S139073

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY ELKINS

Petitioner,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY,

Respondent,

MARILYN ELKINS

Real Party in Interest.

After a Decision By the Court of Appeal
First Appellate District, Division One
Case No. A111923

REAL PARTY IN INTEREST'S RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE OR PROHIBITION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

Petitioner Jeffrey Elkins challenges a local rule of the Contra Costa County Superior Court, and a trial scheduling order filed in his case, which provide for presentation of direct testimony by declaration subject to cross-examination in family law hearings and trials. Petitioner contends these provisions contravene statutes regarding credibility and the order of proof and denied him the due process right to be heard. As Petitioner never objected to these provisions below—on statutory, constitutional, or other grounds—but instead acquiesced in and even embraced them, and never requested live direct testimony, he has waived these challenges here.

Should this Court nonetheless reach the merits of Petitioner's claims, it should find that the direct-by-declaration procedure does not run afoul of statutory or decisional law nor does it deprive litigants of the constitutional guarantees of due process and a fair hearing. The rule and order do not change the statutory order of proof nor impermissibly curtail opportunities for assessment of credibility, as both provide that a declaration in lieu of direct testimony is subject to cross-examination and as neither prohibits oral redirect or rebuttal. Due process protects the right to produce evidence; under our statutes, sworn declarations are the evidentiary equivalent of oral examination. The procedure has been upheld by at least one federal court against an identical due process challenge, and has been

approved for family law motion hearings and trials in California appellate decisions.

Petitioner also challenges the trial scheduling order in this case on the grounds that it constituted a "private judge rule" required to be published in the local rules, whereas here it was filed as an order and served on Petitioner and Real Party in Interest Marilyn Elkins. Petitioner also contends this order was unconstitutional as applied to him because it deprived him of the ability to present his case. Again, by failing to challenge the order below on any grounds, petitioner has waived these challenges here.

Should this Court nonetheless reach the merits of Petitioner's claims, it should find that the order filed in this case does not constitute the kind of general judge rule that must be published. Moreover, if it were held to constitute such a rule, its lack of publication was not prejudicial to Petitioner as he had full notice of its terms. Because the court relieved Petitioner of the order's requirements that pretrial declarations must attach and give the evidentiary foundation for exhibits to be offered at trial, Petitioner lacks standing to challenge these requirements. These same circumstances render any errors in the TSO harmless as to Petitioner. Although given the opportunity to do so at trial, Petitioner failed to lay the proper foundations for his exhibits against Real Party's objections. Accordingly, the exhibits were properly excluded. The record establishes

that in all other ways, the court below gave Petitioner every opportunity to present his case, but Petitioner failed or refused to do so.

Therefore, the writ should be denied and the judgment in this matter should be affirmed.

RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE

The verification by Petitioner Jeffrey Elkins (hereafter Jeffrey) appears to declare true, under penalty of perjury, only that part of the petition preceding his verification, which appears at petition pp. 1-6. Numerous references to procedural and other additional facts, however, are asserted throughout Jeffrey's memorandum of points and authorities, but are not verified, in contravention of California Rules of Court, Rule 56(b)(4). Further, Jeffrey's failure to place any substantive facts within the petition portion of his filing makes it difficult to ascertain exactly what allegations Real Party in Interest Marilyn Elkins (hereafter Marilyn) should be answering. Out of caution, Marilyn has attempted to identify and respond to factual allegations made by Jeffrey not only in his petition but also in his memorandum of points and authorities.

1. For lack of information (which Marilyn submits Jeffrey also lacks), Marilyn neither admits nor denies the allegation (petition p. 2) that by local practice, individual judges promulgate their own pretrial orders or that such orders may be even more onerous than the local rules.

2. Marilyn admits Jeffrey's allegations (petition p. 2) that the Trial Scheduling Order served on the parties and filed April 22, 2005 required the parties to attach all of the exhibits they intended to proffer at trial to pretrial declarations; completely set forth in their declarations the evidentiary foundation for these exhibits; and exchange binders containing these exhibits prior to trial. Marilyn also admits that Jeffrey was in pro per at trial, that he provided a binder of trial exhibits to Marilyn's attorney (but not in a timely manner), and that he failed to identify each exhibit in the binder in his declaration or to state the evidentiary foundation for any exhibit. Marilyn lacks sufficient information to admit or deny the allegation that Jeffrey provided the binder of exhibits to the trial court.

