RIVERSIDE LAWYER

November 2018 • Volume 68 Number 10 MAGAZINE

In This Issue

The Official Publication of the Riverside County Bar Association

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Riverside County Bar Association
4129 Main Street, Suite 100
Riverside, California 92501

Telephone
951-682-1015

Facsimile
951-682-0106

Internet
www.riversidecountybar.com

E-mail
rcba@riversidecountybar.com

RIVERSIDE LAWYER MAGAZINE

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:

To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

The Riverside Lawyer *is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.*

Submission of articles and photographs to Riverside Lawyer *will be deemed to be authorization and license by the author to publish the material in the* Riverside Lawyer.

The material printed in the Riverside Lawyer *does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

Calendar

November

13 **Civil Litigation Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Andrew A. Servais
Topic: "The New Rules Are Here: What is New, What Stays the Same"
MCLE – 1 hour Legal Ethics

14 **Criminal Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Joseph Widman
Topic: "Federal Prosecution in the Inland Empire"
MCLE – 1 hour General

Live Scan Fingerprinting for State Bar Requirement
10:00 – 2:30 p.m. (walk-in)
RCBA Building, 2nd Floor
Contact RCBA for more information

15 **Solo Small Firm Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speakers: Carole Buckner, Esq. and Doug Bradley
Topic: "Social Media and Marketing Ethics for Attorneys"
MCLE – 1 hour Legal Ethics

16 **General Membership Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speakers: Hon. Carol Codrington, Hon. Richard T. Fields, Hon. Marsha Slough
Topic: "Effective Oral Argument"
MCLE – .75 hour General

Live Scan Fingerprinting for State Bar Requirement
10:00 – 2:30 p.m. (walk-in)
RCBA Building, 2nd Floor
Contact RCBA for more information

20 **Family Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Kenny Price, MBA, CVA, MAFF
Topic: "How to Value a Business in Divorce"
MCLE – 1 hour General

December

10 **RCBA Shopping Elves – at Kmart**
6:00 p.m.
7840 Limonite, Jurupa Valley
Contact RCBA for more information

12-13 **RCBA Wrapping Elves**
RCBA – 4:00 p.m.
Contact RCBA for more information

EVENTS SUBJECT TO CHANGE.
For the latest calendar information please visit the RCBA's website at riversidecountybar.com.

President's Message

by Jeff Van Wagenen

Why did you go to law school? For most of us, the answer is pretty simple: to become a lawyer. I know that is the reason I went. But, a surprising number of us aren't actually practicing law.

According to a survey reported by the *American Bar Association Journal* a number of years ago, 24% of lawyers who passed the bar in 2000 were not practicing law in 2012. According to the report, the careers with the highest percentage of non-practicing lawyers were the nonprofit and education sector (where about 75% weren't practicing) and the federal government (where nearly 26% were non-practicing). The types of careers these individuals found themselves in ranged from law professors to real-estate agents to investment bankers.

There are many reasons why people who go to school find themselves in non-lawyer jobs: some may find difficulty getting work as a lawyer, others may simply come to the realization that they do not like the work, and still others may just end up finding themselves in jobs that do not require a law degree.

My interest in this topic is simple enough. And, for those of you who know me, or know a little bit about my background, you may have already guessed the reason … canned cranberry sauce.

This month, we celebrate the Thanksgiving holiday. For many of us, Thanksgiving serves as the official beginning of the holiday season. Over the course of the next several weeks, we will each have the opportunity to share meals with family, friends, and loved ones. A common side dish at many of those meals is cranberry sauce. The fancy folks among us will enjoy fresh, homemade cranberry sauce. But, that group only represents approximately 25% American households. The rest of us will be confronted with the unique sight, sound and taste of a can of cranberry sauce – a jellied "sauce" that has the unique ability to hold the shape of the can it comes in. (At my parents' home, Thanksgiving dinner cannot be served until the gelatinous goodness is jiggled out, with the distinctive slurping sound, and placed on a serving dish ready to be sliced like a loaf of bread.) And, for this miracle of modern science, we can thank Marcus Urann, a lawyer who gave up the practice of law at the turn of the 20th century to buy a cranberry bog.

Native Americans were the first to cultivate the cranberry in North America, but the berries weren't marketed and sold commercially until the middle of the 18th century. By the mid-19th century, the modern cranberry industry was in full swing and the competition among bog growers was fierce. The cranberry market was complicated by geography and timing. The berries require a very particular environment for a successful crop, and are localized to areas like Massachusetts and Wisconsin with natural wetlands. They also require a period of dormancy, which rules out any southern region of the U.S. as an option for cranberry farming. Finally, cranberries are only picked during a six-week period beginning in mid-September and must be consumed immediately. As a result, the ability to meet the demand of the market was limited.

In 1912, Marcus looked for a solution to the challenge. With an altruistic motive to do something for his community and savvy business skills that taught him how to work a market, skills he no doubt developed as a lawyer, Marcus Urann began canning cranberries. He developed a number of cranberry products along the way and introduced the world to canned cranberry sauce in 1941. Marcus' techniques spread to others in the industry. In another shrewd move, he convinced his competitors to join forces with him and he created a cooperative of cranberry canners – a group that would later become "Ocean Spray."

As part of your holiday celebrations this year, feel free to crack open a can of cranberry sauce in honor of non-practicing lawyers everywhere. I'm sure they'll appreciate it – I know I will.

Jeff Van Wagenen is the Assistant County Executive Officer for Public Safety, working with, among others, the District Attorney's Office, the Law Offices of the Public Defender, and the Courts.

Barristers President's Message

by Megan G. Demshki

As I reflected on this month's family law theme, I realized how little I knew about the world of family law. Aside from one community property course in law school, my exposure to this area of the law has been quite limited. So true to how I have learned to tackle any law-related problem that I don't know the solution to, I turned to one of my peers, in this instance Goushia Farook, for her insight in the area as a family law practitioner.

Goushia Farook

Goushia Farook is a member-at-large on the Barristers board. Goushia earned her Bachelor of Arts with honors in political science and women's studies from San Diego State University. She went on to complete her Juris Doctor from John F. Kennedy University School of Law. She is an associate attorney at the Law Offices of Shauna M. Albright in Riverside. One of Goushia's goals this year as a member of the Barristers board is to increase the Barristers' involvement in community service oriented events.

Here are some of Goushia's thoughts on family law:

How did you come to work in family law?

I landed in family law unexpectedly. I had to take time off after law school as I was diagnosed with leukemia. Four years later, I passed the State Bar, but needed to develop marketable skills quickly and efficiently. I picked up the Family Code, started reading, and found myself in court a few days after taking on my first case. I have not looked back since!

Why do you enjoy practicing family law?

I know it may sound very cliché, but I genuinely love practicing family law because I can help my clients' transition through one of the most difficult times of their lives. While it is an often thankless job, nothing replaces the feeling of seeing a parent reunited with a child or two parents working together to reach child-focused goals. I also love that family law is one of the few areas of law where attorneys can find themselves in court practically every single day.

What is one of your greatest lessons learned working in this area?

Everyone has a story. Family law transcends race, class, gender, socio-economics, and politics. Family is the common denominator we all share, and just like a book, you can never judge a person by their cover.

Any words of advice from a family law practitioner?

Not everyone can be a family law practitioner. However, family law is a great opportunity to sharpen your litigation skills. My golden rules: always be prepared, if you are not early, you are late, and civility is key.

Upcoming Events:

- Happy Hour at Riverside Food Lab on Friday, November 16, at 5:30 p.m.
- The Barristers will join the Law Offices of the Public Defender (5th Floor Training Room, 4075-A Main St., Riverside, 92501) on Friday, November 30, for a MCLE program on Ethics by Mohamad Khatibloo. Arrive by 12:00 p.m. to check in and get your name tag. RSVP at Riversidebarristers.org.
- Join the Barristers for a hike up Mount Rubidoux on Saturday, December 1, at 9:00 a.m. Meet up at Ryan Bonaminio Park to begin the hike together! Following the hike, continue the fun with brunch at Simple Simon's.
- The Barristers will participate in the Elves Wrapping on Thursday, December 13, at 5:00 p.m. Following the wrapping, the Barristers will head to Happy Hour at the Salted Pig.
- Learn more about upcoming events by following @RCBABarristers on Facebook and Instragram or visiting our website, www.riversidebarristers.org.

Looking to get involved?

Whether you are eager to start planning the next great Barristers gathering or just looking to attend your first event, please feel free to reach out to me. I would love to meet you at the door of a Happy Hour, so you do not have to walk in alone, or grab coffee to learn more about how you can get involved. The easiest ways to reach me is by email at Megan@aitkenlaw.com or by phone at (951) 534-4006.

Megan G. Demshki is an attorney at Aitken Aitken Cohn in Riverside where she specializes in traumatic personal injury, wrongful death, and insurance bad faith matters.

