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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

For the Association of Certified Family Law Specialists:

Ronald S. Granberg, CFLS, President, Bar No. 80111
Dawn Gray, CFLS, Attorney at Law, Bar No. 113483
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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to the request of the California Supreme Court, En Bank, filed on April 19, 2006, the amicus curiae named herein respectfully request leave to file the attached brief pursuant to California Rules of Court, Rule 29.1(f). This application is timely, having been made within the time extension granted to said amicus curiae by said Court on June 15, 2006.

AMICUS CURIAE

The Association of Certified Family Law Specialists (hereafter, "ACFLS") is a non-profit statewide association of more than 500 attorneys who have been certified as Family Law Specialists by the State Bar of California Board of Legal Specialization. ACFLS was formed in 1980 following the certification of the first group of Family Law Specialists in California. The Association monitors issues of interest to Family Law Specialists, including legislation, court rules, and the State Bar Legal Specialization Program. ACFLS develops and promotes family law practice skills and provides advanced educational programs for the bar and judiciary. Its members also appear in all courts throughout California and have appeared as *amicus curiae* in the appellate courts previously, including in several recently reported cases such as *In re Marriage of Harris* (2004) 34 Cal.4th 210, 17 Cal.Rptr.3d 842, *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th

1410, 72 Cal.Rptr.2d 280, *Dale v. Dale* (1998) 66 Cal.App.4th 1172, 78 Cal.Rptr.2d 513, and *In re Marriage of Scheppers* (2001) 86 Cal.App.4th 646, 103 Cal.Rptr.2d 529. The ACFLS does not represent any party in this matter. None of the ACFLS members who participated in the drafting of this brief has received any compensation for doing so; each has done so pro bono publico.

The ACFLS submits this brief as an *amicus curiae* in response to the Court=s order inviting the organization to file a brief addressing the issues presented by the case. Those issues affect members of the ACFLS who practice in Contra Costa County, although they do not directly affect the ACFLS as an organization. However, the ACFLS is a non-political organization whose members have diverse views on both substantive legal issues and law office practice issues, which issues are involved in this case. Also, the mission of the ACFLS is primarily educational in nature.

The ACFLS amicus committee has reviewed the briefs and other pleadings already filed by the parties and other amici, and feels that those briefs have completely and thoroughly covered the substantive legal issues pending before the Court. We neither wish to duplicate the excellent briefing already done nor contribute to the mountain of documents typically submitted to the high Court for each case. Therefore, we have determined that the ACFLS can best assist the court by providing it with input regarding the effect of the rule at issue in this case upon the practice of family law in general. For

this reason, this brief primarily discusses that effect and is intended to assist the court in the analysis of the issues, not to advocate for any particular outcome with respect to the parties.[1]

INTEREST OF AMICI CURIAE

As mentioned above, the ACFLS is familiar with the issues in this case and the scope of their presentation. As experienced family lawyers, the ACFLS members are deeply concerned with the conduct of family law trials and particularly with the appearance of fairness to not only represented parties, but also B and perhaps especially B to the many *pro per* litigants appearing daily in family law departments across the state. On behalf of its members, the organization=s board strongly feels the need to ensure that judicial officers have an adequate opportunity to observe witnesses and evaluate their credibility during both direct and cross examination. Without this ability, a trial judge cannot make an informed decision, and the integrity of the process is seriously impaired. By the form and contents of this brief, the organization hopes to assist this Court in a greater understanding of the ramifications of the rule at issue in this case, both as written as applied to the Petitioner. Amicus

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[1] This brief does not necessarily reflect the views of the Association of Certified Family Law Specialist or of any member. No inference should be drawn that any attorney who is a member of the ACFLS participated in the preparation of the brief or reviewed it before submission.

curiae=s only interest is to protect our court system and the community it serves. For these reasons these amici curiae respectfully request that this Honorable Court accept the accompanying brief for filing in this matter.