3. Marilyn denies Jeffrey's allegation (petition p. 2) that the trial court sustained an objection to 34 of his exhibits based on the failure to comply with the trial setting order, and denies the allegation that Jeffrey rested because he was denied the ability to present any sort of case. In fact, when Jeffrey could not establish that he had set forth the evidentiary foundations for his proffered exhibits in his declaration, the court explained to Jeffrey the kind of foundation that he was required to establish and invited Jeffrey to rethink his position after the break and to come back and give the court, at trial, the necessary foundational information. (RT 6:11-10:22.) Jeffrey declined to take this opportunity, failed to lay any foundation for any of his exhibits, and instead rested his case, rescinded his

requests for cross-examination, and withdrew even his declaration from evidence. (RT 14:11-16:19.) Marilyn also denies Jeffrey's allegation on the same page that Local Rule 12.5 or the trial scheduling order conflicts with statutory or decisional law and further denies that either resulted in this case in a denial of due process.

4. Marilyn denies Jeffrey's allegation (petition p. 3) that he is the Petitioner in the action for dissolution. Marilyn is the Petitioner below, and Jeffery is the Respondent below.

5. Marilyn denies Jeffrey's allegation (petition p. 3) that, with the exception of the transcript of September 19, 2005, all exhibits accompanying Jeffrey's petition are true copies of original documents on file with respondent court. The documents that Jeffrey calls "Respondent's Trial Exhibits," which are found at AA Tab 11 and comprise almost the entirety of Volume 2 of Jeffrey's Appendix, were not trial exhibits entered into evidence below for the reasons set forth in paragraph 3 of this Answer and were never, so far as Marilyn is aware, filed with the respondent court. Further, Jeffrey has not alleged, by verification or otherwise, that the documents found at Tab 11 are true copies of the binder of exhibits he delivered to respondent court and to Marilyn's counsel on the Friday before the Monday trial.

6. Marilyn denies Jeffrey's allegation (petition p. 4) that the trial judge indicated on the record that the April 2005 order is his standard rule.

In the referenced part of the trial transcript, the judge did not state that this is his standard rule but rather that the earlier trial on date of separation was conducted pursuant an identical order.

7. Turning to Jeffrey's unverified allegations, Marilyn admits that the parties were married on April 20, 1980, separated on July 27, 2001, and that they have a child born in 1991.

8. Marilyn denies that the quotation from the September 19, 2005 hearing that Jeffrey attributes to the court (petition pp. 11-12) was made by the court. Jeffrey notes in a footnote that this statement "may" have been from Marilyn's counsel. In fact, it was from Marilyn's counsel, as the transcript itself reveals. Thus the quoted statement refers to Jeffrey not serving his binder of exhibits "on my office" until Friday and, in response to the quoted statement, the court states "All right. So that's on your agenda," referring to counsel's statement. (RT 3:12-19.)

9. Marilyn lacks information to admit or deny Jeffrey's apparent allegation (petition p. 12) that he had marked the documents in his trial exhibits binder, but notes that the documents appearing at AA Tab 11 to his petition have handwritten numbers (beginning at 100) at the bottom but are not otherwise marked as exhibits.

10. Marilyn denies Jeffrey's apparent allegation (petition p. 17) that he gave up and rested because the court essentially excluded all of his exhibits. The transcript reveals that Jeffrey rested his case after

squandering an opportunity given to him by the court to use an upcoming break to reconsider his argument and to provide the evidentiary foundation for his exhibits. (RT 14:11-16:19.) Marilyn also denies that Petitioner withdrew his request to cross-examine the forensic expert because he was denied the use of evidence for the cross-examination. Jeffrey has confused the admission of a document as independent evidence with its use in cross-examination.