Family Law VSC Program: A Point of Pride

by Donald B. Cripe

And then there were nine.

During the first decade of this millennium, the family court and several attorney volunteers worked together to reinstate a settlement (mediation) program. Nearly ten years of meetings, proposals, squelched ideas, and frustration passed as the work proceeded. During that time, the Administrative Offices of the Courts released a report on family law issues in which a family law mediation process, very similar to the one Soheila Azizi and I presented to the court some time before, was released. The door opened. Under the tutelage of Judge Jack Lucky and Susan Ryan, the Riverside Superior Court Family Court's Volunteer Settlement Conference (VSC) program was unveiled. Dispute Resolution Service (DRS) of the RCBA was awarded the Dispute Resoluion Programs Act (DRPA) contract for the court to administer the mediators who participated. Chris Jensen, president of DRS, contacted me to assist with mediator recruitment and development. By the time the program began in October 2010, the program had approximately 20 attorney/mediator volunteers who had been vetted by DRS to mediate an estimated total of ten cases each week. With the amazing leadership of the Self-Help Center, the dedicated attorneys in that program, paralegals Heather Gonzalez and Stefanie Dobis, the VSC program took off immediately.

Studies have revealed as much as 90% of family law litigants are self-represented. Some of our attorney colleagues view those folks with distain because they represent fees on the hoof lost to the world. Most self-represented litigants find themselves in the situation simply because they cannot afford the process. Our legal system, though in theory intended to help our society dispose of cases, has evolved beyond the understanding of most lay-persons. Consequently, in many cases litigants find themselves in a figurative litigation box from which they cannot extricate themselves. Judge Lucky used to introduce the process on Friday mornings with a little speech. During the speech, he would raise copies of the Code of Civil Procedure, the Family Law Code, and the Evidence Code above his head and ask the audience the following question, "Who has read and understood what was in those books?" Receiving no reply, he would exclaim, "How do you expect to get what you want out of your case if you don't know these rules?"

Enter the VSC program and the volunteer lawyers. We are only partly volunteering as we are paid a small stipend for each day we work in the program. Riverside's point of pride is the amazing results of the program. Each Friday, 90% or more of the people who participate, leave the courthouse with a judgment in hand. Case over and done.

We now face a problem. Though Riverside has a significant number of seasoned family law lawyers who could be a great help volunteering a few hours every couple of months, our panel has shrunken from relocations, retirements, and sadly, deaths. I implore my family law colleagues to contact DRS and volunteer. A few hours a year helping bewildered people will bring you a great deal of professional and personal satisfaction. You will control when and how often you appear. In Riverside, you can volunteer the first and third Friday every month (usually done within two hours in the morning) or as little as one Friday morning a year. The program also runs one Friday a month in Indio. Please call DRS at (951) 682-2132, you will not be sorry.

Donald B. Cripe is an arbitrator, mediator and co-founder of California Arbitration & Mediation Services (C.A.M.S.)

Derailed by Bankruptcy: The Intersection of Bankruptcy Law and Family Law

by Benjamin Heston

While the intersection of bankruptcy law and family law can be extremely complex, there is really only a few concepts that are of immediate importance to the family law practitioner: the automatic stay, property of the bankruptcy estate, the Means Test, exemptions, and dischargeability.

Automatic Stay

The Bankruptcy Code provides that immediately upon the filing of a bankruptcy case, the automatic stay goes into effect that puts a stop to most creditor actions and provides for damages for violation, which can include actual damages, costs, attorney' fees, and punitive damages. It should be noted that actions in violation of the automatic stay are void, not voidable, and it is not the duty of the debtor to see that these actions are reversed.

As federal courts generally do not dabble in matters involving family relations, many of the listed exceptions to the automatic stay relate to family law proceedings.[1] The short version is that the automatic stay affects very few family law proceedings or actions. The exception to the exception is that the automatic stay does stay the division of marital property. If you become aware that a bankruptcy filing may be in the near future, you may want to resolve this aspect of the case sooner than later depending on your client's goals.

If you are in doubt as to whether an action you propose to take would be in violation of the stay, it is best to seek an order granting relief from the stay or confirming that the stay does not apply, before moving forward with such action.

Dischargeability

Marital debts will fall into two categories: Domestic Support Obligation (DSOs) and non-DSOs. A DSO is defined by Bankruptcy Code 101(14A) as a debt: A) "owed to or recoverable by" a spouse, former spouse, or child… or governmental unit; B) "in the nature of alimony, maintenance, or support"..."without regard to whether such debt is expressly so designated"; C) established by separation agreement, divorce decree, property settlement agreement, court order, or a determination by a governmental entity; and D) not assigned to a nongovernmental entity, unless such assignment is for the purpose of collecting the debt.[2]

Debts that are not in the nature of support are nondischargeable in a Chapter 7 or 11, but are dischargeable in a Chapter 13 proceeding. While the bankruptcy court will give great deference to the family law court's characterization of a debt, it is not absolutely controlling. The bankruptcy court may inquire into the nature of a debt for purposes of determining dischargeability.

A DSO or non-DSO marital debt will generally pass through a Chapter 7 bankruptcy unscathed, similar to student loans and priority tax claims,[3] without the need for further action by the spouse. In a Chapter 13, however, DSOs must be paid in full as a top priority claim[4] and non-DSO marital debts can be fully discharged,[5] with no or partial payment through the Chapter 13 proceeding. The non-DSO marital debt is treated as a general unsecured debt and will get paid a percentage of the claim and discharged at the conclusion of the case. This percentage can be between 0% and 100% is going to be based primarily on a determination of the debtor's disposable income and the value of his or her property.

Timing Issues

Means Test

The Means Test is the major hallmark of modern bankruptcy law that was implemented by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and intended to limit the ability to file a Chapter 7.[6] It is the portion of a bankruptcy petition where a debtor's household income is compared against the median income for the state in which the debtor or debtors reside to determine whether there is a "presumption of abuse." If the debtor's household income is below the state median, the debtor can go ahead with a Chapter 7, which will most likely not result in any payment to creditors. When the debtor's

1 See exceptions to the automatic stay under 11 U.S.C. §362(b)(2): establishing paternity, establishment or modification of a DSO, custody or visitation, dissolution except to the extent of determining the division of property, matters concerning domestic violence, collection of DSOs, actions against a license for purposes of collecting DSOs, reporting of overdue support, interception of a tax refund, enforcement of a medical obligation.

2 11 U.S.C. § 101(14A).

3 11 U.S.C. § 523(a)(5).

4 11 U.S.C. § 507(a)(1).

5 11 U.S.C. § 523(a)(15).

6 Not all debtors will be subject to the Means Test. The most common exception is a debtor whose debts are primarily non-consumer debts. A consumer debt is incurred by an individual primarily for a personal, family, or household purpose. Non-consumer is everything else, usually a business debt.

household income is above the state median, the debtor must then move on to the second part of Means Test, which is a much more complex calculation to determine a debtor's disposable income by using certain actual expenses and certain standardized expenses borrowed from the Internal Revenue Code. If the disposable monthly income is above a certain amount, the debtor must either concede and file a Chapter 13, or they can file a Chapter 7 and try to rebut the presumption of abuse by showing "special circumstances," such as a change in income, serious medical condition or active duty in the Armed Forces. More often than not, a debtor will go with the former option and file a Chapter 13.

The Means Test treats debtors differently depending on their marital status. The options for status are: not married, married and filing individually, married and filing jointly, and married filing individual living separately. For obvious reasons, a couple that has two incomes would be more likely to each qualify for Chapter 7, if they are not required to include the non-filing spouse's income by reason of either divorce or separation. It may make sense to hold off on a bankruptcy filing until there is an actual separation or dissolution, even if they are temporarily residing in the same household.

Exemptions

California provides for a set of homestead exemptions that cannot be "stacked" by spouses filing separate bankruptcy proceedings. Because of this, the spouse that files first may "take" the exemption away from the later filing spouse. Since the termination of marital status and division of the property will allow both spouses to file separate exemptions, timing can be very important for purposes of determining what exemptions are available to each spouse. Likewise for spouses who do not need to utilize the homestead exemptions, using the exemptions under Code of Civil Procedure 703.140 after the division of the property would nearly double the amount of property they can protect.

Property of the Estate

An "estate" is created at the moment any bankruptcy case is filed and terminates on dismissal or upon discharge and the closing of the case. Property of the bankruptcy estate includes both the separate property of the debtor, as well as 100% of the community property in which the debtor has an interest. This includes the interest of a non-filing spouse. Spouses continue to have a community property interest in property until there has been a characterization and division of the community into two separate estates and action taken in furtherance of the division, such as the recording of deeds to real property, has been taken to finalize that division.

