EISENBERG AND HANCOCK, LLP

May 17. 2007

VIA FEDEX

Honorable Ronald M. George, Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: ***Elkins v. Superior Court*, No. S139073**

Dear Chief Justice George and Associate Justices:

This letter brief responds to the letter brief filed by petitioner Jeffrey Elkins on May 11, 2007.

I.
PETITIONER WRONGLY ASSERTS THAT DECLARATIONS ARE INADMISSIBLE HEARSAY UNLESS THEIR ADMISSION IS STATUTORILY AUTHORIZED.

Petitioner's letter brief challenges, on hearsay grounds, multiple provisions in respondent superior court's local rules and trial scheduling order (TSO) pertaining to the admissibility of direct testimony by declaration. These contentions share a common theme – which petitioner sounds repeatedly – that the challenged provisions violate the hearsay rule because they are not authorized by statute. Petitioner says:

- "[C]ontested factual disputes cannot be decided on declaration unless specifically authorized by statute." (Petitioner's Letter Brief (PLB) 9.)

- "[W]hen no statutory authorization exists, the Legislature mandates Evidence Code, and specifically hearsay rule, compliance." (PLB 11.)

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- "The hearsay rule reigns absent legislative directive." (PLB 11.)

- "[T]he Legislature has created numerous situations where declarations are permitted as direct evidence, however it has not created any express exception for the family law trials." (PLB 15, fn. omitted.)

- "As Justice Traynor said, if there is to be a new hearsay exception created to permit trials by affidavit, it should be created by the Legislature, not the courts." (PLB 15.)

As explained in respondent's letter brief, petitioner's theme is out of harmony with well-settled California law establishing that the statutorily-prescribed exceptions to the hearsay rule are not exclusive, but are joined by *decisional-law* exceptions, one of which is for factual determination on declarations in family law cases. This point answers each of petitioner's admissibility challenges to the local rules and TSO. The challenged provisions are authorized by the decisional-law hearsay exception.

Justice Traynor never said in *Fewel v. Fewel* (1943) 23 Cal.2d 431, 439, that – as petitioner puts it – hearsay exceptions "should be created by the Legislature, not the courts." (PLB 15.) In fact, Justice Traynor said the opposite in *People v. Spriggs* (1964) 60 Cal.2d 868, 871-872: "Numerous questions arise on which the Legislature has been silent or inexplicit. The courts must answer these questions and develop judicially the law of evidence . . . ."

Here is what Justice Traynor actually said in *Fewel*: "Whether custody cases are of such a nature as to require *a departure from these established principles* is a question for the Legislature." (*Fewel v. Fewel, supra,* 23 Cal.2d at p. 439, italics added.) His reference to "these established principles" (*ibid.*) revolves around Code of Civil Procedure section 2009, which permits the use of affidavits "upon a motion." But it was because that was a procedure on which the Legislature had spoken – i.e., through section 2009 – that Justice Traynor said any departure from established principles governing such procedure is a question for the Legislature.

At issue here, in contrast, is not a decision on a *motion*, but a decision on a *trial*. With regard to the latter – *trial* of contested factual issues on declarations in family law cases – the Legislature has been silent. Respondent relies on decisional law, not on section 2009, as its

source of authority for the challenged provisions of the local rules and TSO. According to Justice Traynor in *Spriggs*, the Legislature's silence means the matter is for the courts to decide.

Petitioner is also wrong that "no published California opinion has ever approved" factual determination on declarations in family law trials. (PLB 14.) The court in *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422 said that "decisions on disputed factual issues" in "hearings and *trials* in district attorney support and marital dissolution cases" may be "based upon evidence presented in declarations under penalty of perjury." (*Id.* at pp. 1423-1424, italics added.)

Petitioner is right that *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479 addresses factual determinations on motions, not trials. (See PLB 12-14.) Petitioner is also right that, for purposes of constitutional due process – i.e., a full and fair opportunity to be heard – there can be no principled distinction between the determination of controverted facts on a motion or at trial. (See PLB 15 [contending local rules "should not be permitted" to allow proof of controverted facts by declaration *either* for motions *or* for trials].) Real party in interest makes the same point. (See Real Party In Interest's Letter Brief 18-19 ["whatever procedure for purposes of the hearsay rule this Court approves for family law trials regarding direct [examination] by declaration must also be used for family law motion proceedings regarding substantive factual disputes"].) If, as a constitutional matter, there can be no hearsay exception for determination of controverted facts at trial, then likewise there can be no such exception on a motion – which would mean the *Reifler* procedure is unconstitutional. Thus, the parties and respondent all agree that the ruling petitioner seeks would necessarily undermine *Reifler*.

II.
RESPONDENT'S PROCEDURE FOR RECEIVING LIVE DIRECT TESTIMONY IN ADDITION TO DECLARATIONS IS GOOD POLICY.

Petitioner has used the opportunity to file its letter brief on the hearsay rule to attack the policy underlying respondent's new Local Rule 12.8(F)(1), which provides that "[a]ny party may present live direct testimony in addition to but not in lieu of a declaration." Petitioner asks "what 'efficiency' is gained by making litigants present their testimony twice?" (PLB 3.)

Petitioner asks the wrong question. The efficiency – that is, delay reduction – is gained not by the rule's special provision for presenting live testimony, but by the general provision for taking direct testimony solely by declaration except where a party wishes also to present live direct testimony. In respondent's experience, the exception will be rarely invoked, and the vast majority of cases will proceed on direct testimony solely by declaration – wherein the delay reduction lies. (See Respondent's Answer To Amicus Curiae Briefs 15 [right to present live direct testimony recently exercised only twice out of some one hundred cases].)

Petitioner needlessly worries that a judge might exclude live direct testimony under Evidence Code section 352 as necessitating undue consumption of time. (See PLB 3.) Any such ruling, however, would contradict the court's own local rule conferring a *right* to present live direct testimony, and thus would be an abuse of discretion.

III.
PETITIONER'S CHALLENGES TO THE LOCAL RULES AND TRIAL SCHEDULING ORDER (TSO) ON GROUNDS OTHER THAN HEARSAY ARE BEYOND THE SCOPE OF THE ISSUE PRESENTED FOR REVIEW AND THIS COURT'S REQUEST FOR LETTER BRIEFS.

Petitioner's letter brief also challenges the following procedures prescribed in the local rules and trial scheduling order (TSO) on grounds other than inadmissibility under the hearsay rule: sanctions for failure to provide timely initial declarations (rule 12.8(F)(1)(a)); advance disclosure of impeachment and rebuttal evidence (rule 12.8(F)(1)(b) & (5)); advance submission of a short statement of expected testimony of non-cooperating or subpoenaed witnesses (rule 12.8(F)(4)); exclusion of exhibits if a declaration does not set forth the foundation for admission (rule 12.8(F)(5)); and exclusion of evidence for failure to comply with the local rules (rule 12.8(F)(12)). (See PLB 3-7.)

We do not address these points because they are beyond the scope of the issue presented for review (see Cal. Rules of Court, rule 8.516(b)(1)) as well as this court's request

for letter briefs addressing the hearsay rule. We will do so upon notice that this court wishes briefing and argument on these points. (See Cal. Rules of Court, rule 8.516(b)(2).)

Respectfully submitted,

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By _____
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Attorneys for Respondent
SUPERIOR COURT OF CONTRA COSTA COUNTY

cc: See attached Proof of Service

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Victoria Beebe**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **May 17, 2007**, I served the within document entitled: **LETTER TO SUPREME COURT** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

Parties Served:

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and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

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 17, 2007**, at Encino, California.

Victoria Beebe

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