11. Marilyn denies and objects to Jeffrey's apparent allegation (petition p. 18) that the court ordered Jeffrey to pay $15,000 toward her attorney's fees "despite the fact that Jeffrey was not employed and Marilyn was getting virtually 100% of the liquid assets." Nothing in the record establishes that Jeffrey's employment status was before the court. See AA Tab at ¶s 2 and 3 (parties stipulated to a mutual waiver of spousal support and that the court would reserve jurisdiction over—rather than award—child support). And the record refutes the allegation that Marilyn received most of the assets. See AA Tab 3 at ¶s 4, 5, 7, 8, 9 (all significant assets divided equally between the parties, with Jeffrey receiving, in addition, $60,000 from the community's interest in CalTech International Telecom as compensation for post-separation efforts); AA Tab 3, ¶8 and Tab 4, ¶12 (because Jeffrey had already received almost $1 million from a joint Merrill Lynch account, while Marilyn had received only $483,255, Jeffrey ordered to equalize the division by paying her $249,235). Marilyn's request for

attorney's fees was based on Jeffrey's litigation conduct that increased Marilyn's litigation costs (AA Tab 8) and, for all the record discloses, the fees were awarded on this basis.

12. Marilyn alleges the following additional facts:

a. Jeffrey represented himself in the dissolution action out of choice and not because he could not afford an attorney. Before the court issued a restraining order in 2003 preventing Jeffrey from writing checks out of the parties' Merrill Lynch account, Jeffrey had received $786,726 from this account. (Marilyn had received $433,255, and $525,199 had been withdrawn from the account to pay business attorneys.) (AA Tab 4, Marilyn's declaration ¶¶8-9.) Pursuant to a July 2003 stipulation and order, Jeffrey received an additional $145,000 from this account, while Marilyn received nothing. (*Id.* at ¶10.) In May 2004, each party received $50,000 from this account. (*Id.* at ¶11.) Thus by May 2004, Jeffrey had received a total of $981,726 from this community account.

b. Then, in response to Jeffrey's request for additional funds to pay an attorney retainer, on October 26, 2004, the court permitted Jeffrey to withdraw a further $5,000 from the Merrill Lynch account and that "an additional $5,000 can be paid directly to an attorney retained by [Jeffrey]." The October 2004 order is included in the Real Party in Interest's Appendix, hereafter RA, being submitted herewith, as Exhibit A. Unless

otherwise noted, all RA exhibits are true and correct copies of original documents on file with respondent court.

c. Although the court repeatedly recommended that Jeffrey obtain legal representation (see RT 20:7-10), and although he had ample resources, Jeffrey did not retain an attorney until these writ proceedings.

d. The issue of the date of separation was bifurcated and tried separately on February 10, 2005 before the Honorable Barry Baskin. In connection with this trial, on January 20, 2005, the court filed and served both parties with a trial scheduling order along with a notice advising the parties that they were required to comply with it. The January 2005 notice and order are included in the RA as Exhibit B. This trial scheduling order contains the same provisions as the trial scheduling order filed and served on April 22, 2005 (AA Tab 2) for the September 2005 trial regarding direct examination by declaration subject to cross-examination; attaching trial exhibits to declarations to be filed 10 and 5 court days before trial; explaining and providing evidentiary foundations for exhibits in such declarations; and serving binders of trial exhibits on the court and opposing party 2 court days before trial.

e. Jeffrey complied with the January 20 trial scheduling order. On January 27, 2005, 10 court days before the February 10 trial, Jeffrey served Marilyn with a trial brief to which he attached four exhibits, including a declaration of his mother, Mildred Balin. Jeffrey's trial brief is

included in the RA as Exhibit C. The attached exhibits were explained in the trial brief.

f. On February 3, 2005, 5 court days before trial, Jeffrey served Marilyn with a responsive trial brief to which he attached 9 exhibits, including his own 8-page declaration and a second declaration from his mother. Jeffrey's responsive trial brief is included in the RA as Exhibit D. Again, each of the exhibits was referenced in the trial brief.

g. In response, Marilyn served Jeffrey with a notice to produce Mildred Balin for cross-examination at trial. In his ex parte motion to quash this notice, Jeffrey affirmatively relied on the provisions of Local Rule 12.5, stating: "Local Rule 12.4(b)(3) [sic] of this Court states '. . .all declarations shall be considered received in evidence at the hearing.' and that 'The Court may decide contested issues on the basis of the pleadings submitted by the parties without live testimony.' [¶] Mildred Balin submitted two declarations. . . The witness is the mother of Respondent JEFFREY ELKINS and was providing direct testimony regarding the marital relationship of JEFFREY AND MARILY ELKINS. Under California Evidence Code Sections 1310, 1311 and 1324, since Mildred Balin is testifying about her own family **none** of her statements are inadmissible by the hearsay rule. Therefore the Declaration of Mildred Balin should remain in evidence though she will be unavailable to attend in person February 10, 2005." Motion to Quash, which is included in the RA

as Exhibit E, at p. 3 (emphasis in original). Ultimately, Marilyn's counsel agreed that Mrs. Balin could appear for cross-examination at the trial by telephone.