Where it is contemplated that only one spouse will file a bankruptcy proceeding, divorcing spouses should seek the characterization and division of community property in the family court as early as possible, to avoid the inclusion in the bankruptcy estate of the non-filing spouse's interest in community property. To protect against a subsequent challenge of that division as a fraudulent transfer, care must be taken to demonstrate that each spouse's undivided half interest in the non-exempt assets of the community estate equals the divided interest. Awarding the filing spouse all of the exempt assets, i.e., retirement and IRA accounts, homestead equity, etc., while awarding the non-filing spouse the non-exempt assets, i.e., stocks, cash, bonds, etc., is not an "equal" division from creditors' perspective, since it places the majority of "reachable" assets beyond the creditors' ability to execute or levy on such assets.

Benjamin Heston is an attorney at Heston & Heston in Riverside and Irvine, where he specializes in consumer bankruptcy law under Chapters 7 and 13.

Please join us on December 18, in the Gabbert Gallery of the RCBA, where Benjamin Heston and Richard Heston are speaking the following topic, "Bankruptcy Law and Family Law Crossover."

* ATTENTION RCBA MEMBERS *

How would you like to receive (or read) the *Riverside Lawyer* magazine?

Some members have told us they prefer reading the online version of the *Riverside Lawyer* (available on our website at www.riversidecountybar.com) and no longer wish to receive a hard copy in the mail.

OPT-OUT: If you would prefer not to receive hard copies of future magazines, please let our office know by telephone (951-682-1015) or email (rcba@riversidecountybar.com).

Thank you.

Towards a Modest Means Program – A Supply and Demand Solution

by Andrew Gilliland

The Riverside Legal Community has a need for affordable attorney services for people who are of modest means, but do not qualify for legal aid. Many legal communities have turned to the creation of a Modest Means Program to meet this need. In Riverside County, the creation of a Modest Means Program for local attorneys has been proposed and initial plans are being made. A Modest Means Program will provide a supply of attorneys willing to take on matters for less than market rates to meet the demand for affordable attorney services.

Attorneys have heard the proverb "a person who is their own lawyer has a fool for their client." The principle behind this proverb is that when someone is too close to the situation (meaning they are personally involved), it is difficult to provide competent representation because they might be blinded by their passion for their case. Lawyers are often accused of speaking out of both sides of their mouths, but that is part of being a competent lawyer. In law school, lawyers are taught to seek out all sides of any issue. When we look at an issue objectively, we come to understand an opposing argument or how a potentially damaging fact can be exploited. Armed with such understanding, we can then minimize the impact of the argument or the fact.

In *The Art of War*, Sun Tzu understood the value of understanding all sides in any conflict:

> "If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle."

When someone represents themselves, they may be too emotionally involved to know themselves and their enemy or they may not have the skills to know either themselves or the enemy. This places the individual at a disadvantage in strategizing a legal battle. Even attorneys who get too emotionally involved in their client's cases may be prevented from knowing the enemy. Furthermore, self-representation is not a good idea even when the person representing themselves is an attorney who understands the legal system and the proper procedure to provide themselves with representation. The inability to disconnect from the issues at hand and the potential for incompetent representation is why "a person who is their own lawyer has a fool for their client."

Recently, I saw this play out in family court. I confess that I find a certain nobility in the attorney who practices family law. The matters are very personal, emotional, and can have lasting ramifications on individual lives as well as society as a whole. There is also a certain admirable skill set the attorney has to have when dealing with often emotionally charged irrational people who have seen their world crumble around them. The family law attorney truly can be a counselor at law. However, my recent experience as I observed a couple of hearings in Family Court was anything but noble.

The first hearing I attended had a self-represented individual and an individual represented by an attorney. The represented individual was seeking to have an evidentiary hearing set, but the hearing took a negative turn when the self-represented individual failed to understand what was going on and could not respond to simple questions to determine if they had been served the proper paperwork. The judge did their best to try and get the information from the self-represented person but ultimately could only direct them to go utilize the self-help resources and continued the hearing for three weeks to allow them to do so. The attorney was frustrated, the judge was frustrated, and the self-represented person was frustrated. At the end of the hearing, the self-represented individual snapped and lashed out at everyone involved and had to be forcibly removed from the courtroom by the bailiff. What should have been a simple scheduling hearing turned into a battle that the self-represented individual lost.

The second hearing I attended had two self-represented individuals with one seeking a protective order against the other. For thirty minutes, I watched a struggle between the commissioner and the pro se litigants who rambled, had no evidence, and did not understand the process at all. The commissioner repeatedly had to admonish them to stay on point and to answer only the questions the commissioner asked. The party seeking the protective order brought their phone with supposed recordings on it that had the defendant threatening the individual, but the commissioner could not understand the recordings and the evidence was useless. The defendant might have

been able to avoid having a protective order issued against them if they simply pointed out the lack of evidence from the plaintiff, but instead they decided to tell their story. What came out was a full admission that they had indeed struck the other individual, but that they were justified in doing so. This confession sealed their fate, a protective order was issued, and the self-represented defendant proved that they had a fool for a client.

These two experiences demonstrate the importance for the individual litigants, as well as the judicial system as a whole, for competent legal representation. There clearly is a demand for such legal representation and there clearly is a supply of attorneys who could meet this demand. What is missing, however, often can be the price point where supply and demand meet. Attorneys should be compensated for their services at whatever rate the market will bear. They worked hard to get their law degrees and put the time, money and energy to become competent in their profession. There is, however, a real need for legal services for those who cannot afford an attorney's normal rates.

So how is the demand met for those who cannot afford the market rates for attorney services? There basically are three types of needs for those in the legal market who cannot afford market rates. There are those who simply want questions answered or those who only want help completing forms and understanding the technical side of the process. Then there are those who want and need help from the beginning to the end of their case. For the first two categories of need, there are services that the individual can use. There are self-help centers at the courthouse, Riverside Legal Aid also has an office and runs clinics where questions can be answered and help can be provided to prepare forms. The Dispute Resolution Program helps family law litigants resolve their cases through mediation. Other attorneys offer unbundled or limited scope services that range from helping with forms, to answering questions, and even representation at hearings or trials. All these resources are valuable and provide guidance to help these litigants who cannot afford market rates, but they do not address the issue of the individual who needs help from beginning to end.

For those who need help from beginning to end, pro bono services are where such individuals would usually turn to for representation, but like legal aid, pro bono service providers typically have financial guidelines that must be met in order for the individual to qualify for their services. Hence, while providing some relief for the self-represented person, pro bono services do not meet the demand for those who cannot afford market prices for legal services, but earn too much to qualify for pro bono services. A Modest Means Program creates a supply of attorneys willing to represent these "beginning to end" needs individuals for below market rates. Both San Diego County and Orange County have implemented Modest Means Programs. While Riverside County does not currently have a Modest Means Program, such a program is needed to create a supply of attorneys who can meet the demand of residents of Riverside County.

Below is a fictional question and answer regarding typical questions about a Modest Means Program.

So what is a Modest Means Program?

Simply put, residents of Riverside County who cannot afford market rate legal services, but do not financially qualify for pro bono or legal aid services, would be referred to attorneys who will represent them for a substantially reduced rate.

How do they find out about a Modest Means Program?

Marketing for a Modest Means Program usually consists of brochures that are available at courthouses, information from existing legal referral programs, as well as online information directing residents to a home page for a Modest Means Program. This home page will usually provide a general overview and contact information. A more elaborate website can be developed to allow for a complete intake process for the public and a signup system for interested attorneys.

Who makes initial contact with the prospective applicant?

Most Modest Means Programs provide for initial contact to be made by a lawyer referral service. This may be directly through the Modest Means Program or an existing related referral service such as Riverside Legal Aid or the RCBA Lawyer Referral Service. Initial contact consists of a basic screening ranging from a verbal question and answer matrix or by providing a formal intake sheet with required documentation. When a referral comes from another lawyer referral service that has already screened the individual, the Modest Means Program could rely on this information. Thus, the individual is not subject to multiple levels of screening. An online form is the norm for most Modest Means Programs with a turnaround time of 48 hours for screening to be completed.

What are the financial standards to qualify for a Modest Means Program?

A resident of Riverside County would qualify for a Modest Means Program if their income fails within the range of 125% to 200% of the federal poverty guidelines. Some Modest Means Programs use a sliding scale that tops out at 300% of the federal poverty guidelines. As mentioned above, income and assets are determined through an intake screening process that would include proof of income and assets such as pay stubs and tax returns.

What areas of law are served by a Modest Means Program?

The most prevalent areas of law served by a Modest Means Program are family law and landlord/tenant law. Other areas often included are bankruptcy, consumer, immigration, elder law, criminal, and guardianship. Specifying the areas of law available to residents can be flexible and determined through ascertaining the areas of practice of the attorneys signing up for the Modest Means Program.

How do interested attorneys sign up for a Modest Means Program?

Interested attorneys would complete an application and designate what areas of practice they are willing to accept cases. The attorney would be required to agree to abide by the rules of the Modest Means Program such as requiring to maintain malpractice insurance and the fee structure. An initial onetime fee is charged which is typically around $50 to $75. This fee is used to offset the administrative costs of the Modest Means Program.

