CALIFORNIA

Family Law Monthly

November 2017

Volume 2017 • Issue No. 11

HIGHLIGHTS

CHILD CUSTODY

- Mother's Fear for Child's Safety Was Not Complete Defense to Criminal Child Custody Deprivation Charge (see Page 218)

DISCOVERY

- In this month's Point of View, Kathryn Kirkland discusses the explosion of electronically stored information and the issues it poses for the family law practitioner (see Page 216)

NULLITY OF MARRIAGE

- Husband Was Not Estopped from Challenging Validity of Wife's First Divorce (see Page 221)

PARENTAGE ISSUES

- Court Properly Determined that Sperm Donor Was Presumed Father Based on His Established Familial Relationship with Child (see Page 224)

SPOUSAL SUPPORT

- Court Properly Imputed Business Income to Husband Who Transferred Business to Second Wife for No Consideration (see Page 227)
- A complete table of contents appears on the next page.

LexisNexis™
Matthew Bender®

Retirement Benefits

When Equal Division Does Not Yield Equal Income from Retirement Benefits Earned During Marriage: Recognizing and Responding to the Effect of Federal Pre-Emption and Regulation

*By Grace Ganz Blumberg**

This article will initially discuss two provisions of federal law that compromise state marital property distribution of spousal retirement benefits. The first of these provisions, an amendment to the Uniformed Services Former Spouse Protection Act (USFSPA) contained in Section 641 of the National Defense Authorization Act for Fiscal Year 2017 [codified at 10 USC § 1408], intentionally preempts state marital property law. The second provision concerns social security derivative spousal benefits. Although enacted in 1977, it has recently received considerable attention in state divorce courts, notably in the case of *In re Marriage of Peterson* (2016) 243 Cal. App. 4th 923, 197 Cal. Rptr. 3d 588. The article will conclude by considering legislation that California might enact to mitigate unequal receipt of income from retirement benefits earned during marriage, when such inequality

* Grace Ganz Blumberg is Distinguished Professor of Law Emerita at UCLA School of Law, where she continues to teach Community Property annually. She is the author of Community Property in California (7th ed. 2016) and writes the commentary for Blumberg, California Family Code Annotated, published annually by West. She is the author of many articles about marital property law and family law, and was a co-reporter of the American Law Institute's Principles of the Law of Family Dissolution (2002). Since her retirement from full-time teaching, she has been consulting with family law practitioners here and abroad on a variety of community property issues, including California community property law, comparative marital property law, and choice-of-law in marital property law.

entanglement that combined to create a very difficult life for a child. Criminal court is no place for family law and this case proves it. In order to establish his parental rights to a child he did not initially want, J.C. pursued a criminal action against the mother of that child. As a result, V.—a child who was born in Sacramento in September 2008 and who lived in South Korea with her mother until she was 6—ended up in a children's center in Honolulu relying solely on a man who did not speak her language (Korean) but who the adults around her said was her father. Probably the most poignant sentence in the entire case is this one: "With the help of bilingual therapists, V. came to understand that J.C. was her father."

Lawyers and judges will find this case enlightening because it clarifies and potentially narrows the defenses available to parents who withhold custody rights. In my view, this decision is a correct interpretation of the law. And the law needs to be changed: the result in this case demonstrates a hole in the legislation. Nan Hui Jo spent almost six months in jail and will spend three years on probation — even though the first jury was not sure that was a just result and the second (!) jury had a rough time with the application of the law to these facts. I do not believe that jail time is an appropriate sanction in this case.

I looked into the family law case filed in Sacramento County. It turns out there are two cases. The first one was filed in 2008 as a child support case, and parentage was established in that case but no custody orders were made. Custody orders were not considered until October, 2009. The Opinion recites that the father filed a petition for custody in October 2009, but the on-line case file reports that the custody Petition was filed after J.C. filed a parentage action for custody in January 2009. That discrepancy may be important because mother may have been served with the custody petition a full 10 months before any orders were made.

