CASE LAW AND STATUTORY UPDATES 2019

1. R.I.P. Non-CLETS restraining orders:

Senate Bill 1089:

The Legislature finds and declares all of the following:

(a) The Legislature has become aware of a practice in proceedings relating to restraining orders whereby the parties seek to have the court enter a stipulated protective order that would not be transmitted to the California Law Enforcement Telecommunications System, also known as CLETS, when the law otherwise requires its transmittal. These proposed stipulated orders are sometimes colloquially referred to as a "non-CLETS restraining order."

(b) It is the intent of the Legislature in enacting this measure to clarify that all protective orders subject to transmittal to CLETS are required to be so transmitted.

2. Professional Responsibility / Attorney Fees / Sanctions and a FLARPL case thrown in for good measure:

Refer to State Bar Opinions and Ventura County Bar Association Guidelines on Civility and Professionalism

a. ***Lasalle v. Vogel***, 36 Cal. App. 5th 127, 248 Cal. Rptr. 3d 263

The trial court denied an attorney's motion to set aside a default (Code Civ. Proc., § 473) in a legal malpractice case.

The Court of Appeal reversed, concluding that the attorney's neglect was excusable in light of significant family emergencies and because inadequate warning of intent to take a default was contrary to the cooperation requirement (Code Civ. Proc., § 583.130); moreover, no prejudice would have resulted from granting relief, and a plainly meritorious defense existed to at least part of the default judgment. The warning was inadequate because it was sent by e-mail, the use of which requires agreement (Code Civ. Proc., §§ 1013, subd. (e), 1010.6, subd. (a)(2)(A)(ii); Cal. Rules of Court, rule 2.251(b)), and because a deadline of one day was unreasonably short. Considering the attorney's past misconduct, which amounted to specific instances of character, was improper (Evid. Code, § 1101). **[PRACTICE POINTER: READ THIS CASE!!!]**

b. ***In re Marriage of Anka & Yeager***, 31 Cal. App. 5th 1115, 242 Cal. Rptr. 3d 884

The trial court sanctioned an attorney for disclosing information in a confidential child custody evaluation report (Fam. Code, §§ 3025.5, subd. (a), 3111, subd. (d)) while asking questions at a deposition in another case. The trial court also sanctioned the attorney's client.

The Court of Appeal affirmed the sanctions order as to the attorney and reversed as to the client. The court found no abuse of discretion in sanctioning the attorney because the information was confidential, those present were not limited to court employees and parties, the disclosure was intentional, and the disclosure was not in the child's best interest. The litigation privilege (Civ.

Code, § 47, subd. (b)) does not apply to court-imposed sanctions. The trial court made sufficient findings to satisfy due process. The sanction was not an excessive fine (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17) absent evidence of the attorney's ability to pay. Sanctioning the client was error because nothing in the record indicated the client might be culpable.

c. ***Herriott v. Herriott***, 33 Cal. App. 5th 212, 244 Cal. Rptr. 3d 755 Companion to the Anka & Yeager case on the issue of ability to pay sanctions. Although self-represented party clearly breached the confidentiality of a custody evaluation by attaching part of the evaluation to her moving papers, the court declined to impose sanctions as the offending party had no ability to pay.

d. ***In re Marriage of Sahafzadeh-Taeb &Taeb,*** 39 Cal. App. 5th 124, 251 Cal. Rptr. 3d 610

An attorney's bad faith conduct was sufficient to support the trial court's imposition of sanctions under Code Civ. Proc., § 128.5, because the attorney not only failed to appear for trial because of a conflict with a trial in another case, but also made a misrepresentation of readiness for trial and failed to correct that misrepresentation, and the record could support a finding that the attorney acted in subjective bad faith with manipulative and harassing motives; [2]-The trial court did not make an express finding under § 128.5, subd. (c), that the attorney acted in bad faith, but because it imposed sanctions, it made an implied finding of bad faith; [3]-The client did not deserve to be sanctioned because there was no evidence the client knew of the attorney's misconduct; [4]-The attorney waived procedural objections by failing to assert them in the trial court.