Respectfully submitted,

Stephen Temko, SBN 67785
Member, Amicus Committee
Association of Certified Family Law Specialists

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; PROPOSED BRIEF

For the Association of Certified Family Law Specialists:

Ronald S. Granberg, CFLS, President, Bar No. 80111
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BRIEF OF AMICI CURIAE ACFLS

I.
INTRODUCTION

In general, Association of Certified Family Law Specialists (ACFLS) supports the arguments presented by the Petitioner. It also adopts and concurs with all of the arguments made by the amicus brief filed on behalf of the Southern California Chapter of the American Academy of Matrimonial Lawyers (AAML), Northern California Chapter of the American Academy of Matrimonial Lawyers, and the Los Angeles County Bar Association, Los Angeles County Bar Association Family Law Section, Orange County Bar Association, as well as Hon. Donald B. King, Justice of the Court of Appeal (Ret.), Hon. Sheila Prell Sonenshine, Justice of the Court of Appeal (Ret.), Hon. J.E.T Rutter, Judge of the Superior Court (Ret.), Hon. Richard Denner, Judge of the Superior Court (Ret.). The AAML brief filed by attorney Marjorie G. Fuller on behalf of said amici states the concerns which the ACFLS has with the local rule and trial order at issue in the case, and those concerns will not be repeated in this brief.

As experienced family lawyers, the ACFLS members are deeply concerned with the conduct of family law trials and particularly with the appearance of fairness to not only represented parties, but also and perhaps

especially to the many *pro per* litigants appearing daily in family law departments across the state. On behalf of its members, the organization's Board strongly feels the need to ensure that judicial officers have an adequate opportunity to observe witnesses and evaluate their credibility during both direct and cross examination. Without this ability, a trial judge cannot make an informed decision, and the integrity of the process is seriously impaired. Therefore, the organization has responded to the Court's request that it submit an Amicus Brief by discussing the practical effect of the challenged rules from the perspective of the ACFLS members and the litigants they represent. The organization believes that is how it can best assist it in determining the legal issues in this case.

II.
STATEMENT OF THE CASE

Local Rule 12.5(b)(3) of the Contra Costa County Superior Court provides that in family law proceedings, "(s)ubject to legal objection, amendment, and cross-examination, all declarations shall be considered received in evidence at the hearing. Direct examination on factual matters shall not be permitted except in unusual circumstances or for proper rebuttal. The Court may decide contested issues on the basis of the pleadings submitted by the parties without live testimony." (Superior Court of Contra Costa County,

Local Court Rule 12.5(b)(3), Appellant's Appendix (AA), Tab 1.) In addition, the family law trial court that made the ruling at issue in this case has developed a "Trial Scheduling Order" (hereafter, "TSO") that is issued *in every family law case scheduled for trial.* That TSO provides, in part, as follows:

> 1. Unless 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.
>
> 2. All exhibits to be introduced at trial shall be attached to, and explained in, the declarations. Any required evidentiary foundation for admission of the proposed exhibits shall be completely set forth in the declaration(s). Documents and exhibits to be used, in good faith, only for purposes of impeachment need not be submitted with the declarations.
>
> 3. Initial declarations by each party and any witnesses shall be filed and exchanged not later than ten (10) court days prior to trial, together with any trial briefs which any party wishes to submit. . . . Failure to provide a declaration because a witness refused to sign it shall not excuse the filing of the unsigned declaration.
>
> **Failure to comply with these requirements will constitute good cause to exclude evidence or testimony at trial and/or to make adverse inferences or findings of fact against the non-complying party. Willful non-compliance may also be subject to imposition of monetary sanctions and will be considered by the court in assessing and awarding attorney fees and costs."** (Trial Scheduling Order, April 22, 2005, AA, Tab 2, emphasis in original.)1

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1 The Contra Costa County court has issued several versions of the TSO. The most current version is now set forth in Contra Costa County Local Rule 12.8, adopted as of July 1, 2006.

Representing himself at his trial on division of his community estate, Petitioner Jeffrey Elkins failed to fully comply with Local Court Rule 12.5(b)(3) and the TSO. In particular, his declarations failed to identify all of his exhibits and their evidentiary foundations, and the trial court denied his request to provide his own testimony to establish the foundation. (Reporter's Transcript (RT) pp. 6:11-11:15.) The trial court also denied his request to submit oral direct testimony. Counsel for the Real Party in Interest, Marilyn Elkins, declined to cross-examine any witnesses. With most of his evidence excluded, Jeffrey realized he could not adequately present his case, and rested. (RT. p. 14:16-17.) Thereafter, the trial court awarded and divided the community assets solely on the evidence presented by Marilyn. The First District Court of Appeal summarily denied Jeffrey's application for extraordinary relief, but this Court granted review and ordered the Contra Costa County Superior Court to show cause why it should not declare Local Rule 12.5(b)(3) and the TSO invalid.

III.

