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HIGHLIGHTS

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- In her inaugural *Point of View* column, Sandra Mayberry talks about the importance of mentoring relationships in the practice of family law (see Page 89)

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- Ninth Circuit Bankruptcy Appellate Panel Holds that Section 760 Community Property Presumption Applies in Bankruptcy Proceedings (see Page 91)

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Community Property

Trial Court Erred in Denying Former Wife's Postjudgment Motion to Divide Unadjudicated Community Property Brought Two Years after Default Judgment Was Entered

*By Carol Rothstein, Esq.**

In *In re Marriage of Huntley* (Case No. C080534; Ct. App., 3d Dist. 4/17/17) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 344, the Third District Court of Appeal reversed an order denying a former wife's postjudgment motion to divide the parties' community property, brought two years after a default judgment of dissolution was entered, on the grounds that she should have first moved to set aside the default judgment. Because the default judgment was silent as to the division of property, the trial court had continuing jurisdiction under Family Code section 2556 to adjudicate all of the parties' community property.

In the opinion by Justice Hoch (Butz, Acting P. J., and Renner, J., concurring), the appeals court stated that the former wife was not required to move to set aside the default judgment, that there was no time limit for bringing a postjudgment motion to divide omitted or unadjudicated assets, and that the wife's awareness of the unadjudicated assets at the time the default judgment was entered did not preclude her from bringing a motion under Family Code section 2556. The appeals court further held that the parties' informal agreement dividing community property did not relieve the trial court of its duty to divide the community property, because the agreement was not in writing and was not made on the record in court.

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the juvenile court would have given Mother's testimony on the issue.

Outcome. The Court of Appeal reversed the order terminating parental rights and remanded the matter for a limited evidentiary hearing on the issue of the applicability of the sibling relationship exception.

References: SEISER & KUMLI ON CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE, Ch. 2 (dependency) (Matthew Bender 2016).

PROCEDURE IN GENERAL

Stipulation to Commissioner

Court Reverses All Orders Made in Dissolution Proceeding when Commissioner Neglected to Obtain Husband's Consent to Proceed before Commissioner

In re Marriage of Djulus
(Case No. D069757; Ct. App., 4th Dist., Div. 1. 4/14/17)
— Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 343
By Benke, J. (McConnell, P. J., Nares, J., concurring)

An appeals court reversed a judgment of dissolution and all orders made in the proceeding, including restraining orders, when the proceeding was heard by a commissioner without the husband's consent. The appeals court found that the commissioner erred in implying husband's consent from his participation in the initial hearing, when there was no evidence that the husband either knew or should have known that the judicial officer was a commissioner and not a judge.

Facts and Procedure. After Marc and Kelli separated, Kelli filed a petition seeking orders regarding child and spousal support, custody and visitation, and attorney fees. At the hearing on the petition, in March 2014 ("the March hearing"), Kelli was represented by counsel but Marc was not. Marc was not informed that Commissioner Darlene White, the judicial officer presiding over the hearing, was a commissioner and not a judge. At the conclusion of the hearing, Commissioner White made a series of rulings on support and custody and awarded attorney fees to Kelli. The two minute orders from the March hearing identified White as "Judge" and did not mention that she was a commissioner.

At the next hearing, in June 2014, Commissioner White stated that she needed Marc to sign a stipulation agreeing to have her act as a judge in the case. She presented him with a stipulation form, which he declined to sign. Commissioner White stated that because she had made rulings on the merits of the case, it was too late for Marc to withhold his consent to her presiding over the case. Marc objected, stating that he was not presented with the form at the March hearing and that he had not consented to her being the judge.

Despite the fact that the undisputed evidence showed that Marc had been unaware that she was a commissioner at the March hearing, Commissioner White found that Marc's failure to object to her at the March hearing amounted to a tantamount stipulation that entitled her to go forward with the case. Kelli's counsel agreed. Four minute orders were entered in connection with the June hearing, one of which denied Marc's "request[] for a non-stip." In December 2015, Commissioner White issued a statement of decision and entered a judgment of dissolution, which was mostly favorable to Kelli. Marc appealed.

