EISENBERG AND HANCOCK, LLP

COPY

May 10, 2007

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

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

Dear Chief Justice George and Associate Justices:

This letter brief addresses the question posed in this court's order of April 25, 2007: Are the respondent superior court's former local rule, trial scheduling order, and current local rule "consistent with the hearsay rule (Evid. Code, § 1200 et seq.; *Fewel v. Fewel* (1943) 23 Cal.2d 431, 438 (conc. opn. of Traynor, J.); *Lacrabere v. Wise* (1904) 141 Cal. 554, 556; *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1107), to the extent they call for the introduction of declarations into evidence at trial in a marital dissolution action?"

The answer is *yes*. The Evidence Code recognizes decisional-law exceptions to the hearsay rule, one of which is – and has been for centuries – the submission of written evidence in equity-based family law proceedings. Factual determination on declarations in family law cases is consistent with California law as reflected in the *Fewel*, *Lacrabere*, and *Pajaro Valley* opinions, which disapproves such determination only where, unlike here, the declarant is not subject to cross-examination.

I.
FACTUAL DETERMINATION ON DECLARATIONS IN FAMILY LAW CASES IS CONSISTENT WITH THE EVIDENCE CODE'S EXPRESSION OF THE HEARSAY RULE.

A. Subdivision (b) of Evidence Code section 1200 recognizes decisional-law exceptions to the hearsay rule.

The respondent superior court's former local rule, trial scheduling order, and current local rule, which provide for submission of written direct evidence subject to oral cross-examination in family law cases, are consistent with the hearsay rule as prescribed in the

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Evidence Code. The code itself includes a series of statutory exceptions to the hearsay rule, but those statutory exceptions are not exclusive. The code also recognizes decisional-law exceptions to the hearsay rule, one of which is for the procedure at issue here.

The nonexclusive nature of the hearsay rule's statutory exceptions is made clear by Evidence Code section 1200, subdivision (b), which states: "Except as provided by *law*, hearsay evidence is inadmissible." (Italics added.) It is well settled that "law" in this context means *decisional* as well as statutory law.

Justice Mosk explained this point for the court in *In re Cindy L.* (1997) 17 Cal.4th 15: "Evidence Code section 1200, subdivision (b) states: 'Except as provided by law, hearsay evidence is inadmissible.' Evidence Code section 160 in turn defines 'law' to include 'constitutional, statutory, and *decisional* law.' The commission comment on section 160 states: 'This definition makes clear that a reference to "law" includes the law established by judicial decisions as well as by constitutional and statutory provisions.' [Citation.] Thus, the language of Evidence Code section 1200, read in light of Evidence Code section 160 and the comments thereon, makes clear that *one source of exceptions to the hearsay rule is from judicial decisions*." (*Id.* at p. 26, italics added.)

This principle traces back to a pre-Evidence Code decision, *People v. Spriggs* (1964) 60 Cal.2d 868, where Justice Traynor observed that the Legislature "did not freeze the law of evidence to the rules set forth in the Code of Civil Procedure or other statutes. [Citations.] Numerous questions arise on which the Legislature has been silent or inexplicit. The courts must answer these questions and develop judicially the law of evidence [citations] in the light of common law principles and the basic objectives of the statutes." (*Id.* at pp. 871-872.)

Chief Justice Lucas reiterated for the court in *In re Malinda S.* (1990) 51 Cal.3d 368 that "exceptions to the hearsay rule are not limited to those enumerated in the Evidence Code; they may also be found in other codes *and decisional law*." (*Id.* at p. 376, italics added; accord, *Houghtaling v. Superior Court* (1993) 17 Cal.App.4th 1128, 1134 ["we are empowered to create, or recognize, [a hearsay] exception not specifically set forth in the statutes"]; see also Sen. Com. on Judiciary com., 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1200, p. 3 ["Other exceptions may be found in other statutes or in decisional law"], p. 4 ["Under Section 1200, exceptions to the hearsay rule may be found either in statutes or in decisional law"].)