I do not have much sympathy for warring parents who use their children as weapons. Still, the various processes that parents are faced with in our court systems are confusing to the most sophisticated litigant. It is no wonder that this unsophisticated, non-native parent ran afoul of the byzantine requirements of "registering" her address and location with local law enforcement (in the form of the District Attorney) before she moved home to South Korea due to immigration issues after being confronted with the father's violent conduct. If these cases are going to be subject to "prosecutorial discretion," or the lack thereof, there must be some "defense" to offer to a jury that allows an understanding of the complexities of navigating what has turned into a morass of overlapping jurisdiction in custody cases. Once again, it is time for the Legislature to step in and provide consistency.

References: California Family Law Practice and Procedure, 2nd ed., §§ 60.30 (improper self-help measures concerning children, § 142.30 (criminal offenses involving violation of custody or visitation rights)

MARRIAGE

Nullity of Marriage

Husband Was Not Estopped from Challenging Validity of Wife's First Divorce

In re Marriage of Kalinawan
(No. H040921; Ct. App., 6th Dist. 10/6/17)
— Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 872
By Mihara, J. (Elia, Acting P. J., Bamattre-Manoukian, J., concurring).

A court erred in ruling in limine that a husband was estopped from challenging the validity of his wife's previous divorce, when there was no evidence that the husband aided in procuring the divorce decree or that he had full knowledge of the circumstances under which the decree was obtained.

Facts and Procedure. In 1986, Gerry and Minerva married so that Gerry could come to the United States from the Philippines. In April 1991, Gerry filed a verified complaint for dissolution of marriage in Nevada. He declared that he had been a resident of Nevada since 1990. Gerry's ex-wife (and Minerva's sister) Victoria filed an affidavit stating that she was a Nevada resident and had personal knowledge that Gerry was a Nevada resident. Minerva, who was

living in Seattle, submitted to the Nevada court's jurisdiction. Gerry and Minerva were granted a Nevada divorce decree in June 1991.

Minerva and Cesar married in August 1991 and had three children together. They separated in 2005 and Minerva filed a petition for dissolution in 2006. In 2013, Cesar amended his response to request an annulment, claiming that his marriage to Minerva was void because it was bigamous. Cesar alleged that Minerva's 1991 divorce from Gerry was invalid because Gerry had falsely claimed to be a Nevada resident in order to obtain a Nevada divorce.

Minerva made a motion in limine asking the court to dismiss Cesar's request for nullity on the ground that he was estopped and had no standing to challenge her prior divorce, because he relied on that divorce in marrying her. The court granted Minerva's motion and denied Cesar's request for nullity, finding that Cesar was estopped from challenging the validity of the Nevada divorce decree because rather than investigate the circumstances of Minerva's divorce, he accepted the benefits of the purported marriage and raised three children with her during their 14-year marriage. Cesar appealed.

Doctrine of Quasi-Estoppel Inapplicable. In determining that Cesar was estopped from attacking the validity of Minerva's earlier divorce, the trial court relied on *Rediker v. Rediker* (1950) 35 Cal. 2d 796 (*Rediker*), in which the Court held that the defendant husband was estopped from contesting the validity of his previous divorce, even if it was invalid, because "[t]he validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry."

The appeals court agreed with Cesar that *Rediker* was distinguishable on its facts, because Cesar did not procure or aid in procuring the Nevada divorce decree. The court reasoned that *Rediker* was inapplicable to a defendant who did not play a role in procuring the allegedly invalid divorce decree. The quasi-estoppel doctrine relied on in *Rediker* is based on the principle that one with full knowledge of the facts should not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another. Quasi-estoppel applies when a party initially took the position that a divorce was valid and then takes the position that the divorce was invalid. The appeals court stated that there was no support for extending the doctrine to a person who was not a party to the divorce proceeding, did not aid in procuring the divorce decree, and did not have full knowledge of the circumstances under which the decree was obtained. Extending the doctrine to include such persons would be inequitable because it would preclude an innocent second spouse from challenging the validity of a divorce that the second spouse had no reason to believe was invalid at the time he or she married the divorced person.

