Case Law Update

22nd Annual AB 1058 Child Support Training Conference

November 13-16, 2018

Hon. Pennie McLaughlin
Patricia Rich
John Sang

IRMO Connolly 20 Cal.App.5th 395

UIFSA

Fact Pattern

- California court orders father to pay child support. H moves to Utah where mother and child reside. Utah court enters judgment determining arrears but does not include interest. Utah policy is not to include interest on out-of-state order unless already ordered as a lump sum or the other state provides the amount. Father moves back to CA where mother files motion to add interest to arrears.
- Add Interest?

A. Yes

B. No

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Trial Court Holding

- Denied motion to terminate jurisdiction.
- Added interest.
- Utah judgment was not an out-of-state judgment; only clarification of Cal. judgment.

UIFSA
(Fam. C. 5700.101 – 5700.905)

- Section 5700.211 continuing, exclusive jurisdiction over spousal support.
- Section 5700.205 Continuing, exclusive jurisdiction over child support.

UIFSA cont…

- "Child-support order" means a support order for a child. FC §5700.102 (2)
- "Support order" means a judgment, decree, order, …issued in a state …for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. FC §5700.102 (28)

Holding

T/CT erred by modifying final Utah money judgment on arrearages to add interest where the issue of interest was not litigated in Utah and Utah law re: interest differs from California's law.

Holding

- Utah judgment of arrears **was not "child support order"**
- Utah judgment **was final judgment** as to arrears as of particular date
- Utah judgment, was res judicata as to W's request for addition of interest.
- UIFSA does not determine jurisdiction over SS orders.

Cima-Sorci v. Sorci (2017) 17 Cal.App.5th 875

UIFSA

Facts

- Married in Italy Sept. 2007
- Son born December 2007
- July 2009 move to California
- Nov. 2009 Mother & son back to Italy → Filed divorce

Facts

- Feb. 2010 Italian court temporary support order
  - Sacramento DCSS began enforcement
- 2013 Italy confirmed support order.
- DCSS filed Notice of Registration of Out-of-State Support Order.

Facts

- Father contested registration
  - Burden on DCSS to prove Italy is "state" under UIFSA
- DCSS – burden on Father to prove one of 7 allowed defenses under former Sect. 4956(a) (current Sect. 5700.607).

Who has the burden of proof?

A. Father

B. Registering party

C. Both

"State" defined [§4901(s)(2)]

- Definition of "state" includes "a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under [UIFSA]."

Section 4956(a) Defenses

- (1) The issuing tribunal lacked personal jurisdiction over the contesting party.
- (2) The order was obtained by fraud.
- (3) The order has been vacated, suspended, or modified by a later order.
- (4) The issuing tribunal has stayed the order pending appeal.

Section 4956(a) Defenses

- (5) There is a defense under the law of this state to the remedy sought.
- (6) Full or partial payment has been made.
- (7) The statute of limitation under Section 4953 precludes enforcement of some or all of the arrearages."

Affirmed

- Father's objection to registration falls under the seven defenses.
- He had the burden of proof but failed to meet the burden.

Current UIFSA §5700.101-5700.905

Applies to:

- (1) a foreign support order;
- (2) a foreign tribunal; or
- (3) an obligee, obligor, or child residing in a foreign country. [5700.105(a)]

Foreign Orders

- §5700.102(6) **"Foreign support order"** means a support order of a foreign tribunal.
- § 5700.102(7) **"Foreign tribunal"**

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Registration Defenses §5700.607

A party contesting the validity or enforcement of a registered support order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

- (1) the issuing tribunal lacked personal jurisdiction over the contesting party;
- (2) the order was obtained by fraud;
- (3) the order has been vacated, suspended, or modified by a later order;

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Defenses (continued)

- (4) the issuing tribunal has stayed the order pending appeal;
- (5) there is a defense under the law of this state to the remedy sought;
- (6) full or partial payment has been made;
- (7) the statute of limitation under Section 5700.604 precludes enforcement of some or all of the alleged arrearages; or
- (8) the alleged controlling order is not the controlling order.

