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ERICA WILLIAMS, PARALEGAL

May 11, 2007

Honorable Chief Justice and Associate Justices
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: Elkins v. Superior Court, Supreme Court Case No. S139073
Real Party In Interest's Letter Brief Addressing Hearsay Question Set Out In Order Filed April 25, 2007

Honorable Justices:

Pursuant to this Court's April 25 order, Real Party in Interest Marilyn Elkins submits this opening letter brief regarding the question of whether the Contra Costa County Superior Court's prior local rule, the trial scheduling order in the present case, and the court's current local rule are consistent with the hearsay rule to the extent they call for the introduction of declarations into evidence at trial in a marital dissolution action.

Introduction

Contra Costa Local Rule 12.5 and the trial scheduling order (TSO) in the present case call for the introduction of declarations into evidence at trial in a marital dissolution action only as a form of direct examination subject to legal objection and cross-examination of the declarant. The Rule and TSO are consistent with the hearsay rule as stated in Evidence Code §1200, construed in conjunction with related Code of Civil Procedure statutes, because sworn declarations of witnesses present at the trial and available for cross-examination are not hearsay within the meaning of the statute.[1] They are also consistent with the cases enumerated by the Court in its order as those cases concerned written statements of persons not subject to cross-examination, whereas by rule and order here only declarations subject to cross-examination are admissible as evidence.

Were the Court nonetheless to find that even sworn declarations explicitly subject to legal objection and cross-examination constitute hearsay, this would not require, or even support, reversal in the instant

[1] New Contra Costa Local Rule 12.8 was not effective until January 1, 2007, some 15 months after entry of the order after trial at issue in the present proceeding. To the extent that its terms differ from those of Rule 12.5, it had no impact on the order at issue herein. Consequently, Real Party will not address it separately from Rule 12.5. Further, Real Party is operating under the understanding that the Court is addressing the question of whether a declaration is itself consistent with the hearsay rule by assuming for purposes of this question that the declaration does not contain any references to the statements of others within it.

matter as Petitioner failed to object below, or here, on this ground and has failed to establish prejudice. Finally, were the Court to hold on hearsay grounds that direct testimony in trials must be by oral examination, Real Party submits that there is no principled reason not to apply the same rule to the majority of family law motions, both before and after entry of judgment, which concern fundamental substantive issues in controversy rather than incidental procedural matters.

Declarations Under Oath of Parties or Others Who Are Present At Trial and Available for Cross-Examination Do Not Constitute Hearsay Evidence Within the Meaning of Evidence Code §1200

Over 90 years prior to the codification of the hearsay rule in Evidence Code §1200, the Legislature defined two key words—*witness* and *testimony*—as embracing declarations under oath. Code of Civil Procedure §1878, enacted in 1872, defines *witness* as "a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." Code of Civil Procedure §2002, also enacted in 1872, defines how *testimony* may be taken, providing that "[t]the testimony of witnesses is taken in three modes: [1.] By affidavit; [2.] By deposition; [3.] By oral examination." Thus this Court in *In re Estate of Bell* (1910) 157 Cal. 528, 531 held that it was an "elementary rule" that "[t]he credibility of the

witnesses, whether testifying orally or by affidavit, is for the trial court" (emphasis added). Under simultaneously enacted Code of Civil Procedure §2003, "affidavit" is defined as "a written declaration under oath." In 1957, the Legislature added Code of Civil Procedure §2015.5, which makes declarations under penalty of perjury the evidentiary equivalent of affidavits or declarations under oath.

Thus, when in 1965 the Legislature codified the hearsay rule in Evidence Code §1200, and defined inadmissible hearsay evidence as a statement that is offered to prove the truth of the matter stated if "made other than by a witness while testifying at the hearing," its definition incorporated already-defined terms. Since under the existing statutes an unsworn statement did not constitute testimony, and the maker of the statement did not qualify as a witness, such a statement became hearsay evidence under Evidence Code §1200 by virtue of being "other than by a witness while testifying."

