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May 17, 2007

Honorable Chief Justice and Associate Justices
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: Elkins v. Superior Court, Case Number S139073

Honorable Justices:

This letter brief is submitted in compliance with the Court's Order of April 25, 2007, replying to the Respondent Court's and Real Party's letter briefs on whether the Contra Costa County Superior Court's prior Local Rules and the Trial Setting Order ("TSO") and the current Local Rules are consistent with the Hearsay Rule. Since this replies to both parties' letter briefs, they will be referred to as "the Responding Parties."

The three cases do not support the Responding Parties' arguments.

The Responding Parties assert that both sets of local rules and the TSO[1] are consistent with the three cases cited by this Court because they disapprove the submission of testimony by declaration "only where, unlike here, the declarant is not subject to cross-examination."[2] Actually, those cases stand for the exact opposite, namely that affidavits may not be used in trials to prove elements of the cause of action.

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[1] When referring to all three sets, Petitioner will use the term "the Rules."
[2] Respondent Court's Letter Brief, p.1.

Lacrabere v. Wise[3] holds that when an element of a cause of action needs to be proven, it cannot be done by affidavit. Since service of the three-day notice-to-quit was an act that had to be performed before suit could be brought, it had to be proven by "the testimony of witnesses given in open court where the adverse party may have an opportunity of cross-examination. ... [Affidavits] rank on no higher plane for that purpose than hearsay evidence."[4]

The Court did not say that a material element of the cause of action could be proven by affidavit if the declarant were available for cross-examination. It said that affidavits could be used where authorized by Code Civ. Proc. §2009, *except when dealing with material facts in controversy*:

> "[T]his section has no application to the proof of facts which are directly in controversy in an action. It was not intended to have the effect of changing the general rules of evidence by substituting voluntary *ex parte* affidavits for the testimony of witnesses."[5]

Note that this directly contradicts Real Party's argument that affidavits are the testimony of witnesses.

The majority opinion in *Fewel v. Fewel* holds that while child custody recommendation reports must be in affidavit form, to be admissible two conditions must be met: the witness "must appear like any other witness and testify subject to the rules of evidence and the right of cross-examination."[6] The conditions are conjunctive, not disjunctive. The witness must appear and testify on direct "subject to the rules of evidence" **and** be subject to cross-examination. The Responding Parties ignore the first condition since obviously affidavits don't satisfy that requirement. Also, since affidavits are often rife with hearsay, opinion, argument and other forms

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[3] *Lacrabere v. Wise* (1904) 141 Cal. 554.
[4] Id. at p. 556.
[5] Ibid.
[6] *Fewel v. Fewel* (1943) 23 Cal.2d 431,431-432.

of inadmissible testimony, the requirement for live testimony makes it possible to enforce the requirement that testimony be "subject to the laws of evidence."

Justice Traynor's concurring opinion goes even further. It holds: "an affidavit may not be used as evidence in cases of this kind. An affidavit is ordinarily excluded as hearsay."[7] Responding Parties would rewrite this to state: "an affidavit is ordinarily excluded as hearsay unless the declarant is available for cross-examination." Those words do not appear in the opinion nor can they be inferred. Justice Traynor would agree that affidavits are permitted, but only when expressly authorized by Code Civ. Proc. §2009, which all agree does not apply in this case.

Finally, there is nothing in *Pajaro Valley Water Management Agency v. McGrath*, that supports the Responding Parties' interpretation. That case held that while a summary judgment declaration is hearsay, it is made admissible by Code Civ. Proc. §437c's "special authorization." Conversely, when no statutory authorization exists, the Legislature mandates Evidence Code, and specifically hearsay rule, compliance.[8]

In short, there is nothing in any of the cases supporting the Responding Parties' position that they authorize the admission of affidavits in trials to prove contested factual issues of a cause of action simply because the affiant is available.

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[7] Id. at p. 438.
[8] *Pajaro Valley Water Management Agency v. McGrath, supra,* 128 Cal.App.4th at 1107.

The Rules do not guarantee the right of cross-examination.

The Responding Parties argue that both sets of local rules and the TSO are consistent with the hearsay rule because they "provide for submission of written direct evidence subject to oral cross-examination."[9] First, the Rules do not guarantee this right.