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IRMO Swain
(2018) 21 Cal.App.5th 830

Evidence

Facts

- Husband is ordered to pay spousal support. Wife agrees she will be self-supporting in one year.
- Several years later H files motion to terminate support.
- W files an Income & Expense Declaration but does not serve H. No opposition and does not appear in court.

You decide

- Can the court consider Wife's Income & Expense Declaration?

A. Yes

B. No

C. It Depends

Background

- Husband & Wife married 1994
- Separated 2005
- No children
- 2007 - Stipulated judgment for dissolution

Background

- H to pay $2,600/mo spousal support.
- W agreed that if not self-supporting by Jan. 2008 she will have earning ability of at least $2,500 per month.

Background

- December 30, 2016 H filed to terminate spousal support.
- W filed an I&E prior to the hearing, but did not serve H.
- No opposition to motion and W did not appear at the hearing.

Trial Court

- Trial court found a material change in circumstances regarding W's income but only reduced the support rather than terminating it.

Holding

- The trial court abused its discretion by failing to terminate spousal support and basing its order for reduced spousal support on Wife's I&E.

Holding

- Wife's I&E was hearsay
  - The court should not have considered the declaration without an opportunity for cross-examination.
- Family Code §217
  - Live testimony

Padron v. Watchtower Bible and Tract Society of New York, Inc. (2017) 16 Cal.App.5th 1246

Discovery Sanctions

Factual Background

- Plaintiff served request for production of documents.
- Defendant objects on the basis of clergy/penitent and attorney/client privileges and 1st Amendment protections.
  - Files motion for protective order
- Court orders defendant to produce documents with limited redactions.
- Defendant refuses.

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You Decide

Which remedy would you order for Defendant's refusal to produce documents?

A. Terminating sanction
B. Prohibit D from opposing any claims related to the unproduced documents.
C. Monetary sanction
D. Contempt sanction

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Trial Court Decision

- Padron filed motion for monetary sanctions.
- Watchtower opposed motion.
- Court imposed sanction
  - $4,000 per day.

Appeal

- Watchtower argued:
  - Court exceeded its authority
  - Exceeded jurisdiction
  - Substantial justification refusing to comply.

Holding

- Affirmed
- Judicial estoppel
  - *Lopez v. Watchtower Bible and Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 201 Cal.Rptr.3d 156
- Superior Court vested with considerable discretion to manage discovery.

Jameson v. Desta (2018) 5 Cal.5th 594

Court Reporter

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You Decide

Is a court's policy of not making an official court reporter available in most civil trials, and permitting a private court reporter to record the proceedings only if a party pays for such a reporter valid as applied to a litigant who is entitled to a fee waiver of official court reporter fees?

A. Yes

B. No

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Facts

- Plaintiff was entitled to a waiver of the court reporter fees but was not provided one because of the court's policy not to make official court reporters available at most civil trials unless the one or both of the parties paid for a private court reporter.
- The defendant chose not to hire a court reporter so there was none at the trial.
- Trial court granted motion of non-suit against plaintiff
- Plaintiff's appeal was rejected due to the fact that there was no transcript.

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Holding

- Policy is invalid
- It impermissibly restricts meaningful access to the judicial process in contradiction to the California in forma pauperis precedents and legislative policies.

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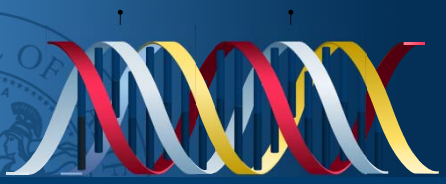
The Subject of DNA—Who's your Daddy?



