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 ANSWER TO AMICUS CURIAE BRIEFS OF THE SOUTHERN CALIFORNIA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, ET AL., THE FAMILY LAW SECTION OF THE CONTRA COSTA COUNTY BAR ASSOCIATION AND THE ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

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I. The Briefs of Southern California Chapter of the American Academy of Matrimonial Lawyers, et al., and the Association of Certified Family Law Specialists Misstate the Record Regarding Jeffrey's Waiver of the Claims He Makes in This Court

Both Southern California Chapter of the American Academy of Matrimonial Lawyers, et al. (hereafter, AAML, at p. 5 of their brief), and Association of Certified Family Law Specialists (hereafter ACFLS, at p. 4 of its brief) accurately state that Jeffrey's declaration failed to identify all of his exhibits and their evidentiary foundations, but then contend that "The trial court denied Jeffrey's request to testify to establish the foundation," which is *not* accurate. Both cite RT 6:11-11:15 in support of this statement, but a review of the transcript pages confirms that Jeffrey *never* made a request to testify to establish the foundation of his exhibits (or for any other reason). Both go on to say, without citation to the record, "The trial court also denied Jeffrey's request to submit oral direct testimony." (AAML brief at 5, ACFLS brief at 4.) This statement is also inaccurate and refuted by the record.

As more fully discussed in Real Party's Return by Answer, Jeffrey never requested live direct but instead at all times relied entirely on the provision in Contra Costa County Local Rule 12.5(b)(3) and the TSO entered in the Elkins case providing for direct examination by declaration, not only for himself but, in an earlier proceeding, also for his third-party witnesses. Nor did Jeffrey ever ask to testify to establish the foundation

for his exhibits. Rather, it was the *trial judge* who suggested that Jeffrey take the opportunity of the break to gather his thoughts and then come back and establish the foundations for his exhibits at trial. Jeffrey spurned this invitation and then sua sponte withdrew his declaration from evidence and rescinded his request to cross-examine Marilyn and the joint expert.

These aspects of the record are critical, for they establish Jeffrey's waiver and lack of standing, two issues discussed at length in Real Party's Return by Answer but ignored in the AAML and in the ACFLS briefs. Jeffrey's conduct in this regard is in stark contrast to that of the defendant in *People v. Johnson* (2006) 38 Cal.4th 717, cited by amici curiae AAML; unlike Jeffrey, the defendant in *Johnson* carefully preserved below the challenge he made on appeal to the prosecution's reliance on the investigating officer's affidavit to meet its burden of proof under Penal Code §1538.5. (*People v. Johnson, supra* at 722.) [1] Although somewhat difficult to decipher, the data in the survey results reported by the Family Law Section of the Contra Costa County Bar Association (hereafter, Section) in the appendix to its brief appears to establish that those who

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[1] In relying on this case, amici curiae ignore this distinction (understandable in light of their misunderstanding of the actual record here) and also overlook two factors that were important in *Johnson* but are absent in the instant matter: (1) in *Johnson* the affiant was not present at the section 1538.5 hearing, thus denying defendant the right of cross-examination (*Id.* at 726), and (2) the hearing at issue in *Johnson* was governed by statutes that clearly contemplated the presentation of live testimony rather than affidavits. (*Id.* at 723, 725-726.)

requested changes in TSOs in their cases frequently obtained them. (Section Exhibit 3, Questions 6-9.) This supports the inference that, had Jeffery requested live direct, the court would have permitted it.

Given the actual state of the record regarding Jeffrey's waiver and Jeffrey's rebuffing of the court's invitation that Jeffrey cure at trial the defects in his filed declaration, Real Party submits that, whatever guidance this Court may wish to give regarding the aspects of the Local Rule and TSO raised by amici curiae in their briefs, the judgment in this particular case should be affirmed.

II. The Local Rule and TSO Do Not Violate Equal Protection

Amici curiae AAML claim that the Local Rule and TSO provisions regarding direct examination by declaration subject to live cross and redirect constitute an impermissible deprivation of equal protection because "[t]here is no legitimate purpose for treating family law litigants differently from any other class of litigants." (AAML brief at 8-9.) On the contrary, as further discussed in Respondent's Return by Answer, there are several legitimate purposes for treating family law litigants differently regarding trial procedures, including the explosion of family law cases leading to lengthy trial delays, the unusually high level of unrepresented litigants in family law, and the policies favoring settlement in family law matters. Although disagreeing with Respondent and Real Party on the propriety of the Rule and TSO, amicus curiae ACFLS agrees that family law matters

require different procedural treatment than civil cases: "family law cases will never successfully fit into a civil litigation mold. By their very natures, family law cases are quite different." (ACFLS brief at 19.)