THE EFFECT OF LOCAL RULE 12.5(b)(3) AND THE TRIAL SCHEDULING ORDER ON FAMILY LAW PRACTITIONERS AND PARTIES

A primary *legal* concern about the local rule and the TSO is that they

can result in a family law trial, including the division of the parties' entire marital estate, without a single witness having testified. However, that issue is well briefed by the parties and other amici. In addition to this due process issue, the ACFLS is concerned about the practical effect of the local rule and the TSO on practitioners and, more importantly, on litigants and families. The rule and order affect parties' substantive rights and affect attorneys' practices in ways that the court may not have intended.

In adopting the TSO and local rule, the court was clearly concerned with judicial efficiency in an era of overcrowded courtrooms and delayed access to judicial time. Those are real concerns and practitioners support the judiciary's efforts to address them. In addition, the ACFLS supports the adoption of reasonable rules and procedures designed to make the practice of family law more efficient and to provide clear guidelines for attorneys and pro per litigants regarding what is required for trial.

However, when a local rule and TSO such as the ones at issue here penalize the lack of a particular kind of advance preparation with the total exclusion of evidence, with the result that the party simply does not have his or her day in court, the rule impermissibly treads on the litigant's due process rights, an issue which has been extensively briefed in this case and with which

the ACFLS concurs. There are better ways to address the lack of preparation for trial than depriving the litigant of access to the courts. In many cases, including the one at bar, the combination of the local rule and TSO at issue in this case simply go too far. They turn the policy of "No Surprise at Trial" to "Surprise - No Trial!" Obviously, this is impermissible, and the case at bar is intended to make that point. Moreover, there are practical problems with the TSO.

A. Practical Problems with the TSO

1. The local rule and TSO are inconsistent and conflict with the California Code of Civil Procedure.

Code of Civil Procedure (CCP) section 1987 permits a litigant to subpoena a party to trial and also request that the subpoenad party produce records at trial. While this is often not the best way to prepare for and present evidence at trial, it is a discovery means that is statutorily available in all civil cases. However, the local rule and TSO are unclear whether this discovery technique remains available or whether the local rule and TSO have abrogated family law litigants' right to use this discovery method.

When the Contra Costa County Family Law judges were recently asked whether the local rule and TSO have abrogated rights to CCP section 1987

requests and whether objections must be made in advance of trial, they opined that "(t)he possible range of objections is too wide to give definitive answers. The point of the TSO is to avoid trial by ambush and surprises at trial. Generally objections to CCP section 1987 should be raised by a motion to quash subpoena, after written notice. We will grant orders shortening time so these can be heard before trial since leaving these to the day of trial may be too late to avoid the harm." ("In Chancery," June 2006, a copy of which is attached hereto as Exhibit 1.) The local rule and TSO, and the court's requirement to file a motion to quash a subpoena, create an additional layer of expense that is unnecessary and burdensome to family law litigants.

Additionally, Contra Costa County family law judges are routinely setting discovery cut-off dates at pre-trial case management conferences prior setting the settlement conference or trial dates. Local Rule 12.6, effective July 1, 2006, now appears to grant the court with the ability to set a discovery cut-off date at a case management conference, which may be significantly sooner than the discovery cut-off deadline provided by the CCP. The practice is that the court will inform the attorneys that it will not change the discovery cut-off date, *even if parties and counsel stipulate to extend the discovery cut-off date.* The court routinely informs the attorneys that the date can be changed only by

the court for good cause upon noticed motion and a hearing, and that it is unlikely that the court will order a different discovery cut-off date.

This practice creates problems for attorneys and litigants. For example, the court-imposed discovery cut-off date is often many months before the trial date and the corresponding discovery cut-off date under the CCP. Preventing parties from extending the discovery deadline by stipulation to obtain more current information such as updated income and employment data and updated real estate appraisals detrimentally impacts family law litigants' access to justice and adversely affects attorneys abilities to prepare their cases for trial.

Additionally, often it does not make financial sense to incur the expense of depositions and other more costly discovery methods until the very end of the discovery period and after the parties have completed their informal exchange of information and exhausted settlement efforts and court-adjudicated settlement conferences. With the Contra Costa County court's imposition of a discovery cut-off before any judicially supervised settlement, a litigant is forced to either forego potentially necessary depositions or unnecessary expense. This creates a larger schism in the ever-widening two-tiered justice system – that for litigants who can afford to opt out of the public court system and retain private judges who do not impose unreasonable and

arbitrary deadlines to all cases and that for those who cannot afford to do so.