[Note from the Appellate Court: We publish this opinion to make explicit that no vestige remains of the holdings in *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306 [203 Cal. Rptr. 3d 34] (*San Diegans*) concerning the requirements of section 128.5. Among other things, *San Diegans* held that an objective standard applies when determining whether a party's or an attorney's conduct is sanctionable under section 128.5, as it does under section 128.7. (*San Diegans*, at pp. 1314–1317.) As we explain, section 128.5 has since been amended to specifically overrule *San Diegans* on this point.

e. ***Martinez v. O'Hara***, 32 Cal. App. 5th 853, 244 Cal. Rptr. 3d 227

Plaintiff filed a motion under Gov. Code, § 12965, subd. (b), and Lab. Code, § 218.5, requesting an award of attorney fees in the amount of $133,887 for "litigating the case" plus $12,747 for fees incurred in bringing the motion itself, for a total attorney fee award of $146,634. The trial court denied the motion for fees.

The Court of Appeal affirmed the trial court's order denying attorney fees and reported plaintiff's attorney to the State Bar of California for misconduct. The court concluded that plaintiff's attorney committed misconduct on appeal, including manifesting gender bias. The notice of appeal's reference to the ruling of the female judicial officer, from which plaintiff appealed, as "succubustic" constituted a demonstration by words or conduct, bias, prejudice, or harassment based upon gender and thus qualified as reportable misconduct. The statements in plaintiff's appellate briefs accusing the trial court of intentionally refusing to follow the law, and the

statement in the notice of appeal suggesting the trial court tried to prevent plaintiff from receiving notice of the signed judgment in an effort to thwart appellate review of its decision, also made without any support in the record, constituted reportable misconduct. Many of the words and phrases in the notice of appeal had no place in a court filing. **[PRACTICE POINTER: Refer to the Guidelines on Civility and Professionalism]**

f. ***In re Marriage of Bittenson*** 41 Cal. App. 5th 333 FLARPL issue

In a marital dissolution action, the husband's trial attorney recorded three family law attorney's real property liens (FLARPLs) totaling $250,000 on the family residence before it was sold (Fam. Code, § 2033, subd. (a)). Relying on Fam. Code, § 2034, the trial court reduced the lien because the parties were contesting the date of marital separation, and the full $250,000 lien amount could impair the overall equal division of community assets and debts.

The Court of Appeal affirmed the judgment. The plain language of Fam. Code, § 2034, subd. (c), does not impose any timing requirement or otherwise limit the trial court's ability to revisit the propriety of a FLARPL. Moreover, as this subdivision is separate from other parts of the statutory scheme relating to the ex parte objection process (Fam. Code, § 2033, subd. (c)), it contemplates disputes apart from the ex parte objection process and contemplates disputes when the FLARPL is already in existence. That would include disputes after the FLARPL is recorded. A trial court may revisit the propriety of the lien at any time and, in an appropriate case, expunge or limit the lien. **[PRACTICE POINTER: Do not resort to a FLARPL if your client wants to keep the property. By doing so, you place yourself in a potential conflict with your client, i.e. the only way to satisfy your FLARPL is to sell the house.]**

3. **Procedure:**

a. ***In re Marriage of Perow & Uzelac,*** 31 Cal. App. 5th 984, 242 Cal. Rptr. 3d 874

A husband filed a motion to modify a child custody order in a marital dissolution proceeding. In the wife's responsive declarations, she requested sanction-based attorney fees under Fam. Code, § 271. After the husband's motion was denied, the wife filed a motion renewing her request for attorney fees and costs arising from the husband's motion. The trial court granted the wife's motion and imposed sanctions against the husband.