Amici curiae AAML not only overlook these special characteristics of family law cases but also the many long-settled divergences from the procedures employed in civil cases that derive from the special nature of family law cases. For example, procedures in which the court decides ultimate issues on motion without trial, like demurrers and summary judgment motions, which are common to civil cases, are unavailable to family law litigants. Unique to family law are the rules permitting bifurcation and trial of a preliminary issue and interlocutory appeal of the resulting order on bifurcated issue, all in advance of full trial or judgment. (Family Law Rules of Court, Rules 5.175, 5.180.)

Regarding trial procedures specifically, family law cases are not subject to the mandatory judicial arbitration and alternate dispute resolution procedures of Code of Civil Procedure §1141.10 et seq. and are exempt from the mandatory "fast track" rules applied to civil matters. (Hogoboom & King, Cal. Practice Guide: Family Law (Rutter, 2006) ¶¶13.2, 13.3, pp. 13-1 - 13-2.) "Family law cases are exempt from the statewide rules of court governing caseflow management and procedures for bringing general civil cases to trial (see CRC 207(b)); nor are there any special California Rules of Court concerning the procedure for bringing family law cases to

trial. Consequently, the caseflow management of family law actions ordinarily is prescribed by local court rules and policies, although these often track rules of practice and procedure for general civil cases." (*Id.* at ¶13.1.5, p. 13-1.)

Perhaps the most important distinction between family law and most civil cases is that there is no right to a jury trial in a family law matter, and in fact a jury trial is completely unavailable to a family law litigant. As further discussed in Respondent's Return by Answer, this distinction derives from the fact that family law courts are courts of equity rather than courts of law. The right to a jury trial in most civil cases and not in family law has never been considered to constitute a denial of equal protection.

Further, as discussed in Real Party's Return by Answer, a chief difference between family law cases and civil cases is that important—sometimes critical—substantive factual disputes related to property, custody, and support issues are decided in motions filed either before or after judgment. (*County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1427; *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 962.) It is settled that such motions may be decided without *any* live testimony, direct or cross. (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483-484). None of the amici curiae expresses any discomfort with this rule and none disputes Real Party's argument (at p. 24 of her answer brief) that it is

hard to justify a distinction between how motions on disputed factual issues are heard and how trials are heard.

Real Party submits that, if the Court is going to mandate live direct for trials, however short and regardless of the issues involved, the Court must also address whether the same mandate applies to motions on important substantive factual disputes. Real Party submits that it is logical to apply the same rule to both types of proceedings, but that requiring live direct in both will undo the decrease in trial delays that the Local Rule and TSO procedures have achieved and will instead create even greater calendar overload in family law courts.

III. The Section and ACFLS Briefs Are of Limited Assistance Because They Focus on Later TSOs With Different Provisions That Are Not Before the Court in This Proceeding

The amicus brief of the Family Law Section of the Contra Costa County Bar Association candidly explains that it is based on a survey of opinions of numerous different versions of trial scheduling orders that have been entered in different individual cases, most of which have many additional provisions that are not present in the only TSO at issue in the instant matter:

> As used in this brief, Trial Scheduling Order (hereinafter "TSO") refers to one of a number of variations of an Order issued by the courts of the Family Law Division of the Contra Costa County Superior Court in 2005 and 2006, and not just the version which is under review in the instant matter. Since the order has gone through numerous iterations and has sometimes been used by some trial departments and not

> others, it is impossible to identify only those attorneys who have experience with the specific TSO which is the subject of the instant Writ. As a result, the survey was designed to address the key issues raised by all of the versions of the TSO which have been utilized in the past 18 months.

(Section brief at 6.)

Thus the Section concedes that it is impossible to identify which survey respondents—*if any*—had experience with a TSO limited to the provisions that appear in the TSO at issue in the present writ proceeding. The TSO at issue here is just under 3 pages, while what the Section identifies as a representative example of a recent TSO is nearly four times as long. (Section brief at 3, fn. 2, and Exhibit 4 of the accompanying Exhibits.)