2. The Court Should Rule on Evidence At the Outset of Trial

Under the Local Rule and TSO, parties must submit any written objections to the testimony declarations and to proffered exhibits in advance of trial. The Contra Costa family law judges were recently asked the following questions:

> "When are evidentiary objections addressed at trial? Is there uniformity on the bench that they will be addressed at the commencement or at the conclusion of the trial? Does it depend on the case? If no ruling is made on the objections prior to the submission of the case, doesn't this force one to present rebuttal evidence with the assumption that the objections will be overruled? Would this rebuttal evidence be permitted?"

They answered that "(o)bjections are generally reviewed later in the trial, in the context of the testimony. However, objections which go the material issues affecting cross examination or possible rebuttal testimony should be ruled on in advance. The only rebuttal we expect is from surprises arising out of responsive declarations that could not reasonably be expected." ("In Chancery," Exhibit 1).

Several ACFLS members who practice in Contra Costa County have found that the judicial officers do not consistently apply the above statement, and that there are cases in which the court takes the objections under

submission, rather than rule on the objections at trial. Unfortunately, the court routinely does not ruled on the objections until the outset of trial, or even during the trial. When the court takes objections under submission and defers a ruling, the attorneys and litigants do not know what evidence has been admitted or excluded and are hampered in the presentation of their case.

3. Cross-Examination Must be Disclosed in Advance

The TSO and local rule require a litigant to file a statement outlining the testimony she expects to elicit in cross examination along with copies of deposition transcripts and exhibits which will be included in the examination. (Rule 12.8) This rule undermines the litigant's right to confront an adverse witness in cross examination in open court. When asked the policy behind this part of the TSO, the Contra Costa family law court answered that "(t)he policy is to avoid trial by ambush and to enhance the possibility of settlements by placing all the known facts on the table." ("In Chancery," Exhibit 1.) As discussed more fully in the AAML's amicus brief, this rules denies parties their due process right to cross-examine witnesses. Cross-examination is not "ambush" – it is a fundamental constitutional right. In family law cases, in which the credibility of witnesses is often critical to the determination of the issues (and in which often the ONLY witnesses are the parties), the ability to

cross-examine a witness without first having to disclose to the witness what the party expects to elicit is fundamental to a fair proceeding.

4. The Deadlines are Difficult to Meet

Another problem is that parties and their counsel often have a difficult time complying with the deadlines stated in the TSO. Under Contra Costa County's current trial setting local rule (Rule 12.8, Trial Setting, effective 7/1/06), a litigant must file a notice fourteen days prior to trial of if he expects to call the opposing party as an adverse witness, and he must also file a notice of what he expects to elicit from the opposing party on cross-examination. However, this deadline is the same day as the deadline for the opposing party's direct testimony declaration to be filed. To comply with the deadlines as written, one must anticipate the full scope of the adverse witnesses' direct testimony and then provide a statement of what one expects to elicit on cross-examination. This is a nearly impossible task. Although the TSO that was in effect when the case at bar was decided has since been modified, the current TSO still creates the same compliance problems.

5. Litigants Have No Right to Present Direct Testimony at Court

Other amici have already addressed the point that requiring all direct trial testimony to be in writing violates the parties' due process rights. We will

therefore not re-state those arguments here and will instead offer observations about the practical limitations of the TSO requirement.

One very practical problem with this requirement is that it significantly undermines the court's ability to assess credibility. Issues in family law should not be determined on the basis of whose attorney is the best drafter. Often key issues in family court cases hinge on the credibility of witnesses. The inability to hear and see the witness or party as she testifies adversely impacts the ability of the trier of fact to weigh the evidence and determine a just result.

A further practical problem is the perception that the judicial officers do not have sufficient time to read all of the direct testimony declarations prior to trial and instead are devoting some of the trial time perusing declarations during cross-examination. Family court litigants already have the impression that their cases are given short shrift in our busy and underfunded court system. With the TSO requirement, their day in court is even further limited.

6. Impeachment and Rebuttal Evidence Must be Disclosed In Advance

The rule requiring that all impeachment and rebuttal evidence be disclosed and provided to the opposing party prior to trial significantly undermines a party's rights at trial. Providing this type of evidence in advance allows the other side the opportunity to fashion a new explanation or even to lie.

7. The TSO and Local Rule May Hinder Preparation of the Record on Appeal

The TSO and local rule may adversely affect a party's ability to appeal. The current version of the TSO states that "(f)ollowing trial the exhibits will be returned to the party preparing the binders or offering the exhibits who will be responsible for preserving them pending any appeals."[2] Returning the exhibits to the party pending an appeal may affect the validity of the record for appeal as it gives the possibility for exhibits to be altered, removed or added.