Commissioner's Jurisdiction to Hear Case Derives from Parties' Stipulation. Under the California Constitution, a commissioner is empowered only "to perform subordinate judicial duties" [Cal. Const., art. VI, § 22]. However, upon the parties' stipulation, the court may order a case to be heard by a commissioner, acting as a temporary judge [Cal. Const., art. VI, § 22; Code Civ. Proc. § 259(d)]. A commissioner's jurisdiction to hear a case derives from the parties' stipulation. Absent a proper stipulation, an order or judgment entered by a commissioner is void.

Either a written stipulation or an oral stipulation on the record is sufficient. In addition, a stipulation may

be implied under the tantamount stipulation doctrine, if a party affirmatively participates in the proceeding and does not object to the commissioner conducting the proceeding until after the proceeding is complete. However, the appeals court wrote, for the tantamount stipulation doctrine to apply, the party or the party's attorney must know that the judicial officer is a commissioner and not a judge. When there is no evidence that the party (or counsel) was aware that the case was being heard by a commissioner, there is no knowing and voluntary assent.

Evidence Showed that Marc Was Unaware that Commissioner White Was Not a Judge. The appeals court found that the evidence showed that Marc was not presented with a stipulation form, nor was he informed at the March hearing that Commissioner White was not a judge. To make matters worse, the two minute orders resulting from that hearing identified White as "Judge." Marc's mere participation in the March hearing and failure to challenge Commissioner White before the June hearing, wrote the court, was not enough for the tantamount stipulation doctrine to apply. Absent a proper stipulation by Marc, the judgment of dissolution entered by Commissioner White was void.

Advice to Temporary Judicial Officers. The appeals court found that the judgment of dissolution and all other orders entered in the case were void, because there was insufficient evidence to support the tantamount stipulation doctrine. The court acknowledged the "harsh consequences" of this result and strongly encouraged judicial officers who seek to act as temporary judges to inform the parties/counsel of their status as commissioners at the very outset of the case and to obtain either a written stipulation or an oral stipulation on the record.

Commentary

Stacy D. Phillips and Kevin Martin

The instant case is a prime example of the draconian ramifications that may result when the proverbial "I's" are not dotted and "T's" are left uncrossed. In *Djulus*, a commissioner's failure to follow a simple and straightforward procedure for obtaining consent of the parties to have their matter heard by a commissioner, in lieu of a sitting judge, resulted in the parties being forced to start their dissolution proceeding from scratch, after months of litigation and wasted attorneys' fees and judicial time.

California's constitution permits parties to stipulate to having their matter heard and decided by a temporary judge/commissioner [*see* Cal. Const. art. VI section 21]. As the appellate court explained in this case, the stipulation does not need to be in writing so long as the evidence in the record establishes that the parties and/or their counsel knew that the judicial officer was a commissioner and the parties decided to proceed with their action with the commissioner presiding. In our experience, the Los Angeles Superior Court requires the parties to sign a form stipulating that the commissioner may act as a temporary judge in their case. Presumably, this is to ensure that the parties know that they are *choosing* to have their matter heard by a commissioner and not a judge.

In *Djulus*, Wife filed a petition for dissolution in January 2014. At an initial hearing at which Husband appeared *pro per,* orders were issued on custody, visitation and support (both child and spousal). Unbeknownst to Husband, the judicial officer presiding over the March 2014 hearing was a commissioner. At a second hearing a few months later, the commissioner asked Husband sign a form stipulation agreeing to have the dissolution proceeding decided by the commissioner. (Wife had signed the stipulation earlier that day.) Husband refused to sign the stipulation and indicated that he was previously unaware that the commissioner was not a sitting judge. Over Husband's objection, the commissioner found that a formal stipulation was not required because Husband's participation in the March 2014 hearing was "tantamount" to a stipulation conveying jurisdiction to the commissioner to preside over the dissolution proceeding. The *Djulus* matter continued to be heard before the commissioner and on December 15, 2015, the commissioner issued a statement of decision and entered a judgment of dissolution. Husband appealed.