The Court of Appeal affirmed the order. The court held that a responding party's request for sanction-based attorney fees under Fam. Code, § 271, is not a request for "affirmative relief" within the meaning of Fam. Code, § 213. The request for such fees is an attack on the messenger, not his or her message. That is because attorney fees under § 271, unlike attorney fees in many other contexts, are wholly a sanction for conduct frustrating settlement or increasing the cost of litigation. What is more, because this sanction is necessarily responsive to the moving party's conduct in litigating his or her motion, allowing a court to consider the moving party's conduct at the same time as his or her motion without the need for a separately filed motion for fees also avoids possible duplicative, repetitious pleadings, thereby further serving § 213's goal of saving time and expense. Because the wife's request for attorney fees under § 271 was not a request for "affirmative relief," she did not run afoul of § 213 by requesting those fees in her responsive

pleadings. Moreover, the wife's motion for attorney fees was not untimely. All that the motion did was renew her earlier and still pending requests for fees. **[QUERY: 271(b) states sanctions can only be imposed after notice and an opportunity to be heard. Is the time frame of a responsive declaration sufficient notice?]**

b. ***In re Marriage of Deamon,*** 35 Cal. App. 5th 476, 247 Cal. Rptr. 3d 420

The family court awarded sanctions without considering any oral testimony (Fam. Code, § 217) and relying instead on documentary evidence. The party seeking sanctions was not present at the hearing, appeared through counsel, and submitted declarations.

The Court of Appeal affirmed, holding that the family court was not required to receive live testimony because personal appearance of the party seeking sanctions was not essential and a failure to serve the party with a notice to appear (Code Civ. Proc., § 1987, subd. (b)) forfeited the right to present live testimony. In the absence of live testimony, deciding the motion based on declarations was proper (Code Civ. Proc., § 2009). Any error in the family court's failure to make an express finding of good cause to refuse live testimony (§ 217, subd. (b)), was not prejudicial because cross-examination of a party not in attendance was not possible as a practical matter, nor was there any explanation of how cross-examination would have related to any material issue. [NOTE: Read this case in conjunction with *Swain* and *Binette.* Both cases are cited in the decision.]

c. ***In re Marriage of Pasco***, 42 Cal. App. 5th 585

The trial court denied an ex-husband's request for an order terminating spousal support based upon changed circumstances.

The Court of Appeal reversed the order and remanded the matter. The court held that the trial court abused its discretion by denying the ex-husband's request for an order without considering any actual evidence. The trial court based its decision on the husband's request for an order solely on the argument of counsel and the ex-wife's unsworn statements in response to the trial court's questions, neither of which was evidence. Moreover, because a prima facie showing of changed circumstances already was made based on the offer of proof in the husband's declarations at trial, the trial court was precluded from relying on the parties' declarations unless they were admitted into evidence, which they were not.

4. **Characterization, spousal support, and attorney fees**: ***In re Marriage of Ciprari*** 32 Cal.App.5th 83.

In its judgment in a marital dissolution proceeding, the trial court characterized a majority of the cash and securities held in commingled accounts as the husband's separate property after finding that his tracing was adequate to meet his burden of proving his separate property. The trial court found that the husband did not breach fiduciary duties when he used community property funds to establish an irrevocable life insurance trust for the benefit of the parties' two children, and to

fund tax-advantaged IRC § 529 college savings accounts (IRC section 529 accounts) for the children. The trial court entered temporary and permanent child and spousal support awards. In a post judgment order, the trial court denied the wife's motion for an award of additional attorney and accounting fees.