Thus, the hearsay rule – including its exceptions – is not limited to its statutory expression in the Evidence Code. There always have been, and continue to be, *decisional-*

law exceptions to the hearsay rule. One of those exceptions is for written evidence in family law proceedings.

B. For centuries, decisional law has excepted from the hearsay rule written evidence in equity-based family law proceedings.

As fully explained in respondent superior court's return to the writ petition, courts of equity such as family law courts have traditionally decided cases on written evidence. This practice is rooted in the English ecclesiastical courts, where jurisdiction over family matters was originally vested. The practice was carried over to the equity courts prior to the merger of law and equity, and it survives to this day in the federal courts, where equity procedure is dominant. (See Respondent's Return, at pp. 23-27.)

This practice also survives in California's decisional law, which – going back more than 30 years – has consistently approved the trial of certain family law issues on declarations. (See *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 962 [evidentiary hearing on child custody in "move-away" case "should be held only if necessary"]; *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1423-1424 ["decisions on disputed factual issues" in "hearings and trials in district attorney support and marital dissolution cases" may be "based upon evidence presented in declarations under penalty of perjury"]; *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 484 ["compelling precedent supports the power of the trial court to hear" issues (in *Reifler*, arising in postjudgment proceedings on modification of spousal support and appointment of a receiver) "on declarations alone and to exclude oral testimony in the sound exercise of its discretion"].)

Thus, for centuries, there has been a decisional-law exception to the hearsay rule for written direct evidence in family law proceedings. Subdivision (b) of Evidence Code section 1200 recognizes such exceptions.

C. A new pronouncement that the hearsay rule always precludes the use of declarations to prove controverted facts would overrule myriad California precedents.

California law abounds with decisional-law exceptions to the hearsay rule for use of declarations to prove controverted facts.

The court in *Reifler v. Superior Court, supra,* 39 Cal.App.3d at page 484, described some of these exceptions to the hearsay rule: "[T]he exclusion of oral testimony and

determination of controverted facts upon declarations alone has been approved in proceedings on motions to set aside a judgment for extrinsic fraud [citation], to quash service of summons [citations], to set aside a default or judgment pursuant to Code of Civil Procedure section 473 or for lack of jurisdiction [citations]; to satisfy judgment and quash a writ of execution [citation], to confirm an arbitration award [citation], for an injunction or for a change of venue [citation], and to establish compliance with a judgment's condition precedent to secure a writ of execution pursuant to its terms [citation]."

Another example appears in *In re Marriage of Brown & Yana, supra,* 37 Cal.4th at page 962, where this court ruled that an evidentiary hearing on child custody in a "move-away" case "should be held only if necessary. . . . [A] trial court may deny the noncustodial parent's request to modify custody based on the relocation without holding an evidentiary hearing to take oral evidence if the noncustodial parent's allegation or showing of detriment to the child is insubstantial in light of all the circumstances presented in the case, or is otherwise legally insufficient to warrant relief." A determination that a showing of detriment is "insubstantial" (*ibid.*) is a determination of a controverted fact, yet *Brown & Yana* permits that determination on declarations.

If this court were to rule that the hearsay rule always precludes the use of declarations to prove controverted facts, the result would be to overrule (whether expressly or sub silentio) myriad California precedents – including *Reifler*, the authorities cited therein, and even the year-old case of *Brown & Yana* – thus wreaking havoc with well-settled California law.

II.
FACTUAL DETERMINATION ON DECLARATIONS IN FAMILY LAW CASES IS CONSISTENT WITH THE *FEWEL*, *LACRABERE*, AND *PAJARO VALLEY* OPINIONS.

A. Justice Traynor's concurring opinion in *Fewel* disapproved the determination of contested factual issues on declarations when, unlike here, the declarant is not subject to cross-examination.

The respondent superior court's former local rule, trial scheduling order, and current local rule are also consistent with the three opinions cited in this court's order of April 25, 2007.