The ACFLS is extremely concerned that the new local rule and TSO could be used as a model for other counties without any boundaries on how far trial courts can go in creating new rules that conflict with the Code of Civil Procedure and the Evidence Code. The practical effect is the elimination of actual testimony and traditional trial in a family law proceeding. Courts are continuing to search for ways to streamline their calendars and eliminating oral testimony could certainly accomplish that goal. However, eliminating oral testimony, as already briefed, also eliminates the court's ability to see a witness as he or she testifies, observe his demeanor and hear the tone of his voice, and use these tools – for which there is no substitute – to assess credibility. The

ACFLS urges this court to set parameters for local rules and courtroom rules to balance them against the substantive legal rights of litigants, so that what happened in this case cannot be repeated. A decision with parameters will guide other counties and limit the rules they enact and assist their judicial officers in performing their roles.

IV.

THE EFFECT OF LOCAL RULE 12.5(b)(3) AND THE TRIAL SCHEDULING ORDER ON PRO PER LITIGANTS

Many ACFLS members who practice under this local rule litigate cases against *pro per* parties. There is no need for additional recitation to the so-called "pro per problem" in this brief; the number of unrepresented parties litigating family law cases, both "simple" and those involving extremely complex issues, varies from county to county but is high in the double digits, no matter whose numbers one accepts. Balancing the complexity of modern legal issues and court procedural requirements with the rights of every citizen to access to the courts is one of the most challenging tasks confronting the judicial system, and it is only getting more difficult every day.

Court rules are obviously necessary to regulate and keep order in the

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2 Local Rule 12.8(F)(6) states "[f]ollowing judicial decision on the issues set for trial, the

courtrooms. Such rules must be enforceable and courts must enforce them when they make them. If such rules and individual judicial officers' own courtroom procedures become impossible or impractical to follow, they are useless. They are equally useless when judicial officers cannot or will not enforce them once they make them. Therefore, they must not only be fundamentally fair and constitutionally permissible enough to both deserve and receive consistent enforcement, but they must be comprehensible to and capable of being followed by all who will be required to comply with them including nonlawyers. As this case illustrates, in many situations unrepresented parties simply do not have the knowledge, experience or ability to comply with complex court rules. Even when they attempt to do so, as Jeffrey did in this case, unrepresented litigants sometimes simply cannot comply. In many cases, they do not understand them at all.

As other amici have pointed out, many proposals have been made to attempt to balance the needs of unrepresented family law litigants with the ever-increasing complexity of court procedures and substantive law. Those proposals have resulted primarily in the addition of Court Facilitators to assist litigants in complying with the rules and in filling out the forms necessary to

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exhibits will be returned to the party preparing the binders or offering the exhibits who will

have their day in court in the first place. However, the rules themselves are not any easier to understand and in many cases have grown ever more complex. Therein lies the problem that arose in this case.

In attempting to balance access to justice with the increasing population and their greater sophistication in addressing their legal rights and the resulting more crowded courtrooms, which problem is no doubt exacerbated by funding issues, counties continually attempt to streamline court procedures. Doing so is not only a laudable goal, it is a necessity if parties are to receive a reasonably speedy right of access to public courtrooms. However, our judicial officers must never lose sight of the fundamentals of this country's legal system when they are dealing with more "mundane" and practical issues, such as how to get an every-increasing case burden through the trial stage. When the rules invoked to protect the trial right (no surprise) are ultimately used to destroy the right to trial (no trial), the rules deprive the litigants they are designed to help of access to the system and cannot stand. The rules are not an end in themselves; they are only a means to the ends of justice consistent with the founding principles of our judicial system.

Local courts must have guidance and limits in their attempts to

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be responsible for preserving them pending any appeals.

the "*pro per* problem." The Legislature has provided some, but it is the job of the judiciary to balance substantive rights with statutes and rules. Those rules and rights have obviously collided in this case. The ACFLS feels strongly that it is up to this Court to protect those rights and set limits on how far rules and orders such as the ones in this case can modify trial procedures consistent with substantive rights. It urges this Court to give such guidance in this case.

V.