How Old is Too Old

- Hypothetical
  - 69 year old woman wants to seek a judgment of paternity against her deceased putative father's estate. She seeks only the determination of paternity with no financial gain sought at all.
- Question
  - The court ruled as follows
    - A. Only a minor may seek a determination of parentage
    - B. A person can only seek a determination of parentage if there is some pecuniary interest included
    - C. A person can only seek a determination of parentage while the "parent" is alive
    - D. Anyone can seek a determination of parentage regardless of age or pecuniary interest

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Dent v. Wolf (2017) 15 Cal.App.5th 230

- In 2014, at age 69, Susan Dent sought a determination of paternity under FC section 7630 against her putative father's estate Her father had passed in 1985 and final judgment on his estate was entered in 1993.
- The administrator of the estate moved to dismiss the action as there as no "justiciable controversy" as she was not seeking money or any relief except the determination of parentage.
- The trial court agreed that Ms. Dent lacked standing and dismissed her petition.

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Dent Findings

Age is just a number….

- FC 7630 allow a child to bring a paternity action. There is no age limit or pecuniary interest necessary to seek this finding.
- There are no conditional requirements that the child seek any pecuniary relief as part of their action.
- It is sufficient that she seeks to determine a parent/child relationship between herself and the decedent. "it is the most fundamental right a child possesses" (County of Shasta v. Caruthers (1995) 31 Cal.App.4th 1838, 1849).

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When is Biology NOT Enough?

- Hypothetical
  - Child is conceived while mother is married, but it is determined by DNA that husband is NOT the father. Bio-dad gave child his last name, was in her life, paid for her daycare costs, participated in school activities and birthday parties. Bio-dad would vacation with child occasionally, and would take child to his home. However, not all bio-dad's family knew of the child so any evidence of the child is hidden in his home. Presumed dad was also actively involved in the child's life, caring for her in his home, taking her to dental appointments and having her on his insurance.
- Question
  - Are the above factors enough for a finding of paternity for bio-dad when there exists a marital presumption?

A. Yes

B. No

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W.S v. S.T.(2018) 20 Cal.App.5th 132

- WS sought a determination of parentage as to minor child with ST
  - Mother argued the Marital Presumption. Husband was later joined into the case.
  - The evidence was contradictory as to the full extent of the relationship between the minor and WS. +
  - The trial court found that WS had not received the child into his home under FC 7611 and did not qualify as a presumed parent. Since he was not a parent, he was not entitled to visitation.
  - WS sought appeal on the following issues:
    1. Application of the receiving requirements under FC 7611(d)
    2. Denial of Visitation
    3. Timeliness of Petition
    4. Constitutionality of California's statutory scheme
    5. Existence of Bias

Receipt into the Home

- Affirmed
- FC 7611(d) requires that "[t]he presumed parent receives the child into his or her home and openly holds out the child as his or her natural child."
  - Examination of pre-UPA cases on the issue
    - Richard M. (1975) 14 Cal.3d 783
    - Estate of Peterson (1963) 214 Cal.App.2nd 258
  - Post-UPA cases
    - Kelsey S.

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Kelsey S. 1 Cal.4th 816

- Overruled previous liberal interpretation of pre-UPA cases relative to receipt
  - Different Interests
    - Pre-UPA was to legitimate the child
    - Post-UPA determines paternity without the stigma of illegitimacy
  - Child must be physically received into the home; constructive receipt is not enough.
    - Constructive receipt (attempts to obtain custody when the child is being kept from the parent)
      - Insufficient to meet the "receiving" requirement.
    - FC 7004 violates the federal constitutions guarantees of equal protection for unwed fathers "to the extent that the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more that a showing of the child's best interest".
      - Requires a sufficient and timely demonstration of a full commitment to the father's parental responsibilities.
  - Case was remanded to determine if the biological father was fit or unfit to be a parent by clear and convincing evidence.
  - On Receiving issues, later decisions found that receiving element was met if the "receipt of the child into the home [was] sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship...."

