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- Court Erred in Requiring Joinder of Evaluator for Purpose of Determining Reasonable Compensation for His Services (see Page 138)

CHILD AND SPOUSAL SUPPORT

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CHILD SUPPORT

- Court May Order Parent to Pay Reasonable Childcare Costs Incurred by Other Parent for Training Unrelated to Requesting Parent's Current Employment (see Page 141)

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Premarital Agreements

Finding that Waiver of Spousal Support Is Unconscionable Cannot Be Based on Circumstances Arising after Time of Enforcement

*By Carol Rothstein, J.D.**

In *In re Marriage of Miotke* (No. H040611, H040972; Ct. App., 6th Dist., 5/28/19) 35 Cal. App. 5th 849, __ Cal. Rptr. 3d __, 2019 Cal. App. LEXIS 494, the Sixth District Court of Appeal held that a private judge properly upheld the validity of a premarital agreement that incorporated a waiver of spousal support and that the family court properly denied the wife's request to set aside the private judge's decision.

In the opinion by Justice Greenwood (Grover, Danner, JJ., concurring), the appeals court further held that a finding that a premarital agreement is unconscionable cannot be based on circumstances that occur after the time of enforcement of the agreement, which in this case was the date of the trial before the private judge.

Facts and Procedure. Natalia and Peter were both trained architects. Natalia, who was Russian, moved to California in 1995 and became pregnant with the parties' child in December 1995.

After their child was born, Natalia and Peter decided to marry. Concerned that Natalia might be scamming him, Peter wanted to have a premarital agreement (PMA) so that he would not have to pay spousal support if Natalia moved back to Russia. The parties met with a paralegal and signed the PMA in October 1996. According to Peter, he brought a boilerplate agreement home for Natalia to review nine days before they met with the paralegal, but Natalia denied seeing the PMA before meeting with the paralegal to sign it.

* Carol Rothstein is the principal author of the CALIFORNIA FAMILY LAW MONTHLY. She is a research attorney in Lafayette, California.

of the fiscal year. In most cases of small businesses, that is the calendar year, but not always. In some cases, where gross income to a business has been fluctuating over the previous two to four years, a blending of those prior years may be more appropriate for determining the "reasonable period."

It is important to use the terminology accurately in order to make the proper record. Only by accurately interpreting the financial evidence can the correct "income available for support" be determined.

CHILD CUSTODY

Evaluations

Court Erred in Requiring Joinder of Evaluator for Purpose of Determining Reasonable Compensation for His Services

In re Marriage of Benner
(No. D073758, Ct. App., 4th Dist., Div. 1, 6/12/19)
__ Cal. App. 5th __, __Cal. Rptr. 3d __, 2019 Cal. App. LEXIS 538
By Aaron, J. (Haller, Acting P. J., O'Rourke, J., concurring)

A trial court properly denied a custody evaluator's special motion to strike a petition for joinder under the anti-SLAPP statute, because the petition did not state a cause of action against the evaluator, but merely sought to provide notice that the court would be issuing an order related to his fees. However, the court erred in requiring joinder of the evaluator for the determination of the reasonableness of his fees.

Facts and Procedure. Rebecca and Paul's marriage was dissolved in 2010. In 2011, Paul filed a motion for modification of child custody and, in 2013, the court appointed an expert to conduct a child custody evaluation. The expert, Dr. Kachorek, issued a written report recommending that Paul be awarded sole legal and physical custody of the parties' two children.

In 2016, the trial court issued an order excluding Dr. Kachorek's report because of pervasive "procedural deficiencies" and "substantial evidence of actual bias." Judge Parker found that the report had no value and that $0 was a reasonable fee for the evaluation. Judge Parker ordered Dr. Kachorek to fully refund all of the fees the parties paid him.

Dr. Kachorek filed a request asking that the repayment order be set aside. At the hearing on the set-aside request, the court stated that Dr. Kachorek had not had a hearing on the reasonableness of his fees and stated that it would conduct such a hearing. Upon being asked what "jurisdictional document" would bring Dr. Kachorek before the court, the court sua sponte joined Dr. Kachorek as an indispensable party to the action and stated that Evidence Code section 730 authorized it to determine the reasonableness of his fees.