The 2005 local rules, which were in effect when this case was tried, stated: "... The Court may decide contested issues on the basis of the pleadings submitted by the parties *without live testimony.*"[10] Although the Responding Parties assure us that this does not mean what it plainly says, that is precisely what happened to Petitioner herein.

Likewise, we know from this case that the operation of the TSO, taken as a whole, did not guarantee Petitioner the right to cross-examine either his wife or the expert because he was denied virtually all of his exhibits by the draconian application of the TSO making it impossible for him to do so.

As discussed in Petitioner's letter brief of May 11, 2007, the 1/1/2007 version of the local rules also provides for instances where declarations can be admitted without cross-examination.

In addition, the Responding Parties have never explained the policy behind or time savings of its new policy, implemented in response to this lawsuit, permitting litigants to offer live testimony so long as it is within the scope of the declaration that was submitted as direct testimony. How does this benefit the Court or the parties? How does doing the same thing twice save time or money? The original declaration is still hearsay and still admitted into evidence. If the "trial by declaration" rule is affirmed, what is to stop the Court from reverting to its previous procedures?

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[9] Respondent Court's Letter Brief, p.1.
[10] AA, Tab 1.

Declarations are Hearsay

The primary differences between the arguments of the Respondent Court and Real Party in Interest is that while the Respondent Court admits that declarations are hearsay, Real Party takes the position that they are not. For the reasons discussed below, this is simply wrong. Regardless of whether the affiant is available, the declaration itself is still an out-of-court statement offered for the truth of the matter asserted. Real Party's argument is that an affidavit's character as hearsay changes depending on whether the affiant is available to be cross-examined. If the affiant is available, then the declaration is not hearsay, whereas if s/he is not, then it is. Her mistake is that she latches onto only one aspect of the hearsay rule, namely the ability to cross-examine. She ignores the other reasons for the hearsay rule, namely the ability to assess the credibility of the witness while testifying and the ability to keep extraneous and inadmissible testimony away from the trier of fact via timely objections.

In her discussion of historically what constitutes *testimony* and a *witness*, she ignores Code Civ. Proc. §2009, discussed at length below, which limits the use of affidavits to very specific circumstances. The Legislature has never authorized the use of declarations/affidavits in the manner suggested by Real Party and certainly has not classified them as nonhearsay.

If her interpretation were correct, then ALL civil trials could be done by declaration, a position that not even the Respondent Court advocates, since it bases its position on the historical concept that Family Law courts are nominally courts of equity and therefore accord less procedural rights than civil courts.

Were her argument true, then Code Civ. Proc. §2009 would be superfluous as all declarations would be admissible for any purpose if the affiant were available. That is not what California law says nor how it has ever been interpreted.

This Court should decline the Respondent Court's request to judicially create a new hearsay exception.

The Respondent Court asserts that the Rules comply with the Evidence Code because the Code permits the judicial creation of hearsay exceptions. However, since no such hearsay exception currently exists, it is asking this Court to create one. Petitioner agrees that this Court has the power to create exceptions to the hearsay rule, provided they do not conflict with a statute.[11] The questions are would such a judicially created exception conflict with statute and should this Court consider such a monumental change in law? Petitioner believes that such an exception would conflict with statutory law and if it were to be created, should be done by the Legislature, not the courts.[12]

Respondent Court correctly states that Evid. Code §1200 (b) provides: "Except as provided by law, hearsay evidence is inadmissible." This is a general prohibition, subject to exceptions. Code Civ. Proc. §2009, however, provides a specific Legislative prohibition against the creation of the hearsay exception the Respondent Court requests:

> "An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, **and in any other case expressly permitted by statute.**"[13]

Unlike the general permission granted by Evid. Code §1200 (b) which permits *judicially* created hearsay exceptions, section 2009 requires that exceptions be *statutorily* created. In other words, it does not permit the courts to expand the use of affidavits beyond those stated in the

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[11] *People v. Wheeler* (1992) 4 Cal.4th 284, 299-300, 14 Cal.Rptr.2d 418.
[12] *Fewel v. Fewel, supra,* 23 Cal.2d at 434
[13] Emphasis added.

statute. Because a more specific statute controls over a more general one, section 2009 is the controlling statute.[14]