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Post-Kelsey S. cases

- Must show an unambiguous demonstration of a parental relationship.
  - Charisma R. v. Kristina S. (2009) 175 Cal.App.4th 361
    - Actual receipt into the home is unnecessary. Parent attended birth of the child, shared parenting responsibilities for the first 6 weeks and held herself out as the child's parent.
  - Jason P. v. Danielle S. (2017) 9 Cal.App.5th 1000
    - Child stayed in his apartment, took the child to the park, fed and cared for the child, took the child to the doctor, put up a baby gate to avoid injuries; gave the child his own room.
  - S.Y. v. S.B. (2011) 201 Cal.App.4th 1023
    - Same-sex relationship where 2nd mother regularly spent 3-4 nights each week at the child's home and helped care for him, visited him after work. When the 2nd child was born, she continued to visit the children even after separation from the partner.
  - In re A.A. (2003) 114 Cal.App.4th 771
    - No finding when father visited child regularly but never at his home
  - In re Cheyenne B. (2012) 203 Cal.App.4th 1361
    - Receiving element could be satisfied by showing "regular visitation" which included "assumption of parent-type obligations and duties."

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The holding relative to Presumed Parent

- More must be shown than the child was inside the home. The court must consider if the bio-dad had taken on the role of a parent in the child's life.

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Other Issues Decided

- Visitation
  - WS was required show he was a presumed father in order to have rights to visitation
- Constitutionality
  - These arguments were waived by failing to bring them at the trial level
    - Kelsey S. has already decided this issue which includes taking prompt action to assert one's rights which was not done here.
- Timeliness
  - While there is no Statute of Limitation, a parent must act promptly in assuming his parental responsibilities. (prompt action to assert parental rights in court can be considered)
- Bias
  - Cannot be shown merely because the court believes one party over another

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How Many Parents are Too Many?

- Hypothetical
  - Mom gets pregnant. Mom and Bio-dad decide to abort child. Dad takes mom to clinic and leaves. Mom decides not to abort child and child is born. Mom and Step-dad raise child. When child turns 2 mom tells Bio-dad he has a child. Bio-dad returns to state to have relationship with child but after two weeks mom secreted the child away. Bio-dad brought suit claiming to be a Kelsey S. dad. 2012 Court determined that Step-dad is presumed dad and not bio-dad. This was before the law related to a child having 3 parents.
- Question: Should the issue of Collateral Estoppel apply when there is a change in the law subsequent to a decision of the court?
  - A. Yes
  - B. No

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In re M.A. et al., Persons Coming Under the Juvenile Court Law. (2018) 20 Cal.App.5th 899

- Collateral Estoppel requires
  - Identical Issues (identical factual allegations)
  - Actually Litigated (both parties had the right to present a full case)
  - Necessarily Decided (not entirely unnecessary to the judgment)
  - Final Judgment (free from direct attacks)
  - Parties (are the parties to both proceedings the same)

➢ In this case all 5 elements are met and the Appellate Court reversed the Juvenile court's finding of paternity.

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When is Collateral Estoppel not Enough?

- Hypothetical
  - Same facts as before except: Child was placed in Juvenile Dependency Court. Juvenile Court looked at whether bio-dad has a right to visitation of the child despite the fact the bio-dad was determined to NOT be a presumed dad.
- Question
  - The Juvenile court
    - A. Is barred from ordering visitation rights to bio-dad based on the family court ruling
    - B. Can make a determination of paternity in its case despite the family court ruling
    - C. Can make a determination of visitation based upon a determination that the visitation would be "beneficial" to the child
    - D. Cannot make any orders on parentage or visitation based on the family court ruling

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Can there be three parents?