What is the fee structure for a Modest Means Program?

Attorneys charge a substantially reduced hourly rate or a substantially reduced flat fee if a flat fee is appropriate. These fees typically range from $75 per hour to $125 per hour. A sliding scale can be used based on the percentage of the federal poverty guidelines. The attorney is always free to charge less than the maximum rate if they so desire. A retainer is usually capped at $1,500 maximum and the attorney is free to work out any arrangement that they are comfortable with the client for payment, including a full retainer paid up front.

How does a Modest Means Program affect an attorney's ethical responsibilities?

There is no effect. The Modest Means Program participant becomes the attorney's client and all ethical rules would apply.

How are assignments made to attorneys?

Each Modest Means Program participant would be provided with the names of two attorneys to contact in the respective area of practice that there case deals with. The participant is free to choose either attorney. The attorney is free to choose whether they want to work with the individual as well. If the participant does not like either attorney, they can request another two attorneys. The assignment system would rotate through the attorneys in each practice area who would be contacted (usually by e-mail) and notified of the name of the participant and the maximum they can charge the participant per hour or the maximum flat fee.

In sum, a Modest Means Program in Riverside County would help the supply meet the demand for the residents of Riverside County. It would also alleviate some of the issues created by self-represented litigants and ideally result in more efficient hearings. There is clearly a demand of those who need attorneys, but cannot afford market rates. For the attorneys, the benefit is that they can fill any available time they have with paying clients as well as take on a case load that will provide them with valuable experience. Thus, a Modest Means Program really can be a win-win situation. If you are interested in a Modest Means Program in Riverside County, feel free to contact me at andrew@gillilandlaw.com and express your interest. The goal is to have a fully functional Modest Means Program in 2019.

Andrew Gilliland is a solo practitioner and the owner of Andrew W. Gilliland Attorney-at-Law with offices in Riverside and Temecula. Andrew is the co-chair of the RCBA's Solo & Small Firm Section and a member of the RCBA's Publications Committee.

Common QDRO Judgment Language Errors and How to Fix Them

by David T. Ruegg and NaKesha S.D. Ruegg

A QDRO (Qualified Domestic Relations Order) is a judgment, decree or order for a retirement plan to pay child support, alimony or marital property rights to a spouse, former spouse, child or other dependent of a participant. A common problem for QDRO attorneys is unclear judgment language that leaves too much room for interpretation by parties at odds with each other. This article will cover some of the more common mistakes that should be avoided.

The Unspecific "Catch All" Error

> "Any and all of Petitioner's retirement accounts, including but not limited to pension plans, profit sharing plans, IRAs, 401(k)s, deferred compensation, or other retirement accounts shall be divided by QDRO."

The problem with the unspecific "catch all" strategy is that it lacks specificity on what plans exist that should be divided. The job of a QDRO attorney is not to conduct discovery for the underlying case or to act as a "detective" for the non-employee spouse. Discovery of retirement assets is the job of the family law attorney and by the time the judgment is entered, the retirement accounts should already be discovered or disclosed, so the exact plan names of all retirement assets are identified in the final judgment.

While the QDRO attorney has some 'tricks' and 'tips' for uncovering previously unidentified retirement assets and might be able to uncover hidden assets in some instances, keep in mind the ethical considerations the QDRO attorney must consider. The QDRO attorney is commonly appointed as a neutral expert and as a neutral expert, the QDRO attorney cannot advocate for one party over the other. The act of poking around looking for previously undiscovered retirement accounts after entry of final judgment is a form of discovery, which could put the QDRO attorney in a tough spot if the employee spouse claims the act of discovery only benefits one party. The QDRO attorney should not be forced into conflicting roles of neutral expert and "detective/retirement discovery expert."

If family law counsel has difficulty discovering retirement accounts, family law counsel should contact a QDRO attorney for advice before entry of final judgment. Family law counsel should also consider utilization of public information websites such as www.freeerisa.com or www.brightscope.com, which aggregate information on IRS 5500 forms, required by all ERISA plans. There is no cost to use either website and they both contain useful information regarding retirement assets such as names, addresses, and phone numbers of the plan administrators. Use of the QDRO attorney as your only 'safety net' to catch all the potential retirement accounts, is not a great strategy and should be avoided.

The Specific Dollar Award Error

> "Respondent is awarded $25,000 via QDRO from Petitioner's 401(k) Plan, payable via QDRO."

The problem with the above format is twofold: it lacks direction on the inclusion or exclusion of gains/losses and it lacks specificity regarding a valuation date.

On the market fluctuation (gains/losses) point, the question becomes: Is the $25,000 award supposed to adjust for market fluctuation of the underlying investments or not? 401(k)s and other defined contribution accounts are invested in stocks, bonds, mutual funds, and other investment vehicles that fluctuate daily with the rise and fall of the stock market. Is the intent that the $25,000 should be the exact amount down to the penny that should be leaving the retirement account at the date of transfer? Was the intent that the $25,000 should ride the waves of market fluctuation? A QDRO attorney is not a judicial officer, so the QDRO attorney should not be "ruling" on this question.

The second layer of complexity with the above language is the valuation date. Let's assume for a moment the parties have agreed the $25,000 should fluctuate with the market. That might be great progress for parties who do not always get along, but now the question becomes: From what date should the gains/losses be tracked? From date of separation? From the judgment entry date? From the date the parties calculated the "specific dollar" award? Each date will cause a different mathematical result, which leads to problems when the date is not specified in the judgment.

Unfortunately for the QDRO attorney trying to problem solve these situations, case law is not settled on this quandary.

From the Fourth Appellate District, Third Division, *In Re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 120, Cal.Rptr.2d 272 discusses a "specific dollar" award from the husband to the wife, to equalize the values of their respective IRA accounts. After the entry of judgment, the husband's IRA account sharply increases over a short period, while miscommunications between the parties prevents the IRA funds transfer from finalizing. Attempting to "re-equalize" at the higher values, the wife requests a set aside of the judgment. The *Heggie* court found that a set aside request based on subsequent circumstances casing the division of assets and liabilities to become inequitable, was not sufficient grounds for set aside under Family Code section 2123. The court stated that the wife's strategy of "wait-and-see, have-your-settlement-and-set-it-aside-too-if-stock-prices-go-up position" would be an unfair result. The court ruled that the wife only could have her specific dollar award without market appreciation.

The *Heggie* ruling is contrasted with the Fourth Appellate District, Second Division case, *In Re Marriage of Janes* (2017) 11 Cal. App. 5th 1043 (Cal. Ct. App. 2017), which also deals with a "specific dollar" award. In *Janes*, the wife received a specific dollar award from the husband's 401(k), and then a delay of over four years occurred before the QDRO was pursued. Similar to the facts of *Heggie*, in *Janes* the underlying account investments in the husband's account increased in value over the four-year passage of time and the wife requested a share of those gains. The court in *Janes* concluded the wife was entitled to a proportional share of the gains in the underlying investments. The court pointed out that no valuation date was specified in the judgment for the specific dollar award, and no directions regarding inclusion/exclusion of gains and losses was specified. Due to the lack of direction in the judgment, the court concluded that the wife's "specific dollar interest" was vested as of date of the judgment (the valuation date), and the wife's investments fluctuated with the market inside the husband's account (gains and losses were included). The *Janes* court directed that absent a specific valuation date and instructions on gains/losses, the valuation date shall be the date of entry of judgment and gains/losses will be included from the date of judgment to the date of account division.

Since the *Janes* and *Heggie* cases are out of different appellate divisions, they are both good law. It seems the distinguishing factor between the two cases is the passage of time between the judgment date and the account division date. To avoid an unnecessary analysis of the *Janes* and *Heggie* cases in a court hearing, counsel should specify inclusion/exclusion of gains and losses, and a valuation date for any "specific dollar" award in the judgment.

Use of the Word "Half" Error

> "Petitioner's 401(k) shall be split in half between the parties as of date of separation, via QDRO."

This language may not cause a problem in all cases. Where there is no pre-marital separate property interest to be considered, half of the total vested account balance as of date of separation IS ONE AND THE SAME as half of the total community property interest, since 100% of the total account balance as of date of separation is also 100% community property. 50% of the total vested account balance is equal to 50% of the community property portion.

However, this language becomes problematic when there is a pre-marital separate property claim. It seems the door is open for the non-employee spouse to argue that the account owner "waived' his/her pre-marital separate property interest. The judgment language states the 401(k) account shall be split "in half" between the parties. How many ways can the word "half" be interpreted, really? In a dispute between the parties, at least two ways. The account holder argues the word "half" means half of the community interest, and the non-account holder argues "half" means half of the total underlying account value, either interpretation is not unreasonable, and that's the problem.