Even were this Court to conclude that it was not statutorily barred from creating a new hearsay exception permitting the use of affidavits in trials, the question would be should it do so? In approving the judicially created "child dependency exemption" to the hearsay rule, *In re Cindy L.* thoroughly discussed the power of the judiciary to create new hearsay exceptions and the process by which that should be done. The analysis began by noting that "[t]he power of the judiciary in developing new hearsay exceptions has been little used."[15] The power springs from the authority granted to the courts by the Legislature "to continue to perform their common law function in a manner consistent with statute, which included 'administrating the rules of evidence on a day-to-day basis, [so as to] to further develop the law of hearsay to respond to new evidentiary problems.'"[16] *Cindy L.* then proceeded to give these guidelines as to the promulgation of new hearsay exceptions:

> "We also emphasize that in developing new exceptions to the hearsay rule, courts must proceed with caution. The general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree. The rule also has a recognized constitutional dimension, at least in the criminal context, because it is related to the confrontation clause of the Sixth Amendment to the United States Constitution. Furthermore California, unlike federal courts and some state jurisdictions, does not have a 'residual hearsay' exception that permits any hearsay statement into evidence as long as it bears sufficient indicia of reliability. Caution on the part of the judiciary is also warranted because hearsay is an area of law that is now governed by an extensive statutory scheme. (See Evid. Code, §§ 1200-1370.) Courts may not create evidentiary exceptions in conflict with statute. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 299-300.)"[17]

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[14] See *McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1486, 49 Cal.Rptr.3d 227, 252.
[15] *In re Cindy L.* (1997) 17 Cal.4th 15, 27, 69 Cal.Rptr.2d 803.
[16] Ibid.
[17] *In re Cindy L. supra,* 17 Cal.4th at pp. 27-28 (some internal citations omitted.)

Cindy L. then went on to set forth conditions that should be met before judicially creating new hearsay exceptions.

> "Despite this cautionary note, it may nonetheless be appropriate for courts to create hearsay exceptions for classes of evidence for which there is a substantial need, and which possess an intrinsic reliability that enable them to surmount constitutional and other objections that generally apply to hearsay evidence."

The three requirements are: need, intrinsic reliability, and surmounting constitutional objections. Petitioner does not believe that a single requirement is met in this case.

As to need, the Court has failed to explain to what "'new evidentiary problems'" the judicially created hearsay exception would be responding. [18] Likewise, it has not expressly explained the need for this procedure, especially if litigants truly have the option of taking the stand and testifying to the same evidence directly. Moreover, nowhere in its briefing does it distinguish between a "trial" and a "motion." It asks that its trial by declaration procedure be approved for all "family law proceedings."[19]

The *Cindy L.* requirement that the proffered evidence, i.e., the litigants' declarations, have any sort of "intrinsic reliability" is humorous to anyone who has ever practiced in family law.[20] Judicial officers are used to seeing declarations where the parties swear to diametrically opposed versions of the same events. There is absolutely nothing "intrinsically reliable" about a declaration in a family law proceeding.

And, as to the constitutional problems, neither of the Responding Parties has addressed the constitutional issues raised in *Mathews v. Eldridge.*[21] Instead, they prefer to continue to rely

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[18] Ibid.
[19] Letter Brief, p. 6.
[20] See, e.g., *In re Marriage of Calcaterra and Badakhsh* (2005) 132 Cal.App.4th 28, 33 Cal.Rptr.3d 246 where Court observed that both parties had been "dishonest with the Court under penalty of perjury."
[21] *Mathews v. Eldridge* (1976) 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893.

on *In re Adair*,[22] which was shown in Petitioner's Reply to Respondent Court's Return to be inapplicable.

The Respondent Court primarily relies upon *Houghtaling v. Superior Court*[23] where a hearsay exception was created for small claims actions. The Court explained that in doing so it was complying with the legislative mandate that such proceedings be "informal"[24] and small claims court is "designed for the unsophisticated petty litigant" and is the "People's Court."[25] While the benefits of "restrict[ing] what are recognized ... as substantial, even constitutional, rights" has been accepted in small claims matters due to the need to resolve these small matters at a reasonable cost,[26] to argue that the same considerations apply in dissolutions of marriage wherein it is not uncommon to divide assets of a million dollars or more – as happened in the case at bar with no live testimony at all – shows the status of family law litigants in the Respondent Court. Recall, the same trial by declaration procedures apply to child custody, move-aways, support, attorney fee orders, etc.