The appeals court noted that it was expressing no opinion on the validity of the Nevada decree and that its ruling was limited to the factual basis underlying the court's in limine ruling. Accordingly, the court did not foreclose the possibility that Minerva could establish, after an evidentiary hearing, that Cesar should be estopped from challenging the Nevada divorce decree.

Doctrine of Equitable Estoppel Inapplicable. The doctrine of equitable estoppel "provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment" [*quoting* Strong v. County of Santa Cruz (1975) 15 Cal.3d 720, 725]. For equitable estoppel to apply, the party to be estopped must be apprised of the true state of facts and the other party must be ignorant of those facts. In this case, equitable estoppel was inapplicable, because Cesar did not have a greater knowledge of the facts of Minerva's first divorce than Minerva herself.

Commentary

Dawn Gray

I don't think that *Kalinawan* is going to be very helpful in future cases involving purportedly invalid marriages because it deals only with the knowledge of the spouse asserting the invalidity of the other's marriage *as of the date of marriage*. It is a very narrow ruling; in footnote 7, the panel said that "[o]ur holding is limited to the undisputed factual basis underlying the court's in limine ruling." Those facts "did not show that Cesar was a party to the Nevada divorce decree, that he had procured it,

had assisted in procuring it, or had full knowledge of the circumstances under which it had been procured." In other words, Cesar didn't help Minerva get divorced from Brillantes, so he had standing to alleging its invalidity. However, that is clearly not the end of the analysis; Cesar could still be estopped from contesting the validity of that divorce on other grounds.

Footnote 7 also said that "[w]e express no opinion on the validity of the Nevada divorce decree, and we do not preclude Minerva from seeking to establish, after a full evidentiary hearing, that Cesar should be estopped or barred for some other reason from challenging the Nevada divorce decree." In its discussion of estoppel, the appellate court said that it refused to extend the doctrine "to a person who was unaware of the circumstances under which a divorce decree was obtained, was not a party to the divorce proceedings, and did not procure or assist in procuring the divorce decree," holding that this "would preclude an innocent second spouse from challenging the validity of a divorce decree that the second spouse had no reason to believe was invalid *when he or she married a divorced person*" (emphasis added). This focuses on the party's knowledge of the possible invalidity of the other spouse's divorce *at the time of the marriage.*

The trial court apparently did not consider estoppel based on Cesar's discovery of the possible invalidity of Minerva's divorce or his conduct after having that knowledge. Several cases hold that a party who continues to live "as married" after discovering that the other spouse was not validly divorced is estopped from challenging the validity of the marriage. In *In re Marriage of Recknor* (1982) 138 Cal. App. 3d 539, 187 Cal. Rptr. 887, for example, the Second District affirmed a trial court that estopped Husband from denying the validity of his marriage to Wife. Husband testified that he discovered about a year after marrying her that Wife had not been divorced from her prior husband at the time they got married. "He admitted, however, that after he found out that Eve's prior marriage had not been dissolved, he continued to live with Eve and fathered another child." The court held that because Husband "waited almost 15 years to attempt to assert the invalidity of his marriage to Eve," he was equitably estopped from doing so.

Claims of the invalidity of marriage are complex and extremely fact-driven. Their results are based on equitable doctrines and thus largely discretionary. *Kalinawan*'s result seems obvious given its limited scope, and probably adds little to the discussion.

Commentary

Stacy D. Phillips, Esq. and Erica A. Swensson, Esq.

Annulment is an interesting and seldom encountered area of divorce law. It is worth reviewing the doctrine of annulment to better understand the *Kalinawan* holdings.

Pursuant to Family Code section 2210, "[a] marriage is voidable and may be adjudged a nullity if . . . at the time of the marriage . . . [t]he consent of either party was obtained by fraud, unless the party whose consent was obtained by fraud afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as his or her spouse." Fraud sufficient to rescind a civil contract is generally not sufficient to sustain an action for nullity of marriage [Marriage of Meagher and Maleki (2005) 131 Cal. App. 4th 1]. Instead, the nature of the fraud must "go to the *very essence* of the marital relation" [Marriage of Johnson (1993) 18 Cal. App. 4th 499, 502 (emphasis in original)]. Courts have found grounds for annulment based on fraud where the nature of the misrepresentation relates to one party's intentions or abilities with respect to the sexual or procreative aspect of the marriage [Meagher at 3]. There are also a number of unpublished cases in which one party fraudulently induced the other party to marry in order to obtain a green card or other citizenship benefits.