h. Jeffrey also complied with the January 20, 2005 trial scheduling order by preparing and timely providing to Marilyn's counsel his binder containing the exhibits he planned to use at trial within 2 court days before the February 10 date-of-separation trial.

i. All the exhibits that Jeffrey had attached to his trial briefs and included in his trial binder were admitted into evidence without objection in the February 2005 trial with the exception of a document that Jeffrey concurred was not relevant to determination of the date of separation.

j. Trial on remaining issues was set for September 19, 2005, also before the Honorable Barry Baskin. On August 16, 2005, the parties appeared before Judge Baskin at a brief trial-setting conference. RA Exhibit F is a copy of the transcript of that conference (Marilyn will lodge the original with the Court as soon as she obtains it). The court confirmed the trial date and that the parties were scheduled out second that day. At the end of the conference, Jeffrey queried the court as to whether discovery was closed and whether DVD's and audio-visual equipment would be available during the trial; the court answered in the affirmative. (RA Ex. F at 4:25-5:3.) It appears that Jeffrey was already lining up his exhibits for

trial and wanted to be sure they were no longer discoverable and that they could be shown to the court on sophisticated equipment.

k. On September 2, 2005, Marilyn filed a 9-page initial declaration, to which she attached 14 exhibits, all of which she identified in the declaration, as well as a trial brief. (AA Tabs 4 and 5.) On September 2, 2005, Jeffrey also filed an initial trial brief, to which he attached three exhibits (AA Tab 9), all of which he identified in the brief, and a short initial declaration (AA Tab 10). All of these documents were timely filed under the trial scheduling order 10 court days before trial.

l. On September 8, 2005, Marilyn timely filed a responsive declaration, attaching 2 additional exhibits which she identified in the declaration. (AA Tab 6.) Jeffrey did not file a responsive declaration.

m. On Thursday, September 15, two court days before trial, Marilyn's counsel provided Jeffrey with her binder of exhibits she intended to use at trial, all of which had previously been attached to her declarations. Marilyn's counsel asked Jeffrey where his binder was, and his only reply was a smile.

n. Jeffrey did not provide Marilyn with his binder of exhibits until the afternoon of the next day, just one-half court day before trial. (RT 3,4,12.) Only one of the exhibits contained in the binder had been attached to his initial declaration. (This document is the August 31, 1998 letter

Jeffrey attached as exhibit I to his trial brief (AA Tab 9) and also included in his writ appendix as # 3 of Tab 11.)

13. Marilyn alleges the following affirmative defenses:

a. The petition fails to state facts sufficient to constitute a cause of action for issuance of a writ of mandate.

b. Jeffrey is not entitled to the relief he seeks because he failed below to raise any of the issues he now raises, thus waiving all claims of error.

c. The use of declarations, subject to cross-examination, in lieu of live direct testimony does not violate due process, especially here where Jeffrey never took advantage of the provisions in the Local Rule and the trial scheduling order providing for exemption from this procedure in appropriate cases.

d. The trial scheduling order is not subject to the rule that a private judge rule must be published, and in any case Jeffrey was served with a copy of the order and used it, so that no prejudice resulted to Jeffrey from its lack of publication. As the court relieved Jeffrey of all of the requirements of the trial scheduling order, and his exhibits were excluded because Jeffrey failed at trial to lay the necessary foundations, and as the court did not enter Jeffrey's default, any improprieties in the issuance of the order or its terms constitute harmless error and the judgment should be affirmed.