- Family Code 7612
  - Allows for more than 2 parents if the court finds that recognizing only 2 parents would be detrimental to the child.
- Questions before this court
  - What is a Claim to Parentage
    - We interpret FC 7612(c) as meaning that if there are "two or more presumptions," as described in subdivision (b) of Family Code section 7612, and it would be harmful to the child to choose two parents based upon policy and logic, then the law will permit three parents.
  - What does the term "parent" mean within FC 7612
    - Biological mothers (FC 7610(a))
    - Adoptive parents (FC 7610(b))
    - Presumed parents (FC 7611)

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Is Visitation Appropriate when there is no Presumed Parentage

- The Juvenile Court has the ability to grant visitation rights to a biological father if the visits would benefit the child.
- The Juvenile Court can modify a previous order on grounds of changed circumstances and best interest of the minor
  - The change in circumstances must relate to the purpose of the order
  - Why isn't allowing visitation a change to the 2012 finding of non-paternity for bio-dad?
    - The Juvenile Court is entitled to make orders of visitation without findings of paternity as long as the minor child would benefit from the visitation.

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To Sum it All Up

- Bio-dad could not re-litigate the issue of presumed parent as it was barred by collateral estoppel
- Bio-dad would have been a Kelsey S. father had the elements been properly addressed in the Family Law case
- Bio-dad does not qualify as a presumed father under the 3 parent statute
- Bio-dad is entitled to visitation because it was in the minor child's best interest to have someone who loved him be in his life.

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Wait…there is MORE—waxing and Waine-ing

- Hypothetical
  - John is CTO of a newly formed company and his compensation consists of a base salary, an annual bonus and stock options. The value of the stock options exercised was $1 million but the company is doing really well and if his stock options are exercised the clouds are his ceiling.
- Question: Should the stock options be included in CS cal?
  - The Juvenile court

A. Yes, stock options are a form of income immediately when vested

B. Yes, but only when the stock option is exercised and sold

C. Yes, stock options become income once the restrictions on the exercise and sale of the options are removed

D. No, stock options are too speculative to be included in income

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In re Marriage of John and Patricia Macilwaine, A147847 slip op (1st App. Dist. 8/22/18)

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Stock Options and Departures from Guideline Examined

- Facts—John has stock options that make him a very rich man, if he were to exercise them. He sought to have the court cap the amount of support he paid on the basis that the options were not exercised and he was an extraordinarily high income earner and the $28000 he paid per month adequately met the needs of the children.

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Patricia's view

- The stock options are available and are therefore income and there is no evidence to support the claim that John is an extraordinarily high income earner.

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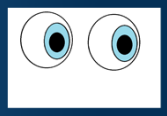
The court's view



- Investment Preference CANNOT affect "income" for purposes of guideline calculations
- The road to support is not changed with good intentions
- The court has no discretion to vary the definition of income under FC section 4058(a)(1) to account for equitable concerns
- In sum….
  - In sum, in determining when stock options become "income" for purposes of section 4058, subdivision (a)(1), the court failed to ascertain the point at which actual compensation was available to John. Instead, it deferred to John's investment priorities and effectively set guideline based upon his desire—rather than his ability—to pay support. On remand, the court shall recalculate guideline support including all "income" that is available to John, including stock options which are vested and mature

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Deviation from Guideline

- The trial court agreed to cap John's income at $2million thereby capping the amount of child support to be paid.
- While there are means to deviate from guideline under section 4057, the trial court's finding that John was an "extraordinary earner" was "infected by legal error"

Insufficient SOD

No appropriate findings

Needs of Children

Legal errors

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Cases from the Tax World

Toddlers and Tiaras

Lopez v. Commissioner of Internal Revenue, T.C. Memo 2017-171 (2017)

Background

*Parents of C.P. incurred several thousands of dollars of expenses for their 9-year old child's beauty pageant competitions.

*C.P. won several events and earned cash prizes totaling $1350 in 2011 and $1850 in 2012.

*The costs to the parents for these same years were $21,732 and $15,445.

You Decide:

Can C.P.'s parents treat their daughter's pageant-related income and expenditures as their own?

A. Yes

B. No

ANSWER: No

Holding:

The awards were income for the child, not the parents, and any expenses paid are assumed to have been paid by the child for tax purposes.