Among the new provisions *not present in the Elkins TSO* are requirements that parties disclose impeachment and rebuttal evidence prior to trial; provide a summary of the testimony the party intends to elicit from adverse witnesses together with copies of deposition transcripts and exhibits to be included in the examination; disclose impeachment witnesses prior to trial; subpoena witnesses 10 days prior to trial; provide a statement of the expected testimony for non-cooperating or subpoenaed witnesses; and exchange prior to trial all impeachment or rebuttal documents or exhibits. (Section brief at 3-5; Exhibit 4.) These provisions were the most controversial among the survey respondents and engendered the most negative comments and percentages. Moreover, none of the

survey questions are directed to a TSO limited to the terms present in the Elkins' TSO, so that it is impossible to correlate any of the survey answers with the TSO at issue in this case.

Because the survey was just recently conducted, it is reasonable to assume that most if not all respondents had the most recent, 12-page TSO in mind when giving their responses. The survey respondents' reaction to the new and much more far-reaching provisions summarized above inevitably permeates all of the survey responses; these new provisions were certainly an important part of both the general negativity expressed by the survey respondents and specific negative findings. A survey addressing provisions not present in the TSO entered in the case at bar produces results that simply are not on point and of little real assistance. Therefore, whatever concerns the Family Law Section of the Contra Costa County Bar Association, or this Court, may have with these new provisions based on that survey, Real Party reminds the Court that such provisions were not part of the Elkins TSO and therefore did not in any way lead to the

judgment herein.[2]

A similar, but even clearer, limitation exists with regard to the amicus brief filed by the Association of Certified Family Law Specialists. In discussing what it calls the "practical problems" with the TSO, the ACFLS reveals that it is considering *only* provisions that are *not present* in the TSO at issue in the present case, such as discovery cut-offs under a new local rule effective only after July 1, 2006, and new requirements to outline the testimony a party expects to elicit in cross-examination, to give notice of the intent to call the opposing party as an adverse witness, to disclose impeachment and rebuttal evidence, and to return trial exhibits to parties. (ACFLS brief at 6-14.) Its brief reflects views not on the TSO at issue herein, but on later and much more burdensome provisions in later TSOs, which are not before this Court, and which now appear in newly published Contra Costa County Local Rule 12.8.

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[2] Another limitation is that the survey on which the Section brief is based was sent only to attorneys (Section brief at 7), and therefore expresses the views only of attorneys and not of unrepresented litigants. The Petitioner in this matter, however, is an unrepresented party who has emphasized what he claims is the unfairness of the Local Rule and of the TSO entered in his case on family law litigants who are not represented by attorneys. It is noteworthy, however, that the majority of the survey respondents reported that judges frequently do not enforce the terms of a given TSO against a self-represented litigant (Section brief at 21-22 and accompanying Exhibit 3, Question 52), a finding that is in accord with what happened in the present case, where the trial judge gave Jeffrey the opportunity at trial to establish the basic foundation for his exhibits, despite the fact that he had not done so in his declaration.

What *is* before this Court is Jeffrey's failure not only to lay the evidentiary foundation for his exhibits in his declaration, but also his failure to timely identify and exchange those exhibits, either by attaching them to his initial declaration or by timely providing Marilyn with a binder that contained all of his proposed exhibits. As to these undisputed facts, it should be noted that none of the amici curiae seriously attack provisions, common to the Elkins TSO and the new Local Rule 12.8, that require proposed trial exhibits to be referenced in the initial declaration and either attached to it or simultaneously provided to the other side or that require such exhibits to be included in an exhibit binder that is exchanged between parties and delivered to the court a specified period before trial.

For example, the Section brief expresses a concern that the court may not read lengthy declarations and voluminous exhibits by the start of trial, but does not complain about the rules requiring pretrial identification and exchange of trial exhibits. (Section brief at 14-15.) The concerns of the AAML is limited to cases where the declarations are "hundreds of pages long, attaching reams, or even boxes of exhibits." (AAML brief at 23.) Here, Jeffrey's declaration was only four paragraphs long and, had Jeffrey complied with the TSO, would have attached only 37 exhibits. For its part, the ACFLS appears to favor the early identification and exchange of exhibits and complains only that judges and commissioners do not

uniformly rule on evidentiary objections to such exhibits at the outset of trial. (ACFLS brief at 9-10.)