The best way to avoid a debate over the meaning of the word "half" is to properly define the division method. If the parties intend that half of the total vested account value be split, then the phrase "half the total vested account value" is clear. If half of the community interest is intended, then using the phrase "half of the community interest" is clear. By keeping these easy fixes in mind, many headaches can be avoided at the QDRO stage.

Loan Language Errors 1

> "The loan against petitioner's 401(k) account shall be paid off through the QDRO process, and the remaining balance of the 401(k) shall be split via QDRO."

Please do not ask the QDRO attorney to "pay off' the 401(k) loan via QDRO; that is not an available option to the QDRO attorney. Loans from a 401(k) can only be "paid off' with outside funds, which are part of the underlying account.

Loan Language Errors 2

> "Respondent shall pay back the loan on petitioner's 401(k) account and the community property interest shall be split equally via QDRO."

The core of the confusion on the "payback of loans" is the QDRO attorney must think in terms of "including the loan" (mathematically adding the loan value back in as an asset of the 401(k) before division) vs. "excluding the loan" (not adding the loan value back in as an asset of the 401(k)

before division). This does not translate with "the loan should or should not be paid back" by the non-employee spouse.

The concept often lost with parties/attorneys is that loans against retirement accounts differ from loans against credit cards or other third-party obligations. Loans against defined contribution accounts are BOTH an obligation AND an asset to the employee spouse. The reason is that the loan payments are due FROM the employee spouse (obligation) and TO the employee spouse's account (receivable/asset). The employee spouse is both the "bank" loaning the money and the "debtor" borrowing the money.

Because of this dual characteristic, 401(k) loans differ from third-party loans, where the third-party retains the repaid principal and interest. With 401(k) loan, each payment increases the underlying value of employee's 401(k) account and reduces the outstanding balance of the loan. The employee retains the repaid principal and interest.

The best advice for handling loans in a judgment, is to describe how the loans are classified: Are they community or separate property loans? If the QDRO attorney knows the loan is a community or separate property, then no matter when the loans are taken out (before or after date of separation), the QDRO attorney can properly account for handling the loan following community property principles.

Adding Too Many Directions Error

> "The community property interest in Petitioner's 401(k) account shall be defined as the contributions between date of marriage and date of separation. Contributions prior to marriage or after separation shall be confirmed as petitioner's separate property. Petitioner's 401(k) account had a value of $100,000 as of date of signing this agreement and the parties agree a 50-50 split is appropriate."

The above language has a conflict in it. Can you spot it? This language suggests two methodologies for splitting the underlying account. The first part the instructions appear to intend a standard community split. However, the second half of the QDRO instructions appear to define the 50-50 split value as $100,000, implying each party should receive $50,000. What is it? A 50-50 split of the community? Or $50,000 to each party as of judgment entry date? Is the $100,000 a 'for your information only' fact? Or is the $100,000 what the parties agreed community value is for purposes of the QDRO? If contributions or withdrawals were made between the separation date and date of judgment, then the mathematical result of a 'community split' vs a $50,000 award to each party would be different.

Many family law attorneys believe they are being helpful by adding additional details, such as in the above example. Another common mistake is always adding in language for the 'time rule' formula, no matter what type of retirement account is being divided. The time rule formula is more commonly used for division of a pension plan (and it is not appropriate for all pension plans) and should rarely be utilized for division of a 401(k). Unless the family law attorney is intimately familiar with the differences between various retirement accounts and how they function, additional mechanical instructions on how the community interest shall be calculated, can be very confusing to the parties and the QDRO attorney.

So What Language Does Work?

[NOTE: This language SHOULD NOT be used for dividing an Armed Forces Retirement System account (military pension). Special language is required in military cases and a competent QDRO attorney should be consulted before entering a bifurcated or final judgment.]

> "The community property interest in petitioner's ABC and XYZ retirement accounts and the community interest in any survivor benefits in the accounts will be equally split between the parties via QDRO/DRO. For purposes of the QDRO/DRO the parties' date of marriage is [DOM] and the parties' date of separation is [DOS]. [Favorite QDRO attorney] will be the Evidence Code section 730 expert for the division order(s) and the parties will retain QDRO attorney's services within 30 days of entry of judgment. QDRO attorney's fees will be split equally between the parties. Both parties will cooperate with QDRO attorney's requests for records to complete said divisions, including any records that may be needed for separate property tracing analysis."

This language is ideal for several reasons.

(1) This language can be used for any plan (other than military) where the desired outcome is a community split-defined benefit/defined contribution/union/non-union/state/federal/etc. Unless the Parties want to deviate from a standard community split, there is really no reason to go into extreme detail regarding how the plan will be divided or change the marital settlement agreement language depending on what type of account is being split. "Equal split of the community" means the QDRO attorney follows established California community property law to divide the account and any potential disputes between the parties can be resolved by pointing to established codes and case law. This way of problem solving is much easier than trying to piece together what was or wasn't said in settlement negotiations, when the judgment language is ambiguous, and parties are questioning the drafting of the QDRO.

(2) This language includes an award of the community property interest in survivor benefits (which under Family Code 2610, the non-employee spouse is entitled to as a matter of right.) This can be important where an untimely death occurs, and that language becomes critical to preserve jurisdiction to prepare a 'post death QDRO'. When a remarriage occurs, this language is critical to preserve a former spouse's survivor rights. Absent this language, the new spouse's survivor rights would supersede the former spouse's rights. This hypothetical horrible became a reality for one such former spouse in the case of *In re Marriage of Padgett* (2009) 172 Cal. App.4th 830, where the judgment "reserved" over the retirement benefits and no mention was made regarding survivor benefits.

(3) This language includes a provision that the parties will provide any records requested by the QDRO attorney, which is critical in high conflict cases where one party simply refuses to provide necessary documents because "the judgment does not order it."

Another great place to lift language is from the rarely used Judicial Counsel Form FL-348. Better yet, attorneys and parties may want to use FL-348 as a standard attachment to their marital settlement agreements. Be a leader and start a new trend! FL-348 is an excellent form and avoids all the unnecessary errors discussed in this article.

David T. Ruegg and NaKesha S.D. Ruegg are partners at the Law Offices of Ruegg & Ruegg, a QDRO law firm. David and NaKesha are also the current RCBA family law section co-chairs. They can be reached by phone at 951/523-7376, or by email at david@qdrodivision.com and nakesha@qdrodivision.com.

MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective November 30, 2018.

Sean C. Florence – Law Student, Whittier

Sarah A. Hodgson – Riverside Superior Court, Riverside

Tara L. Urban – Office of the District Attorney, Riverside

David Vasquez – Law Offices of David Vasquez, Redlands

Jeffrey M. Zimel – Office of the Public Defender, Riverside

Mediation Disclosure Notification and Acknowledgment

by T. Elizabeth McVicker

SB 954 Provides Confidentiality Transparency to Clients

On September 11, 2018, Governor Jerry Brown signed into law Senate Bill 954 drafted by State Senator Bob Wieckowski (D-Fremont), which amended California Evidence Code section 1122 and added section 1129.[1] Section 1129 requires an affirmative duty of an attorney, except in the case of a class or representative action, who is representing a client participating in mediation or a mediation consultation, or as soon as reasonably possible before the client agrees to participate, to obtain written disclosure from the client confirming his/her understanding of all confidentiality restrictions related to mediation contained in the Evidence Code. Section 1122(a)(3) states that a communication, document or writing relating to an attorney's compliance with section 1129, may be used in an attorney disciplinary proceeding to determine compliance with section 1129, provided it does not disclose anything said or done or any admission made in the course of the mediation.

Section 1129 mandates that the communication include the following: (1) printed in the preferred language of the client in at least 12-point font, on a single page not attached to any other document provided to the client; (2) the names of the attorney and the client; and (3) signed and dated by the attorney and the client. Section 1129 contains model language for disclosure, which, "shall be deemed to comply" with the new disclosure requirements under the law:

> **Mediation Disclosure Notification and Acknowledgment**
>
> To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:
>
> • All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
>
> • Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
>
> • A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
>
> • A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.
>
> This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.
>
> I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.
>
> NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.
>
> [Name of Client] [Date signed]
>
> [Name of Attorney] [Date signed]

SB 954 comes in the wake of the California Supreme Court's decision in *Cassel v. Superior Court* (2011) 51 Cal.4th 113, and the Second District's Court of Appeal's decision in *Amis v. Greenberg Traurig LLP*, (2015) 235 Cal. App.4th 331, where evidence of confidential attorney-client discussions during mediation negotiations were excluded to

1 All further statutory references will be to the California Evidence Code unless otherwise indicated.

prevent the clients in each case from proving malpractice claims against their attorneys.

In 2012, the legislature directed the California Law Revision Commission (CLRC) to examine the relationship between attorney malpractice and mediation confidentiality. In 2017, CLRC recommended disclosure of otherwise confidential communications in an attorney disciplinary proceeding of the State Bar or a private malpractice action for damages, if the evidence is relevant to prove or disprove an allegation. In 2018, the California Senate Judiciary Committee analyzed various proposals and amendments to Senator Wieckowski's bill, with the support of various law groups, before adopting the final version.

