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ERICA WILLIAMS, PARALEGAL

May 18, 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, Supreme Court Case No. S139073
Real Party In Interest's Responsive Letter Brief

Honorable Justices:

Pursuant to this Court's April 25 order, Real Party in Interest Marilyn Elkins submits this responsive letter brief.

Petitioner and Respondent Give This Court No Reason To Conclude That Sworn Declarations Subject To Cross Examination Constitute Hearsay

In their letter briefs, both Petitioner and Respondent make the unanalyzed—and unwarranted—assumption that declarations subject to cross-examination and legal objection constitute hearsay within the meaning of Evidence Code §1200. While Petitioner correctly notes (at footnote 40 of his letter brief) that any published opinion must be

understood only in light of the facts and issue then before the court, he proceeds to rely on published opinions that do not involve the precise facts and issue before this Court, which is whether a sworn declaration by a witness present at trial, the admissibility of which is explicitly conditioned on the declarant being subject to cross-examination, constitutes hearsay. So far as Real Party in Interest can discover, no such opinion exists.

Furthermore, Petitioner does not deal with the core difference between the use of declarations in the present matter and the use of declarations in the three cases cited in this Court's order for briefing, namely that here the declarations are explicitly subject to cross-examination, whereas in the cited cases they were not. By sidestepping this distinction, Petitioner avoids addressing the requirement for cross-examination in the Rule and TSO at issue herein and its implications in the context of the hearsay rule.[1] For these reasons, and the reasons set forth in her opening letter brief, Real Party in Interest submits that this Court should not expand the definition of hearsay to include sworn declarations subject to cross-examination.

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[1] Petitioner's repeated assertions that Local Rule 12.5 and the TSO mandate a "trial by declaration" are indicative of his confusion. The rule and order provide for declarations only in lieu of direct examination, and then only subject to cross-examination at trial. Further, the rule and order also permit oral rebuttal and oral redirect.

New Rule Provisions Not in Effect in the Case At Bar Cannot Support Petitioner's Challenge to the Judgment Herein

Much of Petitioner's brief is devoted to provisions that appear in new Contra Costa Local Rule 12.8 and that do not appear in Local Rule 12.5 or the TSO filed in this matter. Because these provisions were not in effect herein and had no impact on the judgment that Petitioner is challenging, Real Party in Interest will not address them.

The Use of Declarations Subject To Legal Objection and Cross-Examination Is an Appropriate Procedure for Resolving Substantive Issues in Controversy in Both Motion and Trial Proceedings

Petitioner and Real Party in Interest concur that it makes no sense to distinguish trials from pre- and post-trial motion proceedings on the central substantive issues in a marital dissolution matter: child support, child custody, spousal support, and property characterization and disposition. Justice Traynor made a similar observation in his concurring opinion in *Fewel v. Fewel* (1943) 23 Cal.2d 431, 438, noting that in a marital action such motion proceedings involve fundamental issues in controversy. Justice Traynor was construing the reach of Code of Civil Procedure §2009 in the context of the hearsay rule, but his observation applies equally well to the question of what procedure is consistent with constitutional principles.

But Real Party in Interest disagrees with Petitioner's contention that both trials and motion proceedings require live direct, a requirement that would only further burden already overcrowded family law trial and motion calendars. Rather, declarations subject to legal objection and cross-examination is a reasonable and proper procedure both for motion hearings and trials on such issues.

At the motion level, declarations submitted by the moving and the responding parties can serve initially to separate cases involving true factual disputes on substantive issues from those in which resolution of the issue turns not on disputed facts but rather on a question of law, such as whether undisputed facts rise to the level of a change of circumstances sufficient to modify support or custody. In the latter type of case, there is no need for cross-examination, much less live direct, but only legal argument that can often be handled on the 20-minute law and motion calendar. In these cases, it is appropriate to decide the motion on declarations alone. As this Court stated in *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 962, an evidentiary hearing serves no real purpose where the moving party is unable to make a prima facie showing on an essential threshold issue or "has failed to identify a material but

contested factual issue that should be resolved through the taking of oral testimony."