In contrast, at the time Evidence Code §1200 was enacted, the maker of a declaration under penalty of perjury qualified statutorily as a witness who is testifying by declaration. Thus the question regarding whether a declaration constitutes hearsay under Evidence Code §1200 turns on whether that declarant—that *witness*—is testifying "at the hearing" in the sense that he or she is present and available for cross-examination. If he or

she is present and available, the sworn written testimony is not hearsay. If he or she is not, it is hearsay.[2]

This construction of Evidence Code §1200 is bolstered by the fact that the Legislature chose not to incorporate the equally established term, *oral examination,* into its definition of hearsay evidence. Code of Civil Procedure §2005, enacted in 1872, defines *oral examination* as follows: "An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness." Had the Legislature intended the phrase "testifying at the hearing" to mean testimony actually given orally at the hearing, it could easily have done so by defining hearsay as a statement made other than by a witness while testifying by oral examination at the hearing. That it chose not to incorporate this term supports interpreting the phrase "testifying at the hearing" to mean being present at the hearing and testifying in any one of the three modes approved in Code of Civil Procedure §2002.

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[2] The maker of a hearsay statement is sometimes called a "declarant," and that person's statement sometimes called a "declaration" in both the case law and the statutory law in this area. This type of declaration, and this type of declarant, is to be distinguished from a person who makes a written declaration under penalty of perjury, which under Code of Civil Procedure §2015.5 is the equivalent of a sworn affidavit. When in this brief Real Party uses the terms "declaration" and "declarant," she is referring to the latter meanings.

This interpretation of Evidence Code §1200 is also consistent with the primary purpose of the hearsay rule, which is to exclude statements of persons not before the court, unless such statements fall within an exception, because the makers of such statements cannot be cross-examined. Thus the legislative comment accompanying the statute cites two earlier cases as embodying the hearsay rule. West's Ann. Cal.Evid. Code §1200. The first is *Kilburn v. Ritchie* (1852) 2 Cal. 145, which involved a form of the party admission exception. The second is *People v. Bob* (1946) 29 Cal.2d 321, in which this Court succinctly stated the core rationale underlying the hearsay rule as follows: "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" (emphasis added). *People v. Bob* at 325. More recently this Court, in the context of discussing nonstatutory exceptions to the hearsay rule, recognized "the venerable policy against admitting declarations by witnesses who cannot be cross-examined." *People v. Demetrulias* (2006) 39 Cal.4th 1, 27.

According to Witkin, the modern approach to the hearsay rule emphasizes "the absence of opportunity for cross-examination of the declarant [meaning the maker of the statement], to expose dishonest and faulty perception or memory" as not only the justification for the rule but

also as a way of determining whether it applies at all. 1 Witkin, California Evidence (4th ed.), Hearsay §1, p. 680. Addressing affidavits specifically, Witkin characterizes an affidavit as hearsay in terms of the affiant not being present to be cross-examined: "[A]n affidavit is not competent evidence; though made under oath, it is hearsay because there has been no opportunity to cross-examine the affiant." 1 Witkin, California Evidence (4th ed.), Hearsay §297, p. 1006 (citing *Fewel v. Fewel* (1943) 23 Cal.2d 431 among other cases).[3]

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[3] See also *Jones v. Duchow* (1890) 87 Cal. 109, 113 (holding a letter to be inadmissible hearsay on the grounds that it was an "*ex parte* written statement of witnesses, not under oath or affirmation, and not in the presence and subject to the examination of all the parties to the action who chose to attend"); *People v. Gould* (1960) 54 Cal.2d 621, 626 -627 ("the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination"); *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608 ("Largely because the declarant is absent and unavailable for cross-examination under oath, hearsay evidence is less reliable than live testimony"); *San Francisco Teaming Co. v. Gray (1909)* 11 Cal.App. 314, 317-318 ("The exclusion of hearsay evidence is based upon the principle that every litigant who comes into a court of justice has a clear right to have the witness against him brought into court face to face, so that he may be tested by cross-examination as to every fact concerning which he has given evidence. It has been said that a person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities. He entrenches himself in his simple assertion that he was told so and so, and leaves the burden upon his dead or absent author"); *Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 585 ("The essence of the hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination. (Wigmore on Evidence 3d ed., vol. V, p. 7.) The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a

The Local Rule and TSO Are Consistent with Evidence Code §1200 As So Construed

Contra Costa County Local Rule 12.5 provides that all declarations shall be considered received in evidence "[s]ubject to legal objection, amendment, and cross-examination." The TSO similarly provides that "[u]nless otherwise approved in advance by the court," direct testimony will be by filed declaration "subject to cross-examination." If a declaration is to be considered as evidence only subject to cross-examination, it follows that under this Rule and this TSO, declarations that are not subject to cross-examination because the declarant is not present at trial will not be received into evidence. This is consistent with Evidence Code §1200, which makes testimony by written declaration admissible because not hearsay if the declarant is present "at the hearing."[4]

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witness, may be best brought to light and exposed by the test of cross-examination").

