

November 2016

Volume 2016 • Issue No. 11

HIGHLIGHTS

ATTORNEYS

- In *Point of View*, Kathryn Kirkland explains how a little planning can help attorneys avoid risks associated with failing to obtain a transcript of contested proceedings and failing to inform clients that a dependent spouse's health insurance coverage will be cancelled upon legal separation (see Page 230)

CHILD CUSTODY

- Court Erred in Granting 50 Percent Timeshare to Parent Who Failed to Rebut Presumption against Awarding Custody to Parent Who Committed Domestic Violence (see Page 231)
- Fifth Circuit Affirms Denial of Return Petition when Parents Shared Intent to Abandon Venezuela as Children's Habitual Residence but Did Not Share Intent to Raise Children in United States (see Page 233)

COMMUNITY PROPERTY

- Wife Required to Pay Share of Liability Arising from Third-Party's Post-Dissolution Action to Rescind Agreement to Purchase Community Business (see Page 236)
- Husband's Unilateral Election of Military Disability Benefits Did Not Relieve Him of Obligation to Pay Wife for Her Community Property Share of His Military Retirement (see Page 242)
- A complete table of contents appears on the next page.

Modification of Child Support

Parents May Not Contract Around Change of Circumstances Rule for Modification of Child Support

By Carol Rothstein, Esq.*

In *In re Marriage of Cohen* (Case No. G052058; Ct. App., 4th Dist., Div. 3. 9/7/16, ord. pub. 10/3/16) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2016 Cal. App. LEXIS 823, the Fourth District Court of Appeal held that parents could not contract around the change of circumstances rule for modification of child support by stipulating that if modification were sought, the court would review the issue of child support “de novo.” Accordingly, a father who stipulated to pay child support in an amount higher than that required by the child support guidelines was not entitled to a downward modification to the guidelines amount, absent a showing of changed circumstances.

In the opinion by Justice Bedsworth (O’Leary, P. J., Thompson, J., concurring), the Fourth District also held that the trial court was not required to consider the father’s monthly income averaged over the calendar year to determine whether his income had decreased. Because the father’s income fluctuated, the court had discretion to choose a “fair and representative” time period, as it had done.

Facts and Procedure. Lauralin and Richard had four children, all of whom had significant disabilities. In 2011, the couple entered into a stipulated judgment for dissolution. The stipulated judgment recited that Richard’s income in March 2011 was \$70,166 per month and provided for child support payments of more than \$17,000 per month, which was higher than required by the statutory child support guidelines [*see* Fam. Code § 4055 et seq.]. The judgment also included the following provision: “The allocations of support as set forth above are without prejudice to either party. In the event

Commentary

Stacy D. Phillips and Kevin Martin

Parties to a marital settlement agreement, like any other contract, are entitled to the benefit of their bargain. While this is black letter law, the Court of Appeal in *Chapman* was faced with the unique fact pattern of one spouse to a marital settlement agreement being denied the benefit of their bargain due to the other spouse's lawful conversion of military retirement pay to "combat-related special compensation".

Husband and Wife were married for 17 of Husband's 20 years of military service. In 1991, Husband retired and began receiving military retirement benefits. In 2003, Husband and Wife divorced and, as part of their marital settlement agreement, agreed that Wife would receive \$475 per month for her community property interest in Husband's military retirement pay. In October 2004, Husband became eligible to receive tax-free "combat-related special compensation" in lieu of his military retirement pay. Without the consent of his former wife, Husband elected to relinquish his military retirement benefits, which were community property, in favor of the special compensation, which was not. Thereafter, Wife ceased receiving her \$475 monthly payment and brought suit to enforce the marital settlement agreement.

The trial court found that Husband had the right to give up his military retirement pay in favor of the tax-free special combat-related compensation, but that this right did not trump Wife's right to receive the benefit of her bargain under the marital settlement agreement. To ensure that Wife continued to receive her \$475 monthly payment, the trial court ordered a constructive trust placed on the funds received by Husband. While the Court of Appeal found that a constructive trust was not warranted because the Husband had not engaged in any wrongdoing when he chose to receive the special compensation, it remanded the case for the trial court to fashion some other equitable remedy to secure Wife's \$475 payment.

The Court of Appeal's rulings in *Chapman* were the right rulings. Equity clearly demanded that Wife receive the benefit of her bargain and that Husband have the opportunity to avail himself of the special

programs created for veterans, notwithstanding Wife's ownership interest in his retirement benefits. As highlighted in *Chapman*, one right does not trump the other. The Court of Appeal's holding in *Chapman* could be extrapolated to apply equally to other property rights divided in marital settlement agreements that are impacted with the passage of time. Based on *Chapman*, it is clear that the Court of Appeal will not take a "form over substance" approach when addressing these changes and instead will look for an equitable resolution for all parties involved.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., § 21.62 (characterization of military disability benefits).

JUVENILE COURTS

Disposition

Briefly Noted

In re Michael S.

(Case No. B269598; Ct. App., 2d Dist., Div. 1. 9/30/16) 3 Cal. App. 5th 977,

— Cal. Rptr. 3d —, 2016 Cal. App. LEXIS 815

By Lui, J. (Rothschild, P. J., Johnson, J., concurring).

A trial court did not err in ordering both the removal of the father from the child's home and the removal of the child from the father's custody in a dependency proceeding.

Procedural Posture. The Los Angeles County Superior Court removed a minor from his father's custody. At the time the dependency proceedings began, the minor lived with his mother and father, but when the court ordered his removal, the father lived elsewhere, and he was prohibited by a restraining order from any contact with the minor other than in supervised visits.

Overview. The court rejected the father's argument that the governing statute, Welf. & Inst. Code section 361(c)(1), does not permit ordering the removal of the child from the offending parent's custody, if the court orders the removal of that parent from the child's home. Section 361(c)(1)(A),