The Court of Appeal reversed the judgment of dissolution and on remand ordered that the case be reassigned to a different judicial officer. The Court of Appeal found that there was no evidence in the record that Husband consented to a commissioner presiding over the dissolution proceeding. The Court of Appeal specifically rejected the commissioner's finding that

Husband's participation in the March 2014 hearing was tantamount to a stipulation and described the commissioner's flawed reasoning as creating a "classic Catch-22" — requiring Husband on one hand, to challenge the commissioner's status when, on the other hand, Husband was unaware of that status.

While the Court of Appeal's decision in *Djulus* was correct, the outcome is unfortunate as significant resources, both financial and emotional, were needlessly wasted. *Djulus* must stand as a reminder for us all that, as part of our zealous advocacy for our clients, we must be mindful of the details (e.g., discovery deadlines, motion deadlines, and completeness of financial disclosures) or our clients (and we) will pay the price. No practitioner ever wants to tell a client "oops, we need to do this all over again."

Commentary

Vanessa Kirker Wright

Just imagine the horror you would feel if you got an opinion that said your client had to go back to square one and relitigate a case that had gone to judgment more than a year prior because you failed to get a stipulation on the record. And not only do you have to relitigate the whole case, you have to reestablish the restraining orders that have been in place for almost three years. Yikes.

This is a well-reasoned case, even though the result was draconian. And it addresses a short-circuiting of process on the part of courts and lawyers alike. In fact, I just used this case as authority in making an application to a court to vacate an order assigning a commissioner and for reassignment. My case is in a relatively small county that has only two or three judges and a couple of commissioners. We filed a judgment, which was signed by a judge and entered even though a commissioner, who subsequently retired, heard most of the case. After our judgment was entered, the retired commissioner was replaced by another commissioner. When the new commissioner took the bench, the court issued a "notice of reassignment" that purported to assign my case to the new commissioner "for all purposes." As an aside, this court routinely assigns dissolution cases to the commissioners to reduce judicial caseloads. But that practice is not authorized by the Constitution or the statutory scheme regarding juridical assignments, and *Marriage of Djulus* establishes why.

Litigants — even family law litigants — are entitled to be heard by a judge, except in certain instances that do not apply here. At the least, they should be given a clear choice and an opportunity to opt out if they are to be assigned to a commissioner. Often, commissioners are a better choice because they have far greater experience in family law. Even so, the choice must be offered.

In *Djulus*, the court held that there was no evidence in the record to establish that Marc knew he was being heard by a commissioner. If there were evidence that he had that knowledge, the "tantamount stipulation doctrine" would have applied. If my client in the example above did not make immediate objection to the "notice of reassignment," it is possible that the notice itself would be sufficient for application of the "tantamount stipulation doctrine." So a litigant faced with the "notice of assignment" or "notice of reassignment" to a commissioner has a choice: use the one and only disqualification available under Code of Civil Procedure section 170.6 or apply for reassignment. If nothing is done the client may not have any avenue of relief.

In the example above, I took the position that it was contrary to the law and unreasonable to force my client to use his single opportunity to disqualify a judicial officer that should never have been assigned in the first place. Instead, I asked the court to vacate the assignment and reassign the case to a judge. It occurs to me that self-represented litigants who do not think to seek reassignment will be subjected to the "tantamount stipulation doctrine" with impunity. Perhaps someone with time on their hands and justice in their heart will challenge the practice. Until then, protect your clients and your practice and pay close attention to judicial assignments and reassignments.

References: California Family Law Practice and Procedure, 2nd ed., § 95.30[3] (agreement to hearing by commissioner)