjudicating custody on the merits.

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*J.M. v. W.T.* (2020) 46 Cal.App.5th 1136, 260 Cal.Rptr.3d 463: In this case, the Second District reversed an order from a Los Angeles County commissioner denying J.M.'s request for a continuance of the hearing on his petition for a DVRO and dismissing the petition with prejudice because "(t)he most recent incident happened ten months ago." The panel held that J.M. "demonstrated good cause for a continuance of at least a few days and the trial court thus abused its discretion by denying any continuance at all."

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*In re Marriage of Everard* (2020) 47 Cal.App.5th 109, 260 Cal.Rptr.3d 556: In this case, the Fourth District affirmed a San Diego County trial court's order "entered after a long-cause hearing in which the court granted reciprocal domestic violence restraining orders (sometimes, DVRO(s)) against Kyle and respondent spouse Valerie Ann Everard (Valerie). In issuing the DVROs, the court pursuant to Family Code Section 6305 found both parties acted as primary aggressors and that neither party acted primarily in self-defense in multiple domestic violence incidents."

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*In re Marriage of Mohler* (2020) 47 Cal.App.5th 788, 261 Cal.Rptr.3d 221: In this case, the Fourth District reversed an order from a San Bernardino County judge determining the community's *Moore/Marsden* interest in the former family residence, which H owned as of marriage. The trial court held that the interest was fixed as of the date of separation but that the percentage CP interest continued to increase after separation "just as if community funds had been used to pay the mortgage during that time." In reversing, the panel said that this was the incorrect method of determining whether the community was entitled to any credit for H's post-separation exclusive use of the property and that the trial court should have determined this issue as a *Watts* charge.

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