In *Fewel v. Fewel, supra,* 23 Cal.2d at page 433, the court found error where, in a proceeding to modify child custody, the trial court refused to consider affidavits filed by the plaintiff and instead merely approved a recommendation by a court investigator. Justice Traynor concurred in the result but wrote separately to say: "I think it should be made clear, however, that an affidavit may not be used as evidence in cases of this kind," where the result would be a decision of substantive contested issues "on the basis of written statements of parties not before the court and therefore *not subject to cross-examination.*" (*Id.* at p. 438, italics added (conc. opn. of Traynor, J.).)

Here, in contrast to *Fewel*, declarants *are* subject to cross-examination. The former local rule provided for submission of declarations "[s]ubject to legal objection, amendment, and cross-examination." (Super. Ct. Contra Costa County, Local Rules, former rule 12.5(b)(3).) The trial scheduling order states that declarations are "subject to cross-examination." (Appellant's Appendix for Writ of Mandate or Prohibition, Tab 2, ¶ 1.) The current local rule continues to provide for cross-examination of declarants and adds that "[a]ny party may present live direct testimony in addition to but not in lieu of a declaration." (Super. Ct. Contra Costa County, Local Rules, rule 12.8(F)(1)(a) & 12.8(F)(2)(a).)

This availability of cross-examination addresses Justice Traynor's concerns in *Fewel*, where he disapproved the determination of contested issues on affidavits because the affiants were "not before the court and therefore not subject to cross-examination." (*Fewel v. Fewel, supra,* 23 Cal.2d at p. 438.) The availability of cross-examination here makes the respondent superior court's local rule and trial scheduling order consistent with the concurring opinion in *Fewel.*

B. *Lacrabere's* disapproval of factual determination on declarations was similarly premised on the absence of an opportunity to cross-examine.

The same point about *Fewel* is true for *Lacrabere v. Wise, supra,* 141 Cal. at page 556, which said that Code of Civil Procedure section 2009, allowing motions to be decided on affidavits, "applies only to matters of procedure, – matters collateral, ancillary, or incidental to an action or proceeding . . . ." Here again, the *Lacrabere* decision rested on the absence of an opportunity for cross-examination: "The rule is, that the best evidence must be produced which the nature of the transaction will permit; the testimony of witnesses given in open court *where the adverse party may have an opportunity of cross-examination.*" (*Lacrabere*, at p. 556, italics added.) That opportunity is presented here, which makes the respondent superior court's procedure consistent with *Lacrabere.*

C. *Pajaro Valley* does not say – nor could it – that there are no decisional-law exceptions to the hearsay rule.

The opinion in *Pajaro Valley Water Management Agency v. McGrath, supra,* 128 Cal.App.4th at page 1107, merely states that "in the situations specified by statute, *otherwise admissible* testimony may be given by declaration, provided it is *under oath*." (*Ibid.*, original italics.) The court did not say that testimony may be given by declaration *only* in statutorily-specified situations. Such a statement would have been incorrect, given the Evidence Code's recognition of decisional-law exceptions to the hearsay rule. Nothing about *Pajaro Valley* is inconsistent with the procedure at issue here.

III.
FOR SOUND POLICY REASONS, THIS COURT SHOULD ADHERE TO THE HEARSAY EXCEPTION FOR DECLARATIONS IN FAMILY LAW PROCEEDINGS SUBJECT TO THE RIGHT OF CROSS-EXAMINATION.

Plainly, the California courts may "create, or recognize, [a hearsay] exception not specifically set forth in the statutes." (*Houghtaling v. Superior Court, supra,* 17 Cal.App.4th at p. 1134.) Thus, in the present case, this court *may* continue California's recognition of the existing decisional-law exception for written evidence in equity-based family law proceedings. The pivotal question is whether this court *should* do so or should *change* the existing law. This is a matter of policy which the Legislature has not addressed and thus is appropriate for judicial determination. (See Traynor, *Some Open Questions on the Work of State Appellate Courts* (1957) 24 U.Chi.L.Rev. 211, 219 [in "an area not covered by legislation . . . policy is often an appropriate and even a basic consideration" for the courts].) And the answer is *no*. As a matter of policy, this court should *not* change the existing law.