And remember this:

- Best line from the case:
- *"Deductions are a matter of legislative grace . . . ."*

No Good Deed Goes Unpunished

Sharp v. Commissioner of Internal Revenue, T.C. Memo 2017-208 (2017)

Background

Petitioner *Sharp* is the girlfriend of *Griffin*. In 2014, they had custody of Griffin's grandkids for 75% of the year. *Humphrey* signed a temporary guardianship agreement granting temporary custody.

Sharp filed HH and claimed an exemption for each of the two children in 2014, and the accompanying child tax credits.

Unbeknownst to *Sharp*, *Humphrey* claimed the dependency exemption for both kids too.

Additional facts:

In 2014, Sharp spent considerable funds on the children, including:

$1,148 on after school care

$622.81 on clothing

$165.62 for shoes and school expenses

$105 for karate classes

$150 for a whale watching tour

$unknown sums for occasional trips to McDonald's

Still more facts:

The temporary custody agreement, which began in 2013, stated that the kids would return to *Humphrey* on July 16, 2014, but they stayed until August 18, 2014.

Two months later, in October 2014, one of the kids returned to live with *Sharp* and *Griffin* because *Humphrey* was unable to handle him.

(Note: in September 2013, *Humphrey* had asked for the kids back only to return them two days later.)

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Final facts, I promise!

Sharp had lived with *Griffin* in CA for 17 years by 2014 in a "common law" marriage.

Sharp and *Griffin* considered *Griffin's* kids to be *Sharp's* step-children, and the grandkids her step-grandkids.

Humphrey had one of her children for 61 days for the entire 2014 year, or 17%.

Humphrey had her second child for 139 days of 2014, or 38%.

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Who gets the dependency tax benefits and credits for the children?

A. ***Sharp*** because she had a much greater percentage of custody and paid for their needs.

B. ***Humphrey***, because *Sharp* did not meet the relationship requirements for "qualifying children" under the tax code.

C. ***Sharp***, because any other result would be perverse under these circumstances.

D. ***Humphrey***, because the children were not placed as foster children by a court or government agency when they lived with *Sharp*.

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Trick Question, 2 right answers!

Both answers that denied *Sharp* the exemptions are the right answers, B and D.

Holding:

CA does not recognize common law marriage and therefore the children did not meet the "qualifying child" definition, and they were not placed as foster children through a government agency or by court order. Likewise, Sharp could not claim the child or earned income tax credits for the same reasons.

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The cost to Sharp

$7,337 dollars tax deficiency

Her total income for 2014 was $29,764.

(Griffin was self-employed and paid for the electric bills.)

The age-old question: Separated- what filing status?

Knez v. Commissioner of Internal Revenue, T.C. Memo. 2017-205 (2017)

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Background:

In 2014, W, who was separated from H, filed as HH and claimed an earned income tax credit. H filed as Single for that year.

Because W was still married, it was found that she was not entitled to an earned income tax credit without filing jointly with H.

W received a deficiency notice from the IRS. Thereafter, she and H reconciled and they filed a joint return in 2016 for 2014.

Did the IRS have to accept the joint return for 2014?

A. No, it was too late to correct the error when W had already filed as HH and the deficiency notice had already been received.

B. Yes, even though the deficiency notice had gone out, the couple could later file a joint return because W had selected a filing status that was legally impermissible when she selected HH.

The Answer Is . . . .:

B

Holding:

It is true that a married person is only entitled to the earned income tax credit when filing jointly, but if, as here, W files HH, and it is not a permissible filing status, she or both parties can file an amended return with the correct filing status.

The Good News:

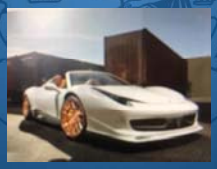
The parties reconciled leading to one less case in our family courts and hopefully a lifetime of happily ever after!