SB 954 does not alter the overriding public policy to maintain open and honest frank candid discussions in mediation to reach an out of court resolution. Instead, it strikes a balance of the competing interests of participants in the mediation process and the attorneys who represent them.

The new law provides transparency and a clearer understanding of the mediation process and its ramifications to clients. The required disclosure to clients directs them to various sections of the Evidence Code to understand what testimony, communications, writings and evidence specifically remain confidential, inadmissible and not subject to discovery or disclosure. Those sections also reveal when disclosure of otherwise confidential communications or writings is permissible (§1122(a)(1)-(3)), and what evidence can be disclosed if such evidence is otherwise admissible in court, such as declarations of disclosure required by section 1120 and Family Code sections 2104 and 2105.

Clients must acknowledge that if problems arise during mediation, attorney-client communications cannot be used against their attorney in a malpractice claim. Therefore, a client makes an informed decision whether or not to proceed with a mediation. SB 954 also protects the inviolability of the mediation process by adding language that the failure of an attorney to comply with its requirements is not a basis to set aside an agreement prepared in the course of, or pursuant to, mediation.

With the passage of SB 954, attorneys should continue to bring their skills to the table during mediation. Attorneys have a duty to support the Constitutions of the United States and the State of California. (Bus. & Prof. Code § 6068.)

Compliance with the printed disclosure requirements at the onset of client retention is advised if there is any future possibility of mediation.

T. Elizabeth McVicker is a Certified Family Law Specialist with State Bar of California, Board of Legal Specialization, and exclusively practices family law mediation in Lake Elsinore.

Stuffed Animals for Foster Children

by L. Alexandra Fong

Riverside County Bar Association (RCBA) is collecting stuffed animals for Riverside County foster children. A few months ago, the RCBA received a letter from the Riverside Superior Court, Juvenile Division, letting us know of the need for toys to be provided to foster children who appear before the court. Throughout the month of November, RCBA will place donation bins at all section meetings.

On average, sixty dependency cases are heard each day in the three juvenile courthouses (Riverside, Southwest, and Indio).[1] Foster children are ordered present at the detention hearing (the first hearing to establish the dependency case), as well as future hearings in which their attorneys require their presence. A minimum of sixty toys are provided weekly to the children who come to court because stuffed animals and other toys provide a small level of comfort to the children. The need is ongoing as new cases are filed almost daily.

Each year, the past president of RCBA receives a gift to be used however the past president chooses. This year, the funds allotted for the past president's gift will be utilized to purchase toys for foster children with cases in Riverside County. RCBA is also accepting donations of new stuffed animals.

L. Alexandra Fong is a deputy county counsel for the County of Riverside, handling juvenile dependency cases, is the president of the Leo A. Deegan Inn of Court, past president of Riverside County Bar Association, co-chair of the juvenile section of RCBA, and is a member of the MCLE committee.

1 This is not an official statistic of the courts, but based upon the author's review of the court's calendar over a period of time.

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Changes to the Family Code

by Honorable Dale Wells

As we near the end of 2018 and the beginning of 2019, there are many changes coming to Family Law. If you have not already made plans for your leisure reading over the coming holidays, you might consider a complete re-reading of the Family Code. The following are a few of the many significant changes you will see.

- **Family Code section 6340:** Has been expanded to allow the court to authorize an alternative means of service of a request for a domestic violence restraining order if, at the time of the hearing, the court determines that, in spite of diligent efforts, the petitioner has been unable to accomplish personal service, and there is reason to believe that the restrained party is evading service. The court may permit service by first-class mail, by publication, or by such other means as are "designed to give reasonable notice of the action to the respondent."
- **Family Code section 4324.5:** Presently only applies to violent sexual felonies will, commencing January 1, 2019, also apply to domestic violence felony convictions on or after that date. Thus, a criminal conviction for a domestic violence felony would, among other things, (1) prohibit an award of spousal support from the injured spouse to the convicted spouse, (2) prohibit an award of attorney's fees payable by the injured spouse to the convicted spouse, (3) require the court to set the date of separation as the date of the incident giving rise to the conviction, or earlier, if requested to do so by the injured spouse, and (4) entitle the injured spouse to 100 percent of the community property interest in his or her own retirement and pension benefits. The statute would, however, authorize the court to determine, based on the facts of the particular case, that one or more of the above limitations on awards do not apply, if the convicted spouse presents documented evidence that he or she has been the victim of a violent sexual offense or domestic violence by the other spouse.
- **Family Code section 4325:** Presently applies to any criminal conviction for domestic violence, will prospectively apply only to a criminal conviction for a domestic violence misdemeanor or a criminal conviction for a misdemeanor that results in a term of probation pursuant to Penal Code section 1203.097. However, it has also been expanded significantly, so that it establishes, among other things, rebuttable presumptions (1) against an award of spousal support to the convicted spouse from the injured spouse, (2) prohibiting an award of attorney's fees from the injured spouse to the convicted spouse, and (3) in favor of setting the date of separation as the date of the incident giving rise to the conviction, or earlier. The court may also award the injured spouse up to 100 percent of the community property interest in his or her retirement and pension benefits. However, the statute lays out a number of factors the court must consider in making such an award.
- **Family Code section 4320(i):** Has been beefed up to require the court to consider any documented evidence of any history of domestic violence between the parties or perpetrated by either party against either party's child, including, but not limited to: (1) a plea of nolo contendere, (2) emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, (3) any history of violence against the supporting party by the supported party, (4) issuance of a protective order after a hearing pursuant to Family Code section 6340, and (5) a finding by a court during the pendency of a divorce, separation, child custody, or domestic violence proceeding, that the spouse has committed domestic violence.
- **Family Code section 3044:** The court will be required to make specific findings on each of the factors in subdivision (b) before finding that the presumption of subdivision (a) against giving an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence, has been rebutted. Moreover, if the court determines that the presumption in subdivision (a) has been overcome, the court will be required to state its reasons in writing or on the record (1) why sole or joint physical or legal custody of a child to the perpetrator is in the best interests of the child, pursuant to Family Code sections 3011 and 3020, and (2) why the additional factors of subdivision (b), on balance, support the legislative findings in Family Code section 3020, which, itself has been expanded to include the legislative finding that "children have the right to be safe and free from abuse."

These are only a few of the many substantive changes to the Family Code that will take effect January 1, 2019. I urge you to do a complete reading of the Family Code as you contemplate how to best serve your clients and their families in 2019 and beyond.

The Honorable Dale Wells is the Supervising Family Law Judge for Riverside Superior Court and currently assigned in Indio.

Judicial Profile: Commissioner Nicholas Firetag

by Jamie Wrage

Riverside Superior Court Commissioner Nicholas Firetag's work life and home life revolve around family. Recently appointed to the Family Law Court, Commissioner Firetag finds his new role greatly rewarding giving him the opportunity to help families and to "make more of an impact" than his prior work as a civil litigator. The Commissioner is dedicated to doing his best for the people in Riverside County and is very thankful for the support he has received from the judicial community while learning his new role. He called out his brother Chad, a judge in the Riverside Superior Court, for being a strong mentor, sharing the tricks of the trade from his years of experience as a judge in the Family Law Court. On July 9, 2018, he was sworn in as Commissioner by Chad.

Commissioner Nicholas Firetag and family at his swearing-in.

The Commissioner grew up in Riverside and has been married for over 18 years to Jamie Firetag, his college sweetheart, now a middle school teacher at a private school in Riverside. The Firetags have three elementary and middle school-age children, the youngest of which is adopted. The family spends their down time trying to keep active with hikes, camping and participating in activities at the Grove Community Church. Their current goal is to visit all of the U.S. national parks. So far, they have visited 9 of 59. Commissioner Firetag is also preparing for his fourth mission trip, this time to Belize to help with community building projects. Professing no actual building skills, Commissioner Firetag jokingly promised to do his best lifting and carrying work to help more talented construction workers on the jobs.

Nicholas Firetag and family

Having always been interested in improving the community, the Commissioner has served on the Board of Directors for the local Habitat for Humanity for five years. He is extremely proud of Habitat's mission to give people the opportunity to own their own homes by partnering with the organization. Not only do the homeowners gain the ability to improve their lives, but he notes that 95% of the kids from those families go to college so the benefits pass on to future generations.

A graduate of U.C. Riverside, Commissioner Firetag received his B.A. in Cooperative Political Science & Administrative Studies. He graduated cum laude from Pepperdine University School of Law in 2005, and went on to work at the Inland Empire firm of Gresham Savage Nolan & Tilden until taking the bench. At Gresham Savage, he ultimately became a shareholder in the civil litigation department with a focus on receivership work. One of the most memorable moments of his career came in 2015, when he managed not to be appointed as a receiver in a case where the homeowner was having to care for her two adult sons with medical issues. By working with Habitat for Humanity and seeking a continuance with the blessing of the City, the homeowner was able to refinance and save her home.