[4] As Real Party noted in her Return By Answer (at p. 16, footnote 1), the later provision in Rule 12.5 that the court may decide issues based on the pleadings without live testimony appears to apply only where the parties choose not to cross-examine declarants, since the initial sentence of the Rule expressly makes declarations subject to cross-examination. This construction is consistent with general principles of waiver, for a party can hardly complain about the asserted unreliability of a statement when he could have, but chose not to, cross-examine the maker of that statement.

This Construction of Evidence Code §1200 And Local Rule 12.5 and the TSO Are Consistent With the Cases Cited in the Court's April 25, 2007 Order for Letter Briefs

This construction of Evidence Code §1200, and the local rule and TSO, are not inconsistent with the cases cited in this Court's order, because these cases characterized written statements as hearsay only in the context of the declarant not being before the court and therefore not subject to cross-examination.

In *Fewel v. Fewel* (1943) 23 Cal.2d 431, 438 Justice Traynor treated a post-judgment custody proceeding as the equivalent of a trial on contested issues. Justice Traynor concurred in the result reached by the majority but wrote to make clear his opinion that judgment could not properly be based on "written statements of parties not before the court and therefore not subject to cross-examination" (emphasis added). Here, as noted, the local rule and TSO specifically provide that declarations in lieu of direct testimony are subject to cross-examination; consequently, such declarations will only be entered into evidence where the declarants are before the court.

Similarly, the court in *Lacrabere v. Wise* (1904) 141 Cal. 554, 556-557, an unlawful detainer action, likened affidavits of service regarding a required three-day notice to hearsay evidence because such affidavits were not "the testimony of witnesses given in open court, where the adverse

party may have an opportunity of cross-examination." Although the decision does not explicitly say that the affiants were not at the trial, this seems an inescapable conclusion in light of the lack of opportunity for cross-examination.

In *Pajaro Valley Water Management Agency v. McGrath* (2205) 128 Cal.App.4th 1093, the lower court entered summary adjudication and judgment on the issue of damages based solely on a declaration by the water management agency's manager, which in turn was based on an attached recapitulation of bills that were not before the court. The *Pajaro* court began its analysis by noting that the manager's declaration was itself hearsay that was admissible only because Code of Civil Procedure §437c, which provides that summary adjudication motions are decided on declarations, constituted an implicit exception to the hearsay rule. *Id.* at 1107. But this holding was made in the context of a statute that expressly limits the evidence to pleadings, denying any form of oral examination including cross-examination. See Code of Civil Procedure §437c(c); 6 Witkin, California Procedure (4th Ed) Proceedings Without Trial, §212 (c), p. 623-624. In contrast, Rule 12.5 and the TSO condition the receipt of declarations as evidence on their being subject to cross-examination and are therefore not inconsistent with the holding in *Pajaro*.

California's Definition of Hearsay Differs From That Construed in *In re Adair*

Although ultimately upholding the direct-by-declaration procedure against an objection that a declaration constituted inadmissible hearsay, the court in *In re Adair* (9th Cir. 1992) 965 Fed.2d 777, 780 found initially that under federal rules of evidence, declarations subject to cross-examination fell "literally" within the federal hearsay rule as enunciated in Rule 801(c) of the Federal Rules of Evidence. Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Because there is no analogous federal statute to either Code of Civil Procedure §1878 or §2002, because the federal rule uses the word "declarant," defined as "a person who makes a statement" (Rule 801(b)), rather than "witness" in its definition of hearsay, and because testimony in federal trials is governed by a statute requiring oral testimony for which there is no California counterpart, the two definitions of "hearsay" are subject to different constructions.

Rule 43 of the Federal Rules of Civil Procedure expressly limits the permissible mode of taking testimony at trial to oral examination in open court. Thus subdivision (a) of Rule 43 provides, in pertinent part, that "[i]n every trial, the testimony of witnesses shall be taken in open court, unless a

federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise." In contrast, California's procedural statutes define a declarant under penalty of perjury as a witness, and define testimony by affidavit, by deposition, and by oral examination in open court as equally permissible modes of taking testimony. [5]

It is in light of these different statutes that the *Adair* court concluded that the declarations at issue therein, which had been presented at trial, fell within the federal hearsay rule. *In re Adair* (9th Cir. 1992) 965 Fed.2d, *supra* at 778-780. This is so because in federal court, to determine if a given statement is hearsay, one must first determine if the statement is being made "by the declarant while testifying at the trial or hearing." Since Rule 43 provides that testimony at trial may only be by oral examination, it follows that a statement in a written declaration could not qualify as testimony within the meaning of Rule 801(c). Hence, under the federal definition, a written declaration entered into evidence at trial is technically hearsay, even if the declaration was made under penalty of perjury and even if the declarant is present and available for cross-examination, while in California it is not.