After the hearing, Dr. Kachorek filed a motion to quash the order joining him as a party. The court granted the motion to quash and ordered Rebecca to serve a formal summons and petition for joinder on Dr. Kachorek.

In her petition for joinder, Rebecca contended that the court had jurisdiction over Dr. Kachorek because Evidence Code section 730 gave the court authority to determine the reasonableness of his fees, and Dr. Kachorek was an indispensable party to the action for this purpose under Code of Civil Procedure section 389(a). The trial court granted Rebecca's petition for joinder.

Dr. Kachorek then filed a special motion to strike Rebecca's petition pursuant to the anti-SLAPP statute. Dr. Kachorek argued that his service in providing custody evaluation was a protected activity and that Rebecca would be unable to prove the validity of her claims. Rebecca filed an opposition, contending that her petition was merely a "glorified Notice of Hearing repackaged to accommodate Dr. Kachorek's demand for formal joinder" and that it did not meet the threshold requirement for the anti-SLAPP procedure because it did not include a cause of action of any kind. The court denied the special motion to strike and Dr. Kachorek appealed.

Anti-SLAPP Statute. Under Code of Civil Procedure Section 425.16(b), "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech. . .in connection with a public issue shall be

subject to a special motion to strike. . . .” Section 425.16 is explicitly directed at striking a cause of action, and a special motion to strike may not be brought to attack pleadings that do not contain a cause of action.

Court Was Required to Determine Reasonable Compensation for Dr. Kachorek’s Services. The appeals court explained that when the court appoints an expert, such as a child custody evaluator, the court has a duty to determine reasonable compensation for the expert’s services [Evid. Code § 730] and to apportion that amount between the parties [Evid. Code § 731; Cal. Rules of Ct., rule 5.220(d)]. This requires the court to review the expert’s billing statements and to conduct an evidentiary hearing [In re Marriage of Laurenti (2007) 154 Cal. App. 4th 395, 405; In re Marriage of Adams & Jack A. (2012) 209 Cal. App. 4th 1543, 1569]. The court may not “abdicate” this duty [Laurenti at 405].

Rebecca’s Petition Did Not State Cause of Action Against Dr. Kachorek. The appeals court rejected Dr. Kachorek’s contention that Rebecca’s petition stated a cause of action against him for the “forced return of fees.” On its face, the petition didn’t contain any separately labeled causes of action against Dr. Kachorek, instead stating only that he was an indispensable party because of his interest in the funds he received as an expert. Moreover, both the procedural history of the case and the text of the petition indicated that Rebecca filed the petition for the sole purpose of giving Dr. Kachorek notice of the court’s intent to fix compensation for his services under Evidence Code section 730. A party’s request that the trial court perform its duty to set the amount of an expert’s compensation is not a claim against the expert for the purpose of the anti-SLAPP statute, the appeals court stated. The fact that Rebecca’s petition indicated that she sought repayment from Dr. Kachorek did not alter this analysis, because there was nothing in the law indicating that she could have alleged a cause of action for repayment. Any repayment that the trial court might order on remand would be based on its determination of the reasonable amount of compensation for Dr. Kachorek’s services and its apportionment of this amount among the parties [Evid. Code § 731; Rule 5.220], rather than on Rebecca’s prosecution of a claim against Dr. Kachorek.

The appeals court also rejected Dr. Kachorek’s contention that Rebecca’s petition sought disgorgement of fees already paid by a party to an evaluator based on a private agreement. Rebecca’s petition did not mention a private agreement, much less seek reimbursement of fees paid pursuant to such an agreement. Moreover, Rebecca and Paul’s agreement with Dr. Kachorek was not in the record and there was no affidavit attesting to its contents. Thus, a private agreement could not serve as a basis for reversal.

The appeals court concluded that the trial court did not err in denying the anti-SLAPP motion.