Prayer

WHEREFORE, real party in interest Marilyn Elkins prays that:

1. The petition for writ of mandate be denied;

2. That, should any portion of the petition be granted, the ruling below be affirmed;

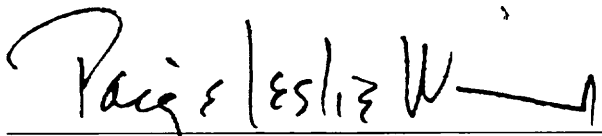
3. That petitioner take nothing from this action;

4. That Marilyn recover her costs in this action; and

5. That this Court grant any other relief it deems just and proper.

Respectfully submitted,

FANCHER & WICKLAND
HARKINS & SARGENT

By 

Paige Leslie Wickland
Attorneys for Real Party in Interest Marilyn Elkins

VERIFICATION

I, Daniel S. Harkins, declare:

I am an attorney at law duly admitted to practice in the State of California, and am the attorney for real party in interest Marilyn Elkins, in the case In re Marriage of Elkins, Case No. D01-05226, Contra Costa Superior Court.

I have read the foregoing Return by Answer To Petition for Writ of Mandate and know its contents. The matters alleged in the answer are true of my own knowledge. I make this verification because the facts sets forth therein are within my personal knowledge and because as real party in interest's attorney, I am more familiar with the relevant facts pertaining to the trial court proceedings than is real party in interest.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24 day of Feb, 2005, at San Ramon, California.

Daniel S. Harkins

MEMORANDUM OF POINTS AND AUTHORITIES

I. Jeffrey Waived His Statutory and Constitutional Challenges To Direct Testimony By Declaration By Never Asserting These Challenges Below and By Never Requesting Live Direct Testimony

Subparagraph (b)(3) of Contra Costa Local Rule 12.5 provides that at evidentiary hearings and trials in family law proceedings, all declarations shall be considered received in evidence, subject to legal objection, amendment, and cross-examination, and that direct examination is not permitted except in unusual circumstances or for proper rebuttal.[1] Paragraph 1 of the trial scheduling order (hereafter, TSO) filed in the instant matter on April 22, 2005, similarly provides that "[u]nless otherwise approved in advance by the court, all direct testimony shall be in the form of declarations filed in lieu of oral direct testimony, subject to cross-examination." The gravamen of Jeffrey's writ petition is that these

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[1] The subparagraph also states that "[t]he Court may decide contested issues on the basis of the pleadings submitted by the parties without live testimony." Given that the Rule expressly makes declarations subject to cross-examination, in context this provision applies only where the parties choose not to cross-examine declarants—a frequent circumstance in motion hearings. By its terms, subparagraph (b) applies not just to trials but also evidentiary motion hearings. See also subparagraph (b)(7), which provides that although the parties may stipulate that certain matters may be submitted on the pleadings, "[s]ubmission of matters on the pleadings should not be considered if there are issues of witness credibility before the court." In any case, it is clear that here the trial court had no intention of deciding contested issues without any live testimony and did so only because Marilyn chose not to cross-examine Jeffrey, and Jeffrey, unprompted, first rescinded his requests for cross-examination and then withdrew all of his evidence. (RT 4:22-5:9, 13:6-15:3, 14:28-16:19.)

provisions requiring direct examination by declaration subject to cross-examination contravene statutory and constitutional provisions.

But Jeffrey waived his current challenges to the direct-by-declaration procedure by never asserting any challenge below. It is well established that points and claims for relief not made in the trial court will not be considered on appellate review. *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422. Further, constitutional questions not raised below are considered waived:

> It is a well-recognized proposition that '[a] person is free to waive any or all procedures required and designed to safeguard fundamental rights' . . . . Such waiver may be express, i.e., by stipulation of the parties, or implied. . . .In civil cases, constitutional questions not raised in the trial court are considered waived.

(*In re Marriage of S.* (1985) 171 Cal.App.3d 738, 745 (citations omitted); see also *In re Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1076; *Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1485-1486.) In the instant matter, Jeffrey forfeited the right to raise either a statutory or a constitutional challenge in this Court by never raising either below and by conduct that waived his current challenges both passively and actively.

Jeffrey never once objected on any ground to the direct-by-declaration provision of Local Rule 12.5(b)(3) or of paragraph 1 of the TSO in either the February 2005 trial or the September 2005 trial. Further, neither the Local Rule nor the TSO contains a blanket prohibition on live

direct testimony but rather permits direct oral examination in unusual circumstances or for rebuttal or, in the case of the TSO, merely on approval in advance. In the two trial phases in which the parties herein operated under these provisions, Jeffrey never expressed any interest in offering oral direct testimony, never objected to this procedure before or at trial, never requested an exemption from this procedure, and never asserted below that either Rule 12.5 or the TSO violated due process.