Second, in a discussion that has great relevance in this case because Petitioner was essentially defaulted for not complying with the TSO that required that the "evidentiary foundation for admission of the proposed exhibits shall be completely set forth in the declaration(s)...",[27] *Houghtaling* said:

> "It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence. How is a lay plaintiff to be made to understand that the bill for services which he presents to show the repair costs for his damaged property must be authenticated as a business record?"[28]

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[22] *In re Adair* (9th Cir. 1992(965 Fed.2d 777.
[23] *Houghtaling v. Superior Court (Rossi)* (1993) 17 Cal.App.4th 1128, 21 Cal.Rptr.2d 855.
[24] Id. at p. 1134, citing to Code Civ. Proc. §116.510.
[25] *Houghtaling v. Superior Court (Rossi), supra,* 17 Cal.App.4th at pp. 1135-1136.
[26] Id. at p. 1133.
[27] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2.
[28] *Houghtaling v. Superior Court (Rossi), supra,* 17 Cal.App.4th at p.1133.

Yet, that is what was required of Petitioner herein when the trial judge instructed Petitioner as follows:

> "THE COURT: No. No. You're misunderstanding what his objection is. In order to get a document admitted into evidence under the trial scheduling order – if you take a look at it. It's paragraph 2, I think it is – it says that the evidentiary basis and foundation for each exhibit must be set forth in the declaration so the at the other side can object to see, you know, if exhibits have an evidentiary basis or not. And he's saying that those exhibits don't have any foundation in your declaration. [¶] So if you can point me to the foundations in your declarations, then we – we'll dispose of that argument quickly If not, those – exhibits that don't have an evidentiary foundation will be stricken."[29]

Of particular note is that *Houghtaling* discussed how the parties have the option of presenting their evidence "by witnesses at the hearing" or by other means. So, there was no requirement that their case be presented either entirely or in the first instance by declaration.

Compare *Houghtaling* to *People v. Wheeler*,[30] wherein this Court refused the People's request to create a hearsay exception for misdemeanor convictions where the statutory scheme expressly limited the hearsay exception to felony convictions, preferring to leave such to the Legislature.

The Respondent Court asks this Court not to "change the law" by holding that affidavits may not be used in family law trials. Although the Respondent Court pretends that this hearsay exception currently exists, it clearly does not or someone would have cited a case so holding. None of the Respondent's Court's authorities, *Marriage of Brown and Yana*,[31] *County of*

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[29] RT, pp. **6/11-11/15.**
[30] *People v. Wheeler, supra*, 4 Cal.4th at 299-300.
[31] *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 38 Cal.Rptr.3d 610.

Alameda v. Moore,[32] or *Marriage of Reifler*[33] even discuss whether such a hearsay exception exists and all deal with motions, as opposed to trials.

Why the Respondent Court puts great weight on *Brown and Yana* in its letter brief and its Return is unclear, since the case does not support its position. The word "hearsay" does not even appear in the opinion. Second, the requirement for the objecting noncustodial parent to make a *prima facie* showing of detriment from the move in order to be entitled to an evidentiary hearing suggests that the Court was endorsing a two-step process. First, the noncustodial parent makes a *prima facie* showing of what he thinks he can prove. If this showing is satisfactory, then he is entitled to a *full evidentiary hearing*. Contrary to the Respondent Court's interpretation, most believe this entails a hearing with *live testimony*, not just more declarations. For example, Justice King states in California Practice Guide: Family Law:

> "Right to evidentiary hearing only after sufficient threshold showing of detriment: The court must bring the move-away contest to a "formal hearing" where mandatory mediation has failed to resolve the matter (Fam.C. §3185(a), ¶7:222). But a full evidentiary hearing *with live testimony* is required only if 'necessary'; and that will be the case only if the noncustodial parent first makes a sufficient *prima facie* showing of detriment through the moving papers, supporting documents and, if needed, an offer of proof."[34]

This makes sense. Otherwise, what is the purpose of the second hearing?