Who does not like a happy ending!

Oh, and they won in the tax court- not an easy feat!

Those Pesky Depreciation Numbers

Marriage of Rodriguez, 23 Cal.App.5th 625 (2018)



Background:

- Robert and Leslie adopted three children during their marriage. For the first few years after separation, the parties agreed that Leslie would have full custody of the children and Robert would not pay any child support.
- Approximately 7 years later, Leslie opened a case with DCSS and a modification motion was calendared.
- After several continuances and a temporary support order, a long hearing was held on June 13, 2016.

Additional Facts:

- Robert was in sole practice as an attorney and sought to deduct depreciation for the car he used for business from his income.
- Robert estimated this amount to be $536 a month, or $6,432 a year.
- Meanwhile, Robert had voluntarily increased his other child support to an unrelated child from $975 a month to $1850 (guideline was **$524**).
- Leslie receives a monthly adoption allowance of $5,847 for their severe special needs children, but explained that the costs to care for the children exceeded this amount.

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Two questions:

1. Should the Court reduce Robert's income by including the depreciation figures for use of the car for business?

   A. Yes

   B. No

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2. Should the Court entertain an upward deviation due to the three children's special needs and Robert's unilateral decision to increase an unrelated child's support from $975 to $1850?

   A. Yes

   B. No

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If you answered no for #1, and yes for #2, you are right!

Holding:

It was proper for the trial court to disallow a reduction to income for the depreciated business asset, as "depreciating an asset does not involve a reduction of cash available for child support." Nor is depreciation required for the operation of a business.

Further, an upward deviation was appropriate given the three children's long term care needs and the fact that Robert unilaterally arranged to pay 3x the guideline in other child support in an unrelated case.

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It is not over yet.

After a year and a half of litigation, Leslie sought to address adult child support at the hearing for the oldest child who was soon turning 18. She had not properly plead for consideration of this issue. She will be filing another motion . . . . .

The deductibility of Attorney Fees and the "Origin of the Claim Test"

- Two recent cases:

Barry v. Commissioner of Internal Revenue, T.C.Memo 2017-237 (2017)

Lucas v. Commissioner of Internal Revenue, T.C. Memo 2018-80 (2018)

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Background:

- *Barry:*
- Barry sued his ex-wife in a breach of contract action for the over-payment of $201,664 in alimony, plus costs and fees. The suit was dismissed as time barred.
- Barry deducted $34,250 in his 2013 tax return as legal fees for the above action. (Barry did not pay his attorney until 2013.)
- IRS denied the deduction and hit Barry with a $5003 deficiency and a penalty of $1,001.

Who was right?

A. Barry

The fees were incurred for "the production of income," and therefore were properly deducted as a business expense.

B. IRS

Under the applicable "origin of the claim" test, there is no "business" origin. Here the fees stemmed from Barry's marital relationship and are not deductible.

No surprise here, IRS wins!

Holding:

The "origin of the claim" test applies: were the expenses (attorney fees) incurred for business or personal reasons? Barry's legal fees are personal expenses because they arose from and related entirely to his marital relationship.

But, what if . . . .

- Suppose the ex-wife brought suit against Barry for unpaid alimony? Would her fees be considered a deductible expense?
  - A. Yes
  - B. No

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The Ex-Wife would win:

- Under IRC section 212, there is a limited exception for divorce related legal fees incurred for the production or collection of unpaid alimony.

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Last (almost) tax case . . . .

- Lucas case background:
- Mr. Lucas and his wife filed for divorce in 2008.
- While the divorce was pending, Husband's investment advisor partnership liquidated and the division of the proceeds received by husband were the subject of a multi-day trial in family court.
- As a result of the litigation, Husband incurred a hefty bill for professional fees.