Indeed, it was precisely in these circumstances that the courts in several of the cases cited in Petitioner's letter brief (at footnotes 35-39) decided motions without an evidentiary hearing. *Miller v. Miller* (1943) 57 Cal.App.2d 354, 360-361 (because husband filed no opposing declaration, wife's declaration in temporary support modification motion was factually unrebutted); *In re Marriage of Hunt* (1985) 172 Cal.App.3d 872, 874-875 (where wife's declaration in support of her motion to modify temporary support was insufficient to establish the threshold factual issue of change of circumstances, lower court could properly have denied motion on that ground); *In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 413 (parties did not dispute fact of husband's continued disability but only whether this constituted a legally cognizable change of circumstances in post-judgment support modification motion). See also *In re Marriage of Brown and Yana, supra* Cal.4th at 962-963 (in post-judgment move-away custody modification motion, father's declaration failed to establish threshold factual issue that move would be detrimental to child).

Other family law motions will address procedural or collateral issues, such as those enumerated in *Reifler v. Superior Court* (1974) 39

Cal.App.3d 479, 484. Consistent with Justice Traynor's concurrence in *Fewel v. Fewel, supra,* such motions are properly decided on declarations and argument alone. In many cases these motions can also be handled on the court's 20-minute law and motion calendar. *In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, cited by Petitioner, combines these elements. It involved a procedural motion (to vacate a renewed child support judgment) with no contested facts that presented the legal issue of whether laches is available as a defense to enforcement of past due child support. Consequently, it was properly decided on declarations and argument. *Id.* at 1353, 1359.

Consistent with Justice Traynor's concurrence in *Fewel v. Fewel*, however, it is not appropriate to decide motions involving fundamental substantive issues in controversy that turn on the resolution of disputed facts on declarations without cross-examination unless the parties agree to such a procedure. See *In re Marriage of Reissmueller* (2005) 126 Cal.App.4th 111, 115. All other such substantive motions should be treated on a par with trials, although in most cases consuming far less time.

At the trial level, as at the motion level, direct by declaration subject to legal objection and cross-examination allows each party to fully present his and her case in chief in a way that conserves judicial time. This

procedure helps to reduce the backlog in the trial calendars of swamped family law departments and benefits litigants by securing them earlier trials. And it is fair. Direct examination in trials is often largely devoted to background and other facts that, while pertinent, may not be in dispute. By presenting this information in simultaneously filed opening, and then responsive, declarations in lieu of direct, as provided for in Contra Costa Rule 12.5 and the TSO herein, the parties and the court can most easily discern, in advance of trial, where the factual conflicts lie. This permits each party to prepare focused cross-examination on those areas, and gives the court the opportunity to concentrate its assessment of each party's credibility on the factual issues that count. Such a procedure comports with the constitutional right to a fair opportunity to present one's case and the hearsay rule, both of which place primary emphasis on cross-examination.

Respectfully submitted,

FANCHER & WICKLAND
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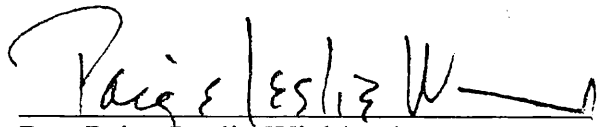

By: Paige Leslie Wickland
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PROOF OF SERVICE

I, Erica Williams, hereby declare:

My business address is 155 Montgomery Street, Suite 1400, San Francisco, California, in the City and County of San Francisco. I am over the age of eighteen years and I am not a party to the within action.

On May 18, 2007, I served the foregoing document entitled **Real Party in Interest's Responsive Letter Brief** on the individuals listed below by enclosing a true copy thereof in a sealed envelope addressed to the individuals at the addresses listed below, and deposited the sealed envelope with the United States Postal Service, with the postage thereon fully prepaid.

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Hon. Thomas M. Maddock
Presiding Judge
Contra Costa County Superior Court
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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 San Francisco, California.

Erica Williams