THE REAL PROBLEM: MARGINALIZATION OF FAMILY LAW

The ACFLS is the only statewide organization of family law specialists and its primary purposes is to enhance and support the practice of family law by promoting and preserving the family law specialty. It can perhaps best do so in this case by pointing out the real problem underlying the issues in this case. That problem is not a new one, and this Court is not necessarily able to solve it by its decision here. However, the ACFLS feels that the problem, which the parties and other amici have alluded to in their briefs, should be brought out front and center and openly discussed as the fundamental reason that Petitioner is in the position of which he now complains. That is the continuing marginalization of family law practice in the courts of California.

When California adopted the Field Code in 1872, the statutes devoted to family law cases took up approximately 6 pages. Today's Family Code is over

350 pages long. When many ACFLS members began practicing, attorneys were handling "any divorce that walked through the door." Now, in order to adequately handle a family law case, an attorney essentially must concentrate on those cases in order to understand their complexities, as well as be conversant in tangential substantive areas such as tax law, bankruptcy law, real property and securities law as well as probate and estate planning. Not only are there many family law specialists, but some have extremely sophisticated boutique practices in the many areas of family law. Also, as legislation has made the practice more complex, the obligations and potential malpractice traps of family law practitioners have multiplied. Nevertheless, courts continue to relegate family law cases to the lower rungs of the judicial hierarchy.

Setting aside the evolving practice aspects of family law for a moment, it has always been true that family law matters were of vital importance in the lives of the parties involved. The dissolution of a family, with the resulting need for decisions regarding custody and support of children, division of marital assets and the myriad of other personal issues involved in divorce and other family law cases has always been of keen importance to those involved, and in many cases the family law courtrooms are the only ones the litigants see in their entire lives. Nothing is more fundamental to the structure and fabric of society than marriage, children and families, as politicians often point out.

Logically, how we support those families when they are in crisis should be of paramount importance. And yet the judicial system still treats family law as the distasteful side of civil practice and efforts continue to turn the dissolution of families into an administrative procedure.

In fact, it would appear that a goal of the local rule and the TSO is to force family law litigants and family law cases into a true civil law model. However, family law cases will never successfully fit into a civil litigation mold. By their very natures, family law cases are quite different. Civil litigation matters tend to involve parties who are strangers to one another litigating a past incident—e.g a car accident or the breach of contract. Family law litigants are fundamentally different. They involve spouses and parents and children and grandparents whose connection will likely continue and whose involvement with the court may last for years.

Family law litigants are not second class citizens. Their cases are not the ugly stepchildren of civil law, nor are their issues of less importance than those of business litigants, personal injury plaintiffs or tort claimants, shareholders bringing derivative suits or beneficiaries contesting bequests. In fact, given the fundamental nature of family law issues to the litigants' lives, they are even more important. However, a courtroom rule that resulted in precluding a personal injury plaintiff from presenting a full trial, including live

witnesses, would be unthinkable, whereas it is not only "thinkable" for family law cases, *but the County is before this court defending it.*

Dedicated family law practitioners such as the ACFLS's members fail to understand why additional family law courtrooms are always in the courthouse annex, why their judges often have no family law experience and why their practice area is chronically underfunded. We speculate that it is because these cases are "messy" in that they have no tidy results, only decisions that please neither party; because people do not want to be reminded that marriages fail and families get re-organized any more than many of us want to be reminded of death or catastrophe; or because we are simply incapable of getting our priorities right and still consider cases involving purely monetary or commercial issues more important than those addressing emotional and personal issues .

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For whatever reason, however, as long as family law cases are seen as less important than other civil cases, there will continue to be an issue of whether or not a family law litigant such as Jeffrey is entitled to a "real" trial.

Respectfully submitted,

Date: July ___, 2006

Dawn Gray, Stephen Temko,
Linda Scinturier, Kathryn Fox,
And Brigeda D. Bank
Members, Amicus Committee
Association of Certified Family Law Specialists

VI.
CERTIFICATE OF WORD COUNT

I, Stephen Temko, hereby certify that, pursuant to California Rules of Court, rules 14 and 29.1(b)(1), the text of this brief consists of 5,294 words as counted by the word processing program used to generate this brief.

Date: July ___, 2006

Stephen Temko, Dawn Gray
Linda Scinturier, Kathryn Fox,
And Brigeda D. Bank
Members, Amicus Committee
Association of Certified Family Law Specialists

In Chancery

A Publication of the Family Law Section of the Contra Costa Bar Association June 2006

PRESIDENT'S MESSAGE

Thanks to those who took the time to respond to the Survey regarding the Trial Scheduling Order. 124 responses were received of the 219 members to whom the Survey was sent. A segment of the membership responded that they did not have any experience with the TSO due to the nature of their practice (i.e. Mediation) so overall, the response was terrific. According to the company administering the Survey, the level of response exceeded their expectations. Hopefully, the data will be significant and food for thought for the Supreme Court.