The general acceptance of these exhibit disclosure and exchange rules is not surprising, since it is common practice for trial courts to require the early exchange of documents to be used as exhibits as trial, either as part of the mandatory settlement conference process or in conjunction with trial rules. For example, Alameda County Local Rule 11.0(5)(G) requires parties to "list and describe all documents, schedules, or summaries to be offered at the time of trial" in a settlement conference statement to be filed prior to the settlement conference, and provides that failure to comply may result in an order precluding the documents, schedules, or summaries from being admitted at trial; San Mateo County Local Rule 5.8 (F)(4) and accompanying Appendix 5 requires parties to exchange a list and copies of trial exhibits seven or more court days before trial.

Jeffrey's failure here to comply with the TSO regarding pretrial identification and exchange of proposed trial exhibits provides further grounds to affirm the judgment herein. "An appellate court reviews the action of a lower court, not its legal reasoning. A ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 402. The lower court did not reach the issue of Jeffrey's failure to provide Marilyn with a description and copies of his trial exhibits in a timely

manner because Jeffrey abruptly withdrew all of his evidence and rested his case. But had he not done so, the court would have been justified in precluding the documents because of Jeffrey's late disclosure of them.

IV. The Section and ACFLS Briefs Support Real Party's Contention That the TSO Filed in the Elkins Matter Was Not Subject To a Publication Rule

As earlier noted, the Section and ACFLS briefs emphasize that trial scheduling orders over the last year and a half have "undergone numerous iterations" (Section brief at 6, ACFLS brief at 3, fn. 1), and the Section brief further states that such orders have "sometimes been used by some trial departments and not others." (Section brief at 6.) The ACFLS reports that the most current version of these orders (essentially the version that appears as Exhibit 4 to the Section brief) has now been published as Contra Costa County Local Rule 12.8.

That trial scheduling orders filed in individual cases have varied so greatly over time, and that different versions of such orders have been only sometimes used, in only some cases, and in only some trial departments, support Real Party's contention that the TSO filed in the Elkins matter does not constitute the type of fixed court rule that comes within the publication rule of Code of Civil Procedure §575.1(c). (Real Party's Return by Answer at 30-33.) Perhaps for this reason, none of the amici curiae assert that the TSO in this matter was required to be published.

V. Conclusion

The judgment entered in this case was not the result of a trial court imposing a court rule or trial scheduling order over a party's objections. On the contrary, Jeffrey had himself used the rules regarding direct examination by declaration in the earlier date-of-separation proceeding for his own benefit. In the proceeding leading to the judgment, Jeffrey never requested live direct or objected to direct by declaration. Jeffrey's exhibits, most of which were inadmissible on their face, were excluded not just because he failed to explain them or attach them to his declaration but also because he failed to establish their most basic foundations at trial though given an opportunity to do so and then withdrew even his declaration from evidence. Jeffrey's failure to timely provide copies of all but two of his exhibits provides another, independent ground supporting their exclusion.

For all of these reasons, the reasons set forth herein, and the reasons set forth in Real Party's Return by Answer, the judgment herein should be affirmed.

Certification Re Length of Brief

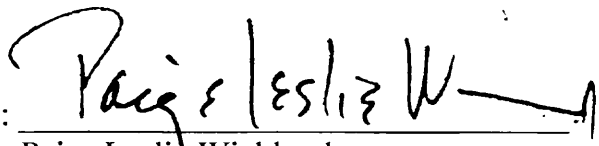
The undersigned certifies that the foregoing brief is 3,274 words in length.

Dated: August 2, 2006

Respectfully submitted,

FANCHER & WICKLAND

HARKINS & SARGENT

By: 

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PROOF OF SERVICE

I, Emily Loeschinger, 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 August 2, 2006 I served the foregoing document entitled **Real Party In Interest's Answer To Amicus Curiae Briefs Of The Southern California Chapter Of The American Academy Of Matrimonial Lawyers, Et Al., The Family Law Section Of The Contra Costa County Bar Association And The Association Of Certified Family Law Specialists** on the individuals listed below by enclosing a true copy in a sealed envelope addressed as follows and by the method indicated below:

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Emily Loeschinger

Emily Loeschinger