Marriage of Reifler doesn't use the word "hearsay" either. As discussed in Petitioner's May 11, 2007 letter brief, *Reifler* was decided based upon whether the matters were "motions" and hence within the ambit of section 2009. If the Respondent Court's interpretation of the case were correct, then there would have been no need for the Court to discuss 2009, since the declarations would have been independently admissible.

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[32] *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 40 Cal.Rptr.2d 18.
[33] *Reifler v. Super. Ct. (Reifler) supra,* 39 Cal.App.3d 479.
[34] Hogoboom & King, California Practice Guide: Family Law (Ratter 2007) ¶ 7:562.3 (emphasis added).

County of Alameda v. Moore only mentions the word "hearsay" twice and for totally different proposition. There, the Court of Appeal rejected the County's argument that the father's failure to object to an offer of proof waived a hearsay objection because the district attorney's statements were not evidence and had no legal consequence, there was no reason to object to them. The Court did not hold that declarations were admissible as exceptions to the hearsay rule.

Although the Respondent Court asserts that it is a widespread practice, it is unable to cite to a single case has permitted the use of affidavits for the trial of ultimate issues in a dissolution.[35] So, this Court is being asked to create such an exception where none currently exists. Moreover, the Respondent Court's request goes far beyond "2009 motions." It wants a blanket hearsay exception for the use of affidavits for all purposes in family law – including trials. It has not explained why such a judicially created rule would not conflict with section 2009's express contrary dictates. Its argument is that "we are doing it now, so an exception must exist."

Moreover, creating a new hearsay exception would not overcome the constitutional issues raised by *Mathews v. Eldridge,*[36] fully discussed in pages 14 to 18 of Petitioner's Reply to Respondent's Return.

The Responding Parties' position ignores the effect of its Rules on *pro pers.*

The argument that all ills of the Rules' trial by declaration procedures can be cured by cross-examination ignores the fact that most of its litigants are *pro pers* and ill-equipped to test the credibility of witnesses through effective cross-examination. It takes lawyers years to learn

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[35] The cases that the Court does cite are federal cases, which are inapplicable for the reasons set forth in *In re Cindy L. supra,* 17 Cal.4th at pp. 27-28 (cited above), namely that the federal statutory hearsay scheme is different from California's.

[36] *Mathews v. Eldridge* (1976) 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893.

the skill required for effective cross-examination. How is a *pro per* supposed to be able to use this tool to expose a witness's lack of credibility? This is a concept made strongly by the majority opinion in *Houghtaling*[37] and valid here.

Also, there is no way for a *pro per* to effectively limit what the other party puts into a declaration, since it is totally unrealistic to imagine them drafting motions to strike. If the trial judge is taking a "inquisitorial role"[38] s/he is more likely to keep the testimony on track in a case involving a *pro per.*

The effect on *Reifler* motions:

While this Court could reconcile the use of affidavits and section 2009 with cases such as *Marriage of Reifler*[39] by interpreting "upon a motion" much more broadly than have cases such as *Lacrabere v. Wise,* discussed above, and *Oil Tool Exchange v. Hasson*[40] which have held that section 2009 has "no application to the proof of facts which are directly in controversy in an action," the question is, should it? Since Petitioner's case was a "trial" (or at least was supposed to be) *Reifler* technically has no application, which was the reason that he did not challenge it in his writ petition.

He asks, however, as have the *amici curiae*, why family law litigants, where potentially huge amounts of money, as well as the futures of children, are often at stake, are not entitled to the same access to justice as is a plaintiff alleging whiplash from an automobile accident? Why must they pay a private judge to handle their case if they want a trial and a judge to listen to them? Why must citizens appearing in the Family Law Department have to bear the Court's need

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[37] *Houghtaling v. Superior Court (Rossi), supra,* 17 Cal.App.4th at pp. 1135-1136.
[38] See discussion below.
[39] *Reifler v. Super. Ct. (Reifler)* (1974) 39 Cal.App.3d 479, 481 n.1, 114 Cal.Rptr. 356.
[40] *Oil Tool Exchange v. Hasson* (1935) 4 Cal.App.2d 544, 547.

for efficiency on their backs by being denied their right to a "trial" as it is commonly understood?

Petitioner does not believe that 2009's "upon a motion" was ever intended to apply to these sorts of proceedings.