Further details will be provided once the Amicus Committee meets later this week. I am proud of our demonstrated interest as a Section in the issues before the Supreme Court and hope the Court will find our responses significant evidence which will help guide their forthcoming decision.

Cheers, JHW

AIC FUNDRAISER

You are invited to a fundraiser for Art in the Courthouse on **July 27, 2006 at 6:00 p.m. to 8:30 p.m.** at the home of Dr. Jan and Mary Ann Beekhuis, 171 Alamo Hills Court, Alamo. $100 per person, complimentary champagne, wine, buffet and musical entertainment. To RSVP, phone 685-2665 and send your check to
Art in the Courthouse
Christine Callahan
2204 Concord Blvd., Concord CA 94520. **Space is limited, so please reserve early.**

JUNE LUNCH PROGRAM

Topic: "Overview of Child Molestation in Child Custody Cases"
Speaker: Patrick Clancy
When: June 14, 2006 at noon
Where: Scott's Restaurant, Walnut Creek
Menu Choices: Chicken Southwestern or Cold Poached Salmon Salad
One Hour MCLE credit
Cost: $35 members, $45 non-members
Reservations are by check only (no walk-ins) by Friday, June 9, 2006 to Jody Iorns, P.O. Box 5818, Concord, CA 94520

JULY LUNCH PROGRAM

Topic: "Child Custody Evaluations: The Good, the Bad, and the Ugly"
Speaker: Dr. Phil Stahl
(Topics include that perennial favorite, what to do when the report doesn't tell you how the evaluator got from data to conclusion...)
When: July 12, 2006 at noon
Where: Scott's Restaurant, Walnut Creek
Menu Choices: Tuscany Chicken or Chinese Chicken Salad
One Hour MCLE credit
Cost: $35 members, $45 non-members
Reservations are by check only (no walk-ins) by Friday, July 7, 2006 to Jody Iorns, P.O. Box 5818, Concord, CA 94520

ADDITIONAL NOTES RE THE SURVEY RESULTS

The results of the TSO are now being tabulated by the FLS's professional consultant and the Amicus Committee. The Committee has asked the Supreme Court for an extension of 30 days in order to analyze the results and write the brief.

In order to protect the integrity of the data and prevent any party from getting an unfair advantage, the results are being kept confidential until the brief and the data are filed and served on all parties. Everyone is curious about the results, but please do not importune, cajole, or attempt to bribe members of the committee to leak information about trends, specifics, or anything else. It just isn't fair to the litigants to have rumors flying before the data is analyzed, the brief written and the data made available to everyone. As soon as the brief is served and filed, a special edition of In Chancery will go to the whole membership, containing not only the brief, but all of the backup data on which it is based. At that point, you can parse and debate it to your

EXHIBIT 1-A

you are fortunate to have as many paying clients as you want, pass this info along to your colleagues who may not be so lucky. It's a win/win/win.

SCOTT'S MENU CHANGES

For those of you who prepaid lunches for a year, Scott's has changed its menu and some of the selections are no longer available. The current selections are:
June: Chicken Southwestern or Cold Poached Salmon Salad
July: Tuscany Chicken or Chinese Chicken Salad
October: Chicken Cordon Bleu or Southwestern Chicken Salad
If you pre-ordered and your choice is no longer available, please notify Jody Iorns at jiorns@courtconnection.net.

ANSWERS FROM THE BENCH ON THE TRIAL SCHEDULING ORDER

Judge Baskin invited questions from the Bar on the Trial Scheduling Order. The following questions were submitted by Brigeda Bank and were submitted to him. The questions and answers follow. The answers represent those of the entire family law division, and not just one judge.

1) Is there uniformity on the bench that objections to CCP §1987 demands will be sustained at trial? Do the objections have to be in writing in advance of trial or will they be sustained by oral objection at the commencement of trial?

Response: The possible range of objections is too wide to give definitive answers. The point of the TSO is to avoid trial by ambush and surprises at trial. Generally objections to CCP 1987 should be raised by a motion to quash Subpoena, after written notice. We will all grant orders shortening time so these can be heard before trial since leaving these to the day of trial may be too late to avoid the harm.