Joinder Was Not Appropriate Procedure for Determining Whether to Order Repayment of Evaluator Fees. However, the appeals court stated that joinder of Dr. Kachorek to the dissolution action was not the proper means for the trial court to determine whether Dr. Kachorek should be ordered to repay his fees. Code of Civil Procedure section 389(a) requires joinder of a person who “claims an interest relating to the subject of the action.” There is no authority for the proposition that a trial court must join a court-appointed expert as a party before making an order concerning expert fees. Litigation pertaining to expert fees has no bearing on the underlying action and should not affect the judgment in that action, the court stated. Compensation awarded to an expert is taxable as a cost of suit [Evid. Code § 731] and is therefore viewed as an incident of the judgment, not as part of the judgment. Accordingly, Dr. Kachorek had no more than “an interest in ancillary questions pertaining to his fees that are not the ‘subject of the action’” [CCP § 389(a)], and the court erred in joining him as a party.

Due Process Requirements. The appeals court rejected Dr. Kachorek’s argument that due process required that he be served with a summons and petition for joinder to determine whether he should repay the fees he received from Rebecca. Due process ordinarily requires no more than reasonable notice and an opportunity to be heard, the court stated, and there was no principle of law that would mandate that Dr. Kachorek be joined as a party. The appeals court directed the trial court, on remand, to issue an order affording the parties and Dr. Kachorek notice of the court’s intent to hold an evidentiary hearing with respect to whether to order Dr. Kachorek to repay

fees he received pursuant to his appointment under Evidence Code section 730.

Commentary

Stacy D. Phillips and Jacqueline Combs

DON'T JOIN ME, I'M NOT A PARTY

There are so many ways that we can procedurally over-lawyer issues. *In re Benner* provides a good example of this. While we all want to ensure we procedurally do things the right way, sometimes we get it wrong. And sometimes, the courts can get it wrong, too.

This case demonstrates years of litigation over a procedural aspect of a case: how to properly give notice to an expert, Dr. Kachorek, that the court will conduct a hearing regarding whether he should be ordered to repay the parties the fees he received pursuant to his appointment under Evidence Code 730. Over three years and, presumably, tens of thousands of dollars in attorneys' fees, the Court of Appeal resolved the matter, noting that all that was required was a simple *notice* to the parties and Dr. Kachorek of the court's intent to hold an evidentiary hearing with respect to whether to order Dr. Kachorek to repay the parties the fees he received pursuant to his appointment. *Reasonable notice and an opportunity to be heard* - that was *all* Dr. Kachorek needed to be awarded due process.

The court was well-intentioned in its attempts to afford Dr Kachorek due process by holding a hearing on the issue of the reasonableness of his fees. However, the court missed the mark as to what role Dr. Kachorek played in the proceedings. The wild goose chase began when Dr. Kachorek's counsel questioned the jurisdictional document bringing Dr. Kachorek before the court. However, the interesting aspect of this case is not that the parties' counsel made the procedural misstep in determining Dr. Kachorek was a party. Rather, on the trial court's motion, and in response to the jurisdictional issues raised by Dr. Kachorek, Dr. Kachorek was joined as "an indispensable party" to the action for a hearing to determine the reasonableness of his fees.

The court relied on the premise that because it had the authority to fix the compensation for Dr. Kachorek's services pursuant to Evidence Code section 730, Dr. Kachorek could be joined as a party. While this issue may not have arisen had Dr. Kachorek not questioned his role in the proceedings, it is still the court's misinterpretation of the law that resulted in the unnecessary and protracted litigation between the parties and Dr. Kachorek. As a result, the parties spent years preparing numerous motions and pleadings, attending multiple court appearances, and participating in an appeal to rectify an issue that should never have been an issue to litigate.

Even after Dr. Kachorek's motion to quash was granted, the court ordered the mother to serve a formal summons and petition for joinder on Dr. Kachorek. While the court recognized at that point that Dr. Kachorek was not a party to *all* of the issues at hand, it still needed to address the technical aspect of the jurisdictional issues raised by Dr. Kachorek: that he had not been served with the summons and petition and thus lacked due process. Yet, this was the Court's goal all along: to give Dr. Kachorek the due process he was entitled to regarding the reasonableness of his fees.