[5] As earlier noted, California uses the term "oral examination" when referring to testimony taken in open court (Code of Civ. Proc, §2005), a term our Legislature did not employ in Evidence Code §1200.

Were This Court To Conclude That Declarations Subject To Cross-Examination of Witnesses Present At Trial Constitute Hearsay, This Would Not Provide Grounds for Reversal Here Because Petitioner Never Objected Below on Hearsay Grounds Nor Established Prejudice in This Court

Should this Court nonetheless conclude that declarations under penalty of perjury subject to cross-examination are hearsay, this conclusion would not support a reversal of the judgment in the present matter. Petitioner never objected below to the entry into evidence of his own or Real Party's declaration on any ground, much less on the ground of hearsay. Nor did Petitioner object to the provisions in Local Rule 12.5 or the TSO requiring direct by declaration subject to cross-examination on the ground that they call for the introduction into evidence of declarations which are hearsay.

Evidence Code §353(a) absolutely requires that the record must disclose an objection to the admission of evidence as a prerequisite for setting aside or reversing a judgment based on the ground of the erroneous admission of evidence. Although Petitioner voluntarily withdrew his own declaration from evidence, and voluntarily rescinded his request to cross-examine Real Party, he never objected to the admission into evidence of Real Party's declaration on the ground of hearsay or on any other ground. Further, it is well-settled that absent an objection, hearsay evidence is

competent to support a judgment. *Flood v. Simpson* (1975) 45 Cal.App.3d 644, 649. For these reasons alone, even if this Court were to conclude that Real Party's declaration constituted hearsay, the judgment herein could not be reversed on this ground.

The gravamen of Petitioner's challenge is not that the local rule and TSO provided for the admission of his own or Real Party's declarations but rather that they limited his own direct examination to such declarations except in unusual circumstances (which Petitioner never asserted below) or with prior approval of the court (which Petitioner never sought below). Petitioner's challenge is, by its nature, not grounded on any contention that Petitioner's own declaration is hearsay. Indeed, as the court in *In re Adair* noted, it is questionable that a party even has standing to raise a hearsay objection to his own declaration. *In re Adair* (9th Cir. 1992) 965 Fed.2d, *supra* at 780. Such lack of standing is even more acute here, where Petitioner not only failed to raise a hearsay objection below but also (unlike the appellant in *In re Adair*) failed to raise such an objection in the Court of Appeal or in this Court.

For many of the same reasons, Petitioner cannot establish that any error in admitting Real Party's declaration into evidence was prejudicial as required by Evidence Code §353(b), California Constitution, Art. VI, §13, and Code of Civil Procedure §475. See also *In re Adair, supra* at 780.

Petitioner's claim of prejudice is directed to his assertion (strongly contested by Real Party) that he was deprived of presenting evidence additional to his declaration at trial. He certainly is in no position to contend that the court below erred by admitting Real Party's declaration and not his when it was Petitioner himself who withdrew his declaration from evidence even as the trial judge was in the process of admitting it. RT 16:2-22.

For all of these reasons, whatever guidance this Court may wish to give regarding whether or not declarations filed subject to cross-examination are consistent with the hearsay rule, the judgment in this particular case should be affirmed.

Declarations Regarding Fundamental Substantive Issues in Controversy Should Be Accorded the Same Treatment in Family Law Trials and Motion Proceedings

As noted above, Justice Traynor's concurrence in *Fewel v. Fewel, supra* is not applicable here, where the declarations were explicitly subject to cross-examination and the declarants were before the court. Further, Justice Traynor's *Fewel* concurrence limits the implicit hearsay exception of Code of Civil Procedure §2009 for declarations not subject to cross-examination to procedural motions. If this Court were to expand the definition of hearsay to include even declarations subject to cross-examination, it must consider the ramifications for family law motion

proceedings. Consistent with *Fewel,* Code of Civil Procedure §2009 would not extend to such declarations in the many family law motion proceedings that concern fundamental substantive issues in controversy rather than incidental procedural matters.