2) When are evidentiary objections addressed at trial? Is there uniformity on the bench that they will be addressed at the commencement or at the conclusion of the trial? Does it depend on the case? If no ruling is made on the objections prior to the submission of the case, doesn't this force one to present rebuttal evidence with the assumption that the objections will be overruled? Would this rebuttal evidence be permitted?

Response: Objections are generally reviewed later in the trial, in the context of the testimony. However, objections which go the material issues affecting cross examination or possible rebuttal testimony should be ruled on in advance. The only rebuttal we expect is from surprises arising out of responsive declarations that could not reasonably be expected.

3) There is no deadline in the TSO for filing written objections to the Responsive Declarations and Exhibits. Can one be added so this is clear?

Response: We all think 2 days before trial is reasonable and will add in such a provision when we next amend the TSO. Until then do what is reasonable or do it orally at trial.

4) What is the purpose of requiring a statement outlining the testimony the party expects to elicit, together with copies of deposition transcripts and exhibits which will be included in the examination? Will the bench consider deleting this? If the bench would like to know why this is a concern to the attorneys, I am happy to provide this information.

Response: The policy is to avoid trial by ambush and to enhance the possibility of settlements by placing all the known facts on the table.

5) It would be helpful to clarify when rebuttal testimony is permitted. Could this be added to the TSO?

Response: It seems impossible to define as this is on a case by case basis. What new issues are raised in reponses that could not be included in the initial declaration is generally dealt with on oral direct during rebuttal. It's purpose is not to rehash the issues.

6) The most current version of the TSO appears to delete Responsive Trial Briefs. It is assumed that these are still permitted. Could a deadline be added to the TSO?

Response: They are permitted. A reasonable amount of time is

EXHIBIT 1-B

2 days before trial and in the next round of revisions we will include this. We appreciate the opportunity to clarify grey areas so as to improve our family law system.

Judge Libby has asked that I forward the following announcement (see additional info below):

THE BRITISH ARE COMING, THE BRITISH ARE ...ERRR... THE STATE IS COMING THE STATE IS COMING!!! (ON AUGUST 1, 2006)

For many years California has paid many, many millions of dollars to the federal government because our child support collection process falls short of federal requirements. The federal rules require that we have a single computer and one central collections point for the state.

During the past few months all IV-D cases (DCSS cases) have been transferred to the state for collections.

During the period from August 1, 2006 to August 1, 2007 the non-IV-D cases (your cases that do not involve the DCSS) will be transferred. The transfer will be done employer-by-employer commencing with the largest employers in the state.

This program will apply to **EVERY CHILD SUPPORT ORDER IN THE STATE THAT IS COLLECTED BY WAGE ASSIGNMENT.** The process is that each employer in the state will send one check each month to Sacramento and the central collections office will send out all of the support checks to the individual payees.

These changes may cause all sorts of problems and we do not now pretend to know all of the answers or even what the questions will be. However, you should be aware of and comply with the following:

1. Your clients (and potentially past clients who are still collecting support) should be aware of the new process.
2. A child support payee client who moves his/her residence after August 1, 2006 may (and after August 1, 2007 will) have to notify the central collections office in Sacramento of the new address or the support will stop.
3. Apparently, the Child Support Case Registry Form (Form FL—191) will be used by the state in the collections/payment process. While we have all ignored this form in the past the filing of this form when child support orders are made or modified will be critical in the future.

[Editor's Comment: Sigh.....]

EXHIBIT 1-C

DECLARATION OF SERVICE BY MAIL

I, Lee Stroble declare:

I am over 18 years of age, and not a party to the within cause; my business address is 1620 Fifth Avenue, Suite 800, San Diego, CA 92101; I served one copy of the attached:

ACFLS AMICUS BRIEF

ON EACH OF THE FOLLOWING, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Garrett C. Dailey
2915 McClure Street
Oakland, CA 94609
Attorney for Petitioner

Contra Costa County
Superior Court
ATTN: Hon. Thomas M. Maddock
725 Court Street
Martinez, CA 94553

Jon B. Eisenberg
Horvitz & Levy LLP
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Attorney for Real Party in Interest

Paige Leslie Wickland
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Attorney for Real Party in Interest

Contra Costa County
Bar Association
Lisa G. Reep, Ex. Dir.
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Association of Certified
Family Law Specialists
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0+13

Fox & Bank LLP
1333 North California Blvd., Ste. 555
Walnut Creek, CA 94596

Each envelope was then, on July __, 2006 sealed and deposited in the United States Mail at San Diego, California, in the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed on July __, 2006, at San Diego, California.

_____
Lee Stroble