On the contrary, in both trial phases, Jeffrey not only used the direct-by-declaration procedure without complaint but affirmatively asserted it for his own benefit. In the February 2005 date-of-separation trial, Jeffrey timely filed initial declarations of his mother, Mildred Balin, and brother, Steven Elkins, in lieu of direct testimony, and filed his own responsive declaration as well as responsive declarations by Mildren Balin and Steven Elkins. (RA Exs. C and D.) He affirmatively asserted Local Rule 12.5 as permitting the two Mildred Balin declarations to constitute her direct testimony despite her inability to appear personally at trial. (RA Ex. E at p. 3.) In the September 2005 trial, Jeffrey also filed a declaration and initial trial brief. It was these pleadings—and not live testimony—that Jeffrey asserted "gets to the heart of a couple of issues." (RT 7:8-10.) The record reflects Jeffrey's clear expectation that he would rely on his trial brief and sworn declaration for his own direct examination, as he had in the February

2005 trial, and that the only live testimony he planned was the cross-examinations of Marilyn and joint expert Michael Eggers. (RT 4:26-5:6.)

Under principles of estoppel and waiver, Jeffrey cannot now attack Rule 12.5(b)(3) or the TSO as statutorily invalid or as unconstitutional when he never objected to the provisions of either regarding direct examination and never requested live direct testimony though he had ample opportunities to do so. "The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." (*Sommer v. Martin* (1921) 55 Cal.App. 603, 610.) Therefore, even if the Court is inclined to review the issue of direct examination by declaration, it should deny Jeffrey relief here because of his waiver and affirm the judgment.

II. A Court Rule or Order Providing That, in the Ordinary Family Law Case, Direct Examination Will Be By Declaration, Subject To Cross Examination, Does Not Violate Statutory or Constitutional Law

Should the Court reach the merits of Jeffrey's claim, it should find the challenged procedure proper, both under our statutes and under the Constitution.

A. The Procedure Does Not Contravene Statutory Provisions

Jeffrey acknowledges that pursuant to Government Code §68070, courts and judges may adopt rules and procedures for the efficient processing of trials in their counties or courts so long as they are not inconsistent with law or statute. (Petition at 19.) In his writ petition, the only statutes Jeffrey claims are affected by the direct-by-declaration provisions of Local Rule 12.5 or the TSO order are Evidence Code §772, setting forth the order of proof, and Evidence Code §780 regarding credibility. (Petition at 21-22.) But direct testimony by declaration, even if it were mandatory in all circumstances (which it is not under the Rule or TSO), does not change the *order* of proof. Under the rules, direct testimony in the form of opening and responsive declarations are presented first, subject to cross-examination at trial, followed by oral redirect or oral rebuttal. As for credibility, Evidence Code §780 merely provides that the court may consider various factors in assessing witness credibility and testimony, and nowhere mentions live direct testimony. The challenged local rule and order both permit oral cross-examination and oral rebuttal, and do not prohibit oral redirect, thus providing the court ample opportunities to assess credibility. And, of course, both permit a litigant to request, or the court to order, oral direct testimony should it be necessary to assess credibility.

B. The Procedure Is Not Unconstitutional

Nor do the direct-by-declaration provisions of Local Rule 12.5 or of the TSO violate due process. All that procedural due process requires is a fair hearing. This right "includes the right to produce evidence and to cross-examine witnesses." (7 Witkin, Summary of California Law (10th ed), Constitutional Law, §640, p. 1042.) The Local Rule and the TSO do not deny the right of cross-examination but rather preserve it. And both provide that party declarations in lieu of oral direct examination will be received into evidence. (Local Rule 12.5(b)(3); TSO ¶1.) By statutory definition, written declarations made under penalty of perjury are the equivalent of affidavits. (Code of Civil Procedure §2004.) And Code of Civil Procedure §2002 explicitly provides that oral examination is only one of three equally acceptable modes of taking the testimony of a witness, the other two being by deposition and by affidavit.

Jeffrey has cited no authority holding that there is a constitutional right to present direct testimony by oral examination rather than by affidavit, and Marilyn submits that there is none. Furthermore, even assuming arguendo that Jeffrey had established a due process right to direct by oral examination, to mount a due process challenge, Jeffrey must establish not only that the Constitution requires live direct examination but also that the rule and order "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Lammers v. Superior Court*