The issue lies in the fact that Dr. Kachorek was never a party to the case and should not have been joined as a party, let alone named in the petition, which, as Mother noted in her opposition to Dr. Kachorek's special motion to strike her petition pursuant to the anti-SLAPP statute, "was merely a 'glorified Notice of Hearing repackaged to accommodate Dr. Kachorek's demand for formal joinder.'" Dr. Kachorek had no skin in the game other than the reasonableness of his fees and whether he should be required to repay the parties.

As the Court of Appeal noted, litigation pertaining to an expert's fees should have no bearing on the underlying action. In this case, the underlying action was the parties' divorce. The Court noted that compensation awarded to an expert under Evidence Code section 730 is taxable as a cost of suit [Evidence Code § 731], and that "[c]osts are not ordinarily considered part of the judgment; rather, they are 'normally viewed as an *incident* of a judgment'" [*citing* Bean v. Pacific Coast Elevator Corp. (2015) 234 Cal. App. 4th 1423, 1430].

This case illustrates the headaches we can create for ourselves when we over-lawyer issues. If we take a step back, more often than not, we can resolve these

issues. Sometimes, procedurally, we get it wrong. The question is, how do we get out of the rabbit hole before expending our time and our client's money in resolving an unnecessary issue?

Sometimes we need to reconcile our training as a lawyer against the end goal: being an advocate for our client. We are capable of resolving matters and achieving our client's objectives without over-lawyering issues. We just need to remember that sometimes all it takes is a little common sense.

References: California Family Law Practice and Procedure, 2nd ed., §§ 33.80[2] (costs of evaluation by expert), 33.82 (use of expert in child custody proceedings), 94.02 (overview of joinder).

CHILD SUPPORT

Childcare Costs

Court May Order Parent to Pay Reasonable Childcare Costs Incurred by Other Parent for Training Unrelated to Requesting Parent's Current Employment.

Greiner v. Keller
(No. A154755, Ct. App., 1st Dist., Div. 3. 6/14/19)
__ Cal. App. 5th __, __Cal. Rptr. 3d __, 2019 Cal. App. LEXIS 545
By Petrou, J. (Siggins, P. J., Wiseman, J., concurring)

A trial court erred in finding that it could not order a father to pay a portion of the childcare costs incurred by the mother while she attended a paralegal training program that was not related to her current employment, when the plain language of Family Code section 4062 permits a court to consider a request for childcare costs related to reasonably necessary education for prospective employment to allow a custodial parent to become self-supporting without the need for public assistance.

Facts and Procedure. Mother had legal and physical custody of the parties' child, and Father was ordered to pay one-half of reasonable childcare costs. Mother subsequently filed a request for an order directing Father to pay one-half of the childcare costs incurred while she attended a paralegal program three evenings a week. At the time, Mother was employed part-time as a receptionist at a law office. Mother explained that she had been laid off from a government job in 2011 due to budget cuts and that she had been unable to secure stable ongoing employment since then. She believed that her inability to find full-time employment was due to her lack of college education, outdated skills, and ignorance about new workplace technologies. Mother relied on public assistance for both food and housing and a public subsidy for childcare costs while she worked. She believed that paralegal certification would enable her to become fully self-supporting.

In his opposition, Father argued that Family Code section 4062, which provides that a court shall award "[c]hild care costs related to employment or to reasonably necessary education or training for employment skills," did not allow for an award of shared childcare costs in this case, because Mother was able to secure employment with her existing job skills and was not required by her current employer to receive additional training. Thus, Father reasoned, Mother's decision to pursue paralegal studies was a personal choice and Father could not be required to pay childcare costs necessitated by her training.

After an evidentiary hearing, the trial court denied Mother's request, finding that section 4062 does not require a parent to share in childcare costs arising from the other parent's decision to pursue an education to expand their existing employment skills if the requesting parent has existing marketable skills that they are currently using to obtain employment. The court did not determine whether mother's educational pursuits were "reasonably necessary education or training for employment skills," whether she had actually incurred reimbursable childcare costs associated with obtaining additional education, and the amount and appropriate apportionment of any childcare costs.

Mother appealed.

Family Code Section 4062 Is Not Limited to Training Related to Parent's Current Employment. The appeals court stated that its fundamental task in interpreting section 4062 was to ascertain the