The respondent superior court's return to the writ petition fully explains why the court's procedure for use of declarations in family law proceedings is sound policy: It reduces delay in getting family law cases to trial, limits the occasions for adversarial confrontation between estranged spouses, assists self-represented litigants by helping to guide them through preparation for trial, avoids surprise, and encourages settlement. (See Respondent's Return, at pp. 27-31.)

In addition to these policy considerations, which are extrinsic to the procedure itself, there is an overarching consideration which is *intrinsic* to the procedure: By affording the

right of cross-examination, the procedure includes the assurance of *trustworthiness* that underlies most exceptions to the hearsay rule.

"'The chief reasons for excluding hearsay evidence are said to be: (a) The statements are not made under *oath*; (b) the adverse party has *no opportunity to cross-examine* the person who made them; and (c) the jury cannot observe his *demeanor* while making them.'" (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523, quoting 1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 558, p. 533, original italics.) "The essence of the hearsay rule is that the witness is not in court and subject to cross-examination and is not available for the jury to judge his credibility." (*People v. Bob* (1946) 29 Cal.2d 321, 325.)

In the present case, all three guarantees of trustworthiness are present: Written evidence is submitted by declaration under *oath*; the adverse party may *cross-examine* the declarant; and by virtue of such cross-examination the judge can observe the declarant's *demeanor* while testifying.

For these very reasons, the federal courts have rejected hearsay objections in cases proceeding under the federal rules allowing proof by declaration. In one case, the Ninth Circuit explained that "[t]he opposing witness can still be cross-examined . . . and the court can assess his demeanor during that cross-examination. . . . [¶] The pretrial order permitted oral cross-examination. It therefore 'preserve[d] an opportunity for the judge to evaluate the declarant's demeanor and credibility.'" (*In re Gergely* (9th Cir. 1997) 110 F.3d 1448, 1452, quoting *In re Adair* (9th Cir. 1992) 965 F.2d 777, 779.)

In another case, the judge explained that the declarant "can take the stand in open court, be placed under oath, and then adopt the declaration or affidavit as his or her direct testimony. The witness would then be subject to live cross-examination and redirect examination. Under these circumstances, no hearsay would be involved, as the statement would not have been made 'out-of-court.' . . . Declarations prepared pursuant to this court's Declarations Procedure have circumstantial guarantees of trustworthiness, especially because the declarants are subject to live cross-examination." (*Kuntz v. Sea Eagle Diving Adventures Corp.* (D. Haw. 2001) 199 F.R.D. 665, 668.)

Here, too, the opportunity to cross-examine declarants assures trustworthiness. This case, therefore, presents one of those situations where it is "appropriate for courts to create hearsay exceptions for classes of evidence for which there is a substantial need, and which possess an *intrinsic reliability* that enable them to surmount constitutional and other

objections that generally apply to hearsay evidence." (*In re Cindy L., supra,* 17 Cal.4th at p. 28, italics added.)

IV.
UNDER THE NEW LOCAL RULE, ANY HEARSAY ERROR WOULD ALWAYS BE HARMLESS AS CURABLE BY LIVE TESTIMONY AND WAIVED BY FAILURE TO REQUEST THE CURE.

Finally, we point out that any hearsay error in the admission of a declaration would always be harmless under the respondent superior court's *new* local rule because it permits any party to present live direct testimony in addition to the declaration (Super. Ct. Contra Costa County, Local Rules, rule 12.8(F)(1)(a)), which makes such error curable. Absent a request to present live direct testimony (as in the present case, where petitioner Jeffrey Elkins neither asserted a hearsay objection to proof by declaration nor asked to be allowed to present live direct testimony), the error would be waived by failure to request the cure. (Cf. *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794 [attorney misconduct waived by failure to request curative admonition].)

Respectfully submitted,

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By _____
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Attorneys for Respondent
SUPERIOR COURT OF CONTRA COSTA COUNTY

cc: See attached proof of service

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Millie Gandola**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **May 10, 2007**, I served the within document entitled: **LETTER TO SUPREME COURT** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **May 10, 2007**, at Encino, California.

Millie Gandola

Millie Gandola