Petitioner did not waive his right to object to the Rules:

Responding Parties again argue that Petitioner waived his rights by failing to use the magic words, "I object." It is true that as a *pro per,* Petitioner was unaware of the technical rules of civil and appellate procedure. However, as he has quoted many times, he made the judge aware that he was resting solely because he had been denied the use of virtually all of his evidence and the judge responded "that may be the correct advice."[41] Nevertheless, the Responding Parties argue that his failure to use the words "I object" equates to a waiver so game over. This highlights the need for this Court's opinion to discuss the effect of local rules, especially ones as complex as these, on *pro pers* and the need for them to be flexible and provide discretion to deviate from them when needed to achieve substantial justice.

In the case of *Ross v. Figueroa,*[42] the Court of Appeal discussed the plight of a *pro per* who failed to assert the proper grounds for a continuance:

> "Especially in a forum which in practice must largely function without lawyers and where the judge, as a result, is expected to play an active role in protecting the rights of the parties, we are loathe to conjure a waiver or forfeiture of Figueroa's statutory entitlement to a continuance from his failure to argue those [specific statutory]grounds when seeking a continuance at the hearing."[43]

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[41] RT, pp. 19/26-20/27 (emphasis added).
[42] Ross v. Figueroa (2006) 139 Cal.App.4th 856, 43 Cal.Rptr.3d 289.
[43] Id. at p. 864.

The opinion went on to provide sage guidance to trial judges dealing with *pro pers* that hopefully this Court will endorse:

> "The role of a judicial officer [dealing with pro pers] has many attributes of an inquisitorial as opposed to an adversarial process, is different than when sitting in a purely adversarial court where the parties are presumed to be 'well counseled' by skilled and knowledgeable lawyers. [¶] In a purely adversarial setting it is reasonable for the judge to sit back and expect a party's lawyer to know about and either assert or by silence forfeit even the most fundamental of the party's constitutional and statutory procedural rights. But not so in a judicial forum, such as this domestic violence court, which can expect most of those appearing before the court to be unrepresented."[44]

If the Trial Judge had done that below, we would not be here now. As was stated in a different context in *Monterroso v. Moran*[45] *pro pers* "should be guided through our judicial system, not herded."

Conclusion

Although those appearing in Family Law courts have had to accept the expediency of having their motions ruled on without their testimony for years, they certainly should not have to accept it for the final division of their property, the setting of their support and the custody of their children. Courts should be able to test the credibility of witnesses by watching them testify at trial, not by reading a declaration written for them by an attorney. The rules of evidence are the only defense that we have against unfounded accusations.

Although section 2009 permits the use of affidavits "upon a motion," Petitioner does not believe that it was the Legislature's intention to permit parties to use affidavits in the place of live testimony to prove up contested facts essential for a cause of action. If the Court interprets section 2009 to include Family Law motions, it should still preserve parties the option of a trial

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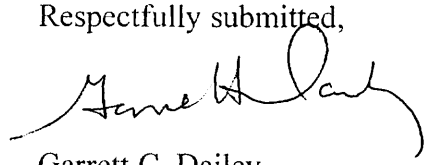
[44] Id. at pp. 866-867.
[45] *Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 738, 37 Cal.Rptr.3d 694.

where they can tell their stories to a judge and win or lose come away thinking that they had their day in court.

Respectfully submitted,



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PROOF OF SERVICE

I, BRENDA K. BUTLER, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 2915 McClure Street, Oakland, California 94609; I am employed in Alameda County, California. I am familiar with my employer's practices for the collection and processing of materials for mailing with the United States Postal Service, and that practice is that materials are deposited with the United States Postal Service the same day of office collection in the ordinary course of business.

On May 18, 2007, I served a copy of the following document(s): **LETTER TO THE CALIFORNIA SUPREME COURT DATED MAY 17, 2007**

On the addressee(s):

__X__ **BY MAIL --** by placing a true copy of the above-referenced document(s) enclosed in a sealed envelope, with postage fully prepaid, in the United States mail at Oakland, California, addressed as set forth below, on the date set forth above.

____ **BY FACSIMILE --** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, on the date set forth above, before 5:00 p.m.

SUPREME COURT (Hand-Delivery) (original + 7 copies)
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 18, 2007, at Oakland, California.

Brenda K. Butler