Fewel v. Fewel involved a post-judgment motion for an order to modify custody of two minor children of the parties. *Fewel v. Fewel, supra* 23 Cal.2d at 433. In his concurring opinion, Justice Traynor held that Code of Civil Procedure §2009 functioned as an implicit hearsay exception embracing affidavits not subject to cross-examination only as to motions concerned with "an incidental procedural matter" but not as to motions, like the one at issue therein, which raise "fundamental substantive issues in controversy" and which result in an order that is "in effect a judgment on the merits." *Fewel* at 438.

The great majority of family law motions, both before and after judgment, fall into the latter category. Pretrial temporary custody, child support, and spousal support motions address what are often the chief fundamental substantive issues in controversy, especially in a small asset case. Orders on such motions are effective until trial or a later motion on change of circumstances, and are often in effect for a significant duration, even years. Family Law Code §§3601-3603; Hogoboom & King, Cal. Prac. Guide: Family Law (Rutter, 2006), ¶¶5:107-5.109.1, 5:142.10-5:143,

5:173-5:174. In the case of a short-term marriage, for example, the temporary spousal support order may be of much longer duration than the permanent support award rendered after trial, especially if trial has been delayed as a result of party delay, overcrowded trial calendars, or discovery proceedings on other issues.

Orders for child support, spousal support, and attorney's fees pending trial are all independently appealable and therefore are in effect a judgment on the merits. *In re Marriage of Skelley* (1976) 18 Cal.3d 365. Although the court in *Lester v. Lennane* (2000) 84 Cal.App.4th 536 held that pretrial custody orders are not independently appealable, in doing so the court explicitly found that the temporary custody order at issue therein "went to the only disputed issue in the case," and was of enormous importance. *Lester v. Lennane, supra* 84 Cal.App.4th at 564-565.

As *Fewel v. Fewel, supra* and *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479 illustrate, post-judgment orders for modification of child custody, child support, spousal support, and attorney's fees are also independently appealable and likewise constitute "in effect judgments on the merits."

The court in *Reifler v. Superior Court*, although not directly addressing whether declarations filed in post-judgment family law motion proceedings constituted hearsay, held that Code of Civil Procedure §2009

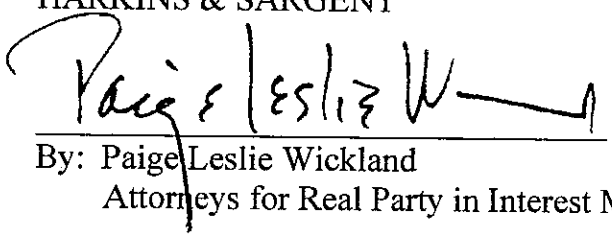
gave the court discretion to decide post-judgment motions on declarations alone, without cross-examination. *Reifler v. Superior Court, supra* 39 Cal.App.3d at 482-485. Among the motions before the court in *Reifler* were former husband's motion to terminate spousal support and to reduce child support and former wife's motion to increase both spousal and child support and for attorney's fees. In construing Code of Civil Procedure §2009 to apply to these motions, the court relied exclusively on earlier cases that had applied Code of Civil Procedure §2009 only in the context of procedural motions. (See *Reifler v. Superior Court, supra* 39 Cal.App.3d at 484 for the court's characterization of the procedural motions in the cases on which it was relying.) Further, the court characterized the support termination, support modification, and attorney fee motions as "pertain[ing] to directions after judgment," apparently under the mistaken belief that this made them "procedural."

Real Party submits that pre-judgment motions for support and custody pending trial and post-judgment motions to modify child and spousal support are no more "procedural" than was the post-judgment motion to modify custody at issue in *Fewel v. Fewel,* and that *Reifler* is in conflict with Justice Traynor's concurrence in *Fewel.* Consistent with Justice Traynor's concurrence in *Fewel,* whatever procedure for purposes of the hearsay rule this Court approves for family law trials regarding direct

by declaration must also be used for family law motion proceedings regarding substantive factual disputes, whether pre- or post-judgment.

Respectfully submitted,

FANCHER & WICKLAND
HARKINS & SARGENT



By: Paige Leslie Wickland
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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 May 11, 2007, I served the foregoing document entitled **Real Party In Interest's Letter Brief** 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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☒ **VIA UNITED STATES POSTAL SERVICE.** I placed the above-described sealed envelope for collection and mailing by following ordinary practices for collecting and processing of correspondence for mailing, said practice being that, in the ordinary course of business, correspondence (with postage thereon fully prepaid) is deposited in the United States Postal Service the same day it is placed for collection. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for delivery by mail.

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 11, 2006 at San Francisco, California.

Emily Loeschinger

Emily Loeschinger