Annulment may be desirable to some clients. An annulled marriage is treated as though it never existed. It is *void ab initio.* Since the marriage is considered void, the parties have no obligation to divide community property, or pay spousal support or attorneys' fees. There is no 6-month waiting period for the court to enter a judgment of nullity. The marriage is terminated immediately. Since no valid marriage existed, the parties had no spousal fiduciary duties and are not required to make financial disclosures.

It is because of these benefits that parties may seek annulment instead of dissolution. *Kalinawan* is a niche ruling on doctrines related to annulment of marriage for reason of bigamy. The marriage is treated as though it never existed because one of the parties was still legally married to a third party. An unscrupulous party may seek to avoid obligations to his or her current spouse by alleging that their marriage was never valid — and should be nullified — because the unscrupulous party's prior divorce was somehow defective. But all is not fair in love and war. The courts created the concept of quasi-estoppel to protect the innocent spouse who believed that the unscrupulous spouse was legally divorced at the time of their marriage. The unscrupulous spouse presumably represented to the innocent spouse that the earlier divorce was valid and is thus estopped from now taking the contrary legal position that the former divorce was invalid.

The related doctrine of equitable estoppel is centered in fairness. It punishes the unscrupulous spouse for misleading the innocent spouse. The distinction is subtle. In the Court's succinct words: "Equitable estoppel focuses on the relationship between the parties, and is designed to protect litigants from injury caused by less than scrupulous opponents. By contrast, judicial estoppel focuses on 'the relationship between the litigant and the judicial system, and is designed to protect the integrity of the judicial process'" [Kalinawan at footnote 8, *quoting* Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 183].

In *Kalinawan,* the appellate court concluded that the husband was not estopped from challenging the validity of the marriage under either doctrine, because the husband had not been involved in any way with procuring his wife's divorce decree from her former spouse and did not have full knowledge of the circumstances under which it had been procured, nor was he apprised of any facts of which his wife was ignorant. Unlike the cases relied on by the trial court, the husband was not trying to benefit from something he knew or he did; he was in the dark about the circumstances of his wife's prior divorce.

References: California Family Law Practice and Procedure, 2nd ed., §§ 11.15 (estoppel to assert invalidity of marriage), 12.02 (nature and effect of nullity proceedings), 12.07 (bigamous marriages)

PARENTAGE ISSUES

Artificial Insemination

Court Properly Determined that Sperm Donor Was Presumed Father Based on His Established Familial Relationship with Child

County of Orange v. Cole
(No. G053375; Ct. App., 4th Dist., Div. 3. 8/15/17)
15 Cal. App. 5th 504, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 707
By Fybel, J. (O'Leary, P. J., Aronson, J., concurring)

The appeals court held that a man can be a sperm donor and nevertheless be a presumed parent and responsible for child support under section 7611(d), based on his established familial relationship with the child.

Facts and Procedure. Brian Cole and Mie Lynn Tsuchimoto began a sexual relationship in 2005 and discussed having a child together. Cole, who had previously had a vasectomy, had sperm extracted for the purpose of impregnating Tsuchimoto. Cole was present in the delivery room when their son was born in February 2008, and selected the child's name.

Cole was married to another woman throughout his relationship with Tsuchimoto, and had two other children. Although Tsuchimoto was aware he was married, she mistakenly believed that they were separated at the time of her pregnancy. Because Cole was a pilot, Tsuchimoto believed that he was out of town on the nights when he was not with her.

Cole identified himself as the child's father to Tsuchimoto's family and friends and the child called him daddy. Cole never paid child support, but he bought the child gifts; occasionally paid for groceries; bought Tsuchimoto a car after the child was born; paid Tsuchimoto $500 a month, ostensibly for renting garage space from her; and helped Tsuchimoto make her mortgage payments in 2009.