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Why it became a tax case:

- In 2010, Mr. Lucas deducted $1,337,158 in expenses for the legal and professional fees.
- In 2011, Mr. Lucas deducted $1,644,261 for legal and professional fees, again incurred from issues related to the partnership in the divorce.
- Just for perspective, Husband received $48,723,169 in distributions while the divorce action was pending. Of this amount, the court found that $4.7 million was pre-divorce earnings and a marital asset.

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Final Facts:

- The IRS issued a notice of deficiency to Mr. Lucas for both the 2010 and 2011 deductions for the professional and legal fees noted above.
- The deficiency amount was $1,760,709.

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Who was right?

- **A.**
  - The IRS, because the professional and legal fees were personal expenses, and were not necessary expenses of carrying on a business, nor were they incurred as a result of a profit-seeking endeavor.
- **B.**
  - Mr. Lucas, because he expended these sums for legal and professional fees related to defending a claim for profits earned in his business.

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Another win for the IRS:

The "Origin of the Claim" test:

"Did the claim arise in connection with the taxpayer's profit-seeking activities or personal activities? The Court held that legal expenses paid to defeat claims arising from a marital relationship were personal and non-deductible.

Additional test: "But for . . ."

If the claim could not have existed "but for" the marriage relationship, the legal fees are not deductible, and are personal expenses.

Why this matters in family support cases:

- In determining income, it may be proper to add back in to income amounts deducted for legal and professional fees under the two tests analyzed in Barry and Lucas.

Hot off of the Press:

- Marriage of Morton, 5DCA, No. F073689, Sept 26, 2018
  - In determining income available for support, the Court must add back to income any federal or state tax refunds received when all of the parent's income tax withholdings and estimated income tax payments have been deducted from gross income.

- In the Morton case, Father's income consisted of wages and S corporation income .
- FC 4059: factors to determine a parent's net disposable income
  - Inaccuracy in predictions of proper amount to withhold and what will actually be owed. For example, you can grossly overpay an "estimated" tax owed, and reduce your income significantly only to receive it as a refund later.
  - Accordingly, the Morton case holds that a parent's state and federal income tax refunds must be added back in determining income available for support when a parent's income tax withholdings and estimated tax payments are deducted from his or her gross income.

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The real numbers:

- Tax year 2014 (one of several reviewed):
- F made estimated federal tax payments of $240,000, which exceeded his tax liability by $74,844. For his state taxes, he paid $123,214, which exceeded his tax liability by $19,454.
- F's refunds totaled $94,258 ($40 was applied to a tax penalty), which equaled 112% of his of his reported wages.
- In this case on remand, the trial court had to add back the $94,258 to F's income for 2014.

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F's argument against adding the refunds to his income:

- Claimed he did not own the refunds, the S corporation did.
- Big problem with this position was the lack of any evidence to show that he transferred the refunds to the corporation.
- There was also no evidence of any contractual or legal obligation to transfer the refunds back.

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Y.H. v. M.H., 7-17-18

- The 6-year long wait for the social security decision:
- Father paid support each mo. while awaiting the decision. Eventually, a large lump-sum of $41,384 for derivative benefits was paid to M. F did not owe any arrears and sought credit for the lump-sum payment.
- DCSS argued that he could not receive credit if no arrears existed under FC 4504(b).

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The court's holding:

- FC section 4504(b) permits retroactive child support credit from a lump-sum derivative benefit payment paid to the obligee/custodial parent.

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Additional facts:

- Mother never notified F or DCSS about the lump-sum.
- The on-going derivative benefit was $123 short of F's ongoing cs order.
- M refused to answer F's discovery about the amount she received.
- DCSS believed it could only be credited toward that month's cs, or arrears.

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- DCSS acknowledged that if F had not been current, he would have been entitled to credit toward arrears.
- 4504(b) mandates the credit: "payments made for support to the custodial parent . . . *Shall* be credited toward the amount ordered by the Court to be paid for support by the NCP . . . "
- *The court noted that "DCSS' s interpretation would lead to perverse consequences of encouraging arrears by an obligor who has applied for federal benefits."*

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