If you find yourself in Family Law Court before Commissioner Firetag, you can have confidence that he will use his knowledge and experience to follow the law while also keeping best interests of the parties at heart. While there are almost always difficult emotions and circumstances involved, Commissioner Firetag's love of the law, the community and family values will guide his actions.

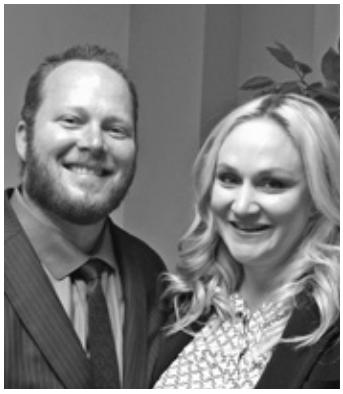
Jamie Wrage is a Shareholder with Stream Kim Hicks Wrage & Alfaro, PC, specializing in employment and complex business litigation.

Opposing Counsel: NaKesha and David Ruegg

by Betty Fracisco

A Family Law Duo

One would have to call the Rueggs one of the "Dynamic Duos" of Riverside family law. It would be difficult to find a couple with a more interesting story. They have a long and varied history, and after two very hectic careers, they have made some critical choices and have settled into a life that brings them personal fulfillment and a sense of well-being. How many of us, as lawyers, can say that?



David and NaKesha Ruegg

NaKesha Steffler Dodson Ruegg (an Indian name bestowed by her father, her mother's maiden name and her father's surname, plus her married name) was born in Loma Linda and had a happy childhood in Riverside with her sister Tanisha. Her parents divorced when she was six years old, and her mother, iconic family law attorney Mary Swanson, went to law school and started a "general practice." Her mother would bring her to the old family law courthouse on Brockton in Riverside. NaKesha's stepfather (from the age of nine or ten), Martin Swanson, had been a deputy public defender and then sworn in as a commissioner for Riverside County Superior Court and was assigned the dependency court.

NaKesha attended Cornelia Connelly High School in Anaheim. It was at this point, at the age of 15, that NaKesha met David Ruegg, a student at Servite High School, with whom she worked on a Servite theater production. They both laugh, remembering their "first date," when his mother drove them to see the movie *Grease*. David, born in Fullerton, had grown up in Brea with four siblings in what he describes as a chaotic household, children of an information systems tech father who worked for LA County and a mother, who was a laboratory technician at St. Jude's Hospital. After that date, NaKesha and David attended one dance, but in David's words, she was "too cool for him."

NaKesha graduated from Marquette University with a degree in communications, but at graduation was unsure of her future, so she took a year off, working for a family law attorney in Orange County. Her stepfather encouraged her to complete CASA (Court Appointed Special Advocates) training, and she actually completed three cases. This spurred her to take the LSAT and enter Chapman Law School. In the meantime, David had attended USC, graduating with a degree in business administration. He was really into computers (X-Box), but had no idea what he was going to do with his life. Mostly to avoid having to get a job, he decided to attend law school at Chapman, coming back to Orange County to live at home.

David never enjoyed law school, and actually contemplated quitting after the first week. During law school, he worked summers at Richmond & Richmond (wills and trusts) and interned at the Public Defender's Office. Lo and behold, when NaKesha arrived at Chapman, they ran into each other and began dating in 2006. Unlike David, NaKesha immersed herself in the law, getting involved in the Student Bar Association and working about 32 hours a week at the Herreman firm in Temecula/Murrieta. They married in 2010, after both had passed the State Bar.

Their early careers are a sharp contrast. After taking the State Bar, David worked for a year with criminal defense attorney Correen Ferrentino, working on a Federal RICO case (gangland) in which they succeeded in getting 60 convictions. This was followed by two years with Giovanniello and Michels, a medical malpractice defense firm in Brea, where he reviewed medical records of nursing homes. Overall, none of his legal work was satisfying.

NaKesha, on the other hand, jumped right into family law. She worked for Guy Herreman for six months and clerked at Swanson & Myers, where her mother, who had retired, was of counsel. Then she and her mother formed Swanson & Ruegg, as a way for NaKesha to get started, although her mother was of counsel and would only step in full-time when NaKesha was on maternity leave. After his initial attempts to find work that interested him, David started working with NaKesha, whose practice was already starting to do well. He handled the "business side of the office," and since "he was terrible at family law," he handled subsidiary matters, including collections, landlord/tenant, and expungements. They had their first child in 2011, followed by children in 2013, 2015, and 2017. During the early years, NaKesha was the main breadwinner, and at times David worked at home, and took care of their first two children. NaKesha recalls that, although she remembers as a child hearing her mother dictating at 3:00 a.m., she was now putting in a full day in the office, coming home to her mom duties, then working from 10:00 p.m. to 2:00 a.m. at home. NaKesha was very tired, especially since their second child was a special needs child. But, she loved her work.

Meanwhile, David, who was more attracted to analytical/computer matters than regular legal cases, became

interested in the challenge of QDROs, the bane of many a family law attorney. Mary Swanson suggested he network, so David sent out flyers to RCBA members announcing that he was going to be specializing in QDROs. Laura Rosauer was the first attorney who took a chance on him; and his unique practice gradually took off. He attended meetings in Orange, Los Angeles, and San Diego counties, listened to every available audiotape, and attended a QDRO conference, but was mostly self-taught in this technical area. Upland attorney Richard Muir, now his biggest competitor, helped him out. His mother-in-law sent him all her QDRO business. He and NaKesha did joint presentations in Orange and San Bernardino counties. In his first year in this new area, he handled three QDROs. Now he has 20 to 30 consults a week and has cases all over the state. He has become one of about 20 retirement benefits experts in California, in an area where pension plans are complex, especially military retirements with their constantly changing criteria and cut-off dates, about which he spoke in Long Beach recently.

Meanwhile, NaKesha's practice was ever thriving. However, she now had four children, age five and under, and despite much family support from both her and David's families, she decided she needed to pull back, so she could spend more time with her young children. With a special needs child, she had been attending a multi-hour class with that child right in the middle of her workday several days a week, which meant working at night to keep up. Something had to give. NaKesha and David discussed this even before she had her fourth child. NaKesha finally decided to take a leave of absence. She is wrapping up her ongoing cases, still consults on cases, makes court appearances several times a week, and is thinking about focusing on mediation, which would be a natural progression for her now. She likes to deal with people who can come to an honest agreement regarding how to deal with their children and who are willing to sit down and talk about it. She believes this has been a strength in her family law practice.

The Ruegg pendulum has swung and now David is the primary breadwinner, both are chairs of the RCBA Family Law Section, and they feel they have achieved a good balance and are happier overall. The beauty is that while NaKesha is spending more time with the children, she fully understands David's perspective and frustrations and finds it easier to appreciate the challenges of his work and the reason for his occasionally having to be at the office late, working on the "nice little boxes" that are now his unique analytical life in family law. The Rueggs' are in the process of opening a new office on Chicago in Riverside for both of them to use as a home base for meeting with clients.

Betty Fracisco is an attorney at Garrett & Jensen in Riverside and a member of the RCBA Publications Committee.

Classified Ads

Office Space – RCBA Building

4129 Main Street, Riverside. Next to Family Law Court, across the street from Hall of Justice and Historic Courthouse. Office suites available. Contact Charlene Nelson at the RCBA, (951) 682-1015.

Office Space – Downtown Riverside

Riverside Legal & Professional Center. Downtown Riverside walking distance to Courthouse. Private Executive Suite offices, virtual offices and conference rooms rental available. We offer a state of the art phone system, professional receptionist and free parking for tenants and clients. Accessible from the 91, 60 and 215 freeways. (951) 782-8089.

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Seeking attorney to join our Civil Litigation/Premises Liability team. Potential candidates must possess a strong background in litigation matters (at least 3 years of civil litigation, premises liability and insurance defense experience). The following are requirements for this position: excellent written and oral communication skills, excellent organizational and interpersonal skills, acute attention to detail and ability to multi-task and must have initiative, be able to act decisively, work independently and exercise excellent and ethical judgment. Please send resumes to vb@varnerbrandt.com.

Conference Rooms Available

Conference rooms, small offices and the Gabbert Gallery meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@riversidecountybar.com.

Project Graduate Continues to Foster Success

by Brian C. Unitt

This past June, Project Graduate celebrated the high school graduations of four more students, all of them from the Riverside County foster care system. Arturo, one student, has participated in Project Graduate since he was a freshman. With the help of his Educational Representative, Deputy Public Defender Tatiana Klunchoo, he has blossomed into a confident young man with a plan to pursue a career in culinary arts. He has also shown a commitment to give back to the program by speaking at our recent training session, and promising to return to cook for us. In the seven years RCBA members have mentored foster youth, twenty-six of them have become high school graduates with definite plans to take on their adult lives. Many of them, like Arturo, have also become ambassadors for the program.

Project Graduate grew out of the reality that less than forty-five percent of foster youth graduate from high school, entering the adult world with minimal social relationships skills or financial resources. They are then vulnerable to exploitation, unemployment, homelessness, and crime. The obstacles that prevent these young students from graduating include the likelihood that they will change homes and schools several times in a school year, lack of consistent adult support and guidance, and little reason to believe they can trust people who work in the system. The educational needs of foster children is supposed to be a state priority. The court recognized that something more needed to happen to provide these students with the support and guidance they needed to pursue their education goals.

In 2011, the presiding judge, along with the bench officers assigned to the Juvenile Court, asked members of the RCBA to come up with a plan to address this need. The RCBA answered that request and established Project Graduate as one of the bar's official programs. The Project Graduate Steering Committee includes representatives of the bar, the court, and the Riverside County Department of Public Social Services (DPSS). The committee developed a program built around the following three elements:

- Trained volunteers serving as court-appointed Educational Representatives acting as mentor/advocates to get their students on track to graduate and plan for their future;
- Monthly hearings at the Juvenile Court to monitor and encourage progress; and
- Recognition and rewards for the success of the participating students.

Project Graduate measures success not just in the number of graduates, but also in the impact our volunteers have on the lives of the students. It is the hard work and dedication of the people who see the need and step up to do something about it.

From the court, Judges Jacqueline Jackson and Matthew Perantoni have generously carved out time to oversee the monthly education calendar, showing the students enthusiasm, warmth and compassion. Juvenile Court Division Supervisor Deborah White keeps the calendars running smoothly. The students talk about how their experience in the education calendar has allowed them not to fear going to court for their regular dependency hearings.

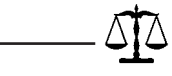
We continue to have outstanding RCBA volunteer Educational Representatives who understand the importance of the adults who took an interest in their own life and are now paying that forward to the students. Our current volunteers include Luis Lopez, Kellie Husted, Barbara Stroud, Sarah Overton, Angel Coleman, Tatiana Klunchoo, Mike Donaldson, Malvina Ovanezova, Lysandra Erwin, Mark Singerton, Amelie Kamau, Kelly White, and Patricia Cisneros.

Our new DPSS Liaison, Sherry Jansen, is committed to growing the program. She has matched all our volunteers with students, some even taking on two. She still has a waiting list, so we just finished a training session for new volunteers and a waiting list for the next training session is forming. We also truly appreciate the social workers and transporters at DPSS who ensure that the students are able to participate fully.

Finally, even though Project Graduate is entirely a volunteer effort, there are significant costs. The students who live up to their participation pledge earn points for improving their grades, attendance, discipline record, and for participating in extracurricular activities. These points translate to cash rewards at the annual luncheon. Arturo's cash reward is going to enable him to buy a professional knife set to use when enrolled in Riverside Community College Culinary Academy. All of our graduates so far have enrolled in college, a step most of them could not have imagined when they joined the program. We reward that decision with a laptop computer, an essential tool for their success at the next level. The support of the Riverside County Bar Foundation has improved our ability to raise funds; but at the end of the day, our success comes directly from the generosity of our association and our friends in the general community. In that regard, we are very grateful to Juvenile Defenders Inc., who have generously donated laptops for our graduates.

As we look back with pride on the accomplishments of seven years, we still know there is much more to do. Project Graduate always welcomes new volunteers, not only to serve as Educational Representatives, but also to work on fund raising, training, event organizing, and the details of administration. There are at least 4,000 children in the foster system in Riverside County and those who have reached their high school years will continue to look for an adult to provide a positive influence in their lives. A modest investment of five to ten hours a month makes a tremendous difference in the life of each student we are able to serve. If you would like to help, please get in touch by calling the RCBA at 951-682-1015.

Brian C. Unitt is a certified specialist in appellate law and a shareholder in Holstein, Taylor and Unitt, a Professional Corporation, where his practice focuses on civil appeals, personal injury claims, and mediation. Brian is proud to serve as the chair of the Project Graduate Steering Committee.



The RCBA Elves Program – Season XVII

by Brian C. Pearcy

Since Christmas 2002, your RCBA Elves Program has helped local families in need to provide Christmas to their kids. While the U.S. economy has improved this last year, our local economy still presents challenges for many. This will be your 17th opportunity to show that we care about and do give back to the community that supports us. Once again, your RCBA is providing four opportunities for you, your family, your staff, and colleagues to become an Elf and share your time, talents, and interests with these local families in need. I do encourage you to get your kids involved. This is good training for them on the importance of giving back. Plus, some schools have recognized our program as a way for students to earn public service credits. Your task is to decide which Elf category(ies) you want to participate in this season?

Shopping Elves: Monday, December 10, 2018 at 6 p.m., is our designated shopping day and time. All RCBA "Shopping Elves" will meet at Kmart, which is located at 7840 Limonite in Jurupa Valley. (This is a new location from previous years.) As a Shopping Elf, you will receive a Christmas "wish list" from your adopted families. Your job is simple, shop and fill your basket with as many gifts as possible within the dollar amount given to you at the start of the evening. This is a real opportunity to test or show off your "value" shopping skills. Many of our Shopping Elves have made this a family affair using its younger members to assist in selecting the "cool" gifts for the kids while learning about the value of charity and the joy of giving to the less fortunate. Some law offices bring their entire staff and are joined by their families and make this a night of bonding. Whatever the motivation, please put on an Elf cap and come and join us. A good time will be had by all!

Wrapping Elves: After the Shopping Elves finish their job, Wrapping Elves swing into action. As Wrapping Elves you will have two opportunities: **December 12 and 13, starting at 4 p.m.** We meet in the RCBA boardroom (on the first floor of the Bar building) and wrap all the gifts purchased. Wrapping Elves must ensure that all the gifts are tagged and assembled, by family, for easy pick up and distribution by the Delivery Elves. Experience has shown that the holiday music, food, and camaraderie of wrapping gifts together will help even the biggest Grinch shake off the "bah humbug" blues and get them into the holiday spirit. Santa sightings have occurred in the past. There are rumors that Santa may drop in to visit his Wrapping Elves again! Excellent wrapping and organizational skills are welcomed, *but are not required.*

Delivery Elves: If you need a way to kick-start the warm holiday glow inside and out or just want to feel like Santa on Christmas Eve, this is it! Depending on the total number of families adopted, teams of two to four Delivery Elves are needed to personally deliver the wrapped gifts to each of our families from **December 14 to 24**. This part of the program has been designed to accommodate your personal schedules. Over the years, many members have expressed that delivering gifts to the families was by far one of the most heart-warming Elf experiences. It is also a good opportunity to teach your young ones early the rewarding feeling of helping those less fortunate than themselves. When signing up, please inform us of the type of vehicle you have, so we can match the number and size of gifts to the storage area available in your vehicle.

Money Elves: The Money Elves provide the means necessary for the other Elves to shop, wrap, and deliver presents to the families we adopt. Donations received will fund gifts purchased from Kmart and the purchase of gift cards from Stater Brothers, so the families can buy food for a nice holiday dinner, and gas cards so they can get to the grocery store.

You can really help us by sending in your donation early since it allows us to determine our budget for the families we help. The majority of funds need to be donated no later than December 7, to allow for the big shopping night, but late donations can still be used for the food and gas cards. The more money we raise means a greater number of families we can assist. (Remember our goal is 60+ families this year.) Please note, even if you are a procrastinator, we will accept money after December 7. Monies received this late will be applied to any last minute "add on" families or will be saved to get us ahead on donations for next year.

Please make your checks payable to the Riverside County Bar Foundation and write "*Elves Program*" in the memo section of the check. The RCB Foundation is a 501(c)(3) (Tax ID# 47-4971260), so all donations for this project are tax deductible. Please send your checks directly to the RCBA. We thank you in advance for your holiday generosity.

To become a Shopping, Wrapping, Delivery, or Money Elf, please phone your pledge to the RCBA at (951) 682-1015 or email your name and desired Elf designation(s) to one of the following: Charlene Nelson (charlene@riversidecountybar.com), Lisa Yang (lisa@riversidecountybar.com), Brian Pearcy (bpearcy@bpearcylaw.com), or Anna Gherity (agherity@bpearcylaw.com). By contacting us via email you will assist us with the ability to update each of you via email in a timely manner.

To those who have participated in the past, "Thank you" and to those who join us for the first time this year, we look forward to meeting you. Don't forget to tell a friend or two or three!

Brian C. Pearcy is past president of the RCBA and chair (i.e. "Head Elf") of the Elves Program.

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RCBA 951-682-1015 LRS 951-682-7520
www.riversidecountybar.com rcba@riversidecountybar.com

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