The Court of Appeal affirmed in part and reversed and remanded in part. The court held that the detailed tracing analysis performed by the husband's expert witness, upon which the trial court relied, was valid and constituted substantial evidence in support of the judgment. The court disagreed with the wife's assertion that the husband's method of tracing separate property to, and characterizing the activity within, a particular commingled account was wholly unprecedented. Substantial evidence supported the conclusion that—in making the IRC § 529 account contributions and funding the life insurance trust—the husband was merely executing on a mutually agreed estate plan of gifting to the children. The trial court abused its discretion when it retrospectively modified 2014 pendente lite child and spousal support, as it based the modification on the parties' 2013 tax returns, rather than their 2014 tax returns, which were then available. The court agreed with the wife that the $5,000 per month in permanent spousal support awarded to her was too low, when compared to the marital standard of living and the husband's ability to pay more. The trial court apparently disregarded the wife's Judicial Council form FL-150 expense calculator, and it did not relate the amount of the award to the marital standard of living. The trial court erred when it denied the wife's post trial motion for an award of additional attorney and accounting fees. An award of reasonably necessary fees and costs to the wife was mandatory based on the trial court's implied finding that there was a disparity in access to funds to retain counsel and the husband was able to pay for the legal representation of both parties, which was supported by substantial evidence. The wife could not be faulted for requiring the husband to trace his separate property and for incurring professional fees to review and litigate the issue, nor could she be denied mandatory fees for doing so.

5. Move Away / Move to: *In re Marriage of C.T and R.B*. 33 Cal.App.5th 87

The superior court entered an order changing primary physical custody of a 12-year-old child from the mother in California to the father, who had moved to Arkansas six years before requesting physical custody.

The Court of Appeal reversed the order. It was an abuse of discretion to change custody based on a finding that the mother was the parent least likely to share the child with the other parent because the father did not meet his burden of showing that the change in custody would not result in detriment to and was in the best interests of the child. The potential detriment included significantly diminished contact by the child with his mother, stepfather, stepsiblings living with the mother, his school, his friends, his community, and his doctors and therapists. In addition, the child had adamantly objected to visitation with the father and had refused any contact, the father was unemployed and did not have health insurance coverage for the child, and stability with the father was questionable in light of the father's history, which included an attempted suicide. **[COMMENT: ALL the *LaMusga* factors must be considered in a move away or move to case.]**

6. Overbroad language in DVRO: *Molinaro v Molinaro* 33 Cal.App.5th 824

Six months after filing a petition for dissolution of marriage, the wife filed an application requesting a domestic violence restraining order against the husband. The trial court issued the restraining order, which listed the couple's three children as additional protected persons, prohibited the husband from posting anything about the divorce case on Facebook, and ordered the husband to attend anger management classes once a week for six months.

The Court of Appeal reversed the provision of the restraining order prohibiting the husband from posting anything about the divorce case on Facebook and directed the trial court to strike it from the restraining order, but affirmed the restraining order in all other respects. The court held that substantial evidence supported the trial court's finding that the husband committed abuse under the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.)—not by physical violence, but by disturbing the peace of the wife. Among other things, the husband had detained the wife against her will by using his car to block her moving truck from leaving the home, and he was belligerent during the confrontation and had to be restrained by police officers who responded to the scene. He also had physically restricted the wife from leaving the home on two other occasions. Accordingly, the trial court did not abuse its discretion in ordering the husband, as the restrained party, to undergo counseling addressed to the apparent cause of the type of abuse he committed. The husband forfeited his void for vagueness challenge to the DVPA by failing to raise it in the trial court. His challenge lacked merit in any event. The court concluded that the part of the restraining order prohibiting the husband from posting anything about the divorce case on Facebook constituted an overbroad, invalid restraint on his freedom of speech. The record showed the husband's Facebook posts were not specifically directed to the minor children, but in many cases invited comments from his adult friends and extended family. Moreover, although the trial court plainly had the power to prohibit the husband from disparaging the wife in the children's presence, the order was much more far-reaching, proscribing speech only peripherally related to the case. The trial court properly included the parties' adult daughter as a protected person under the restraining order.

…and in the Opps! File:

***In re Marriage of Martin* 32 Cal.App. 5th 1195**

The trial court ordered a former wife to reimburse her former husband for $27,000 in spousal support that he had paid after she remarried.

The Court of Appeal reversed the order. The husband's spousal support obligation did not terminate by operation of law upon the wife's remarriage because the parties agreed in writing, on form SB-12035, that the husband would pay the wife spousal support for a period of four years and, by failing to check the box in section 3, they agreed that the wife's remarriage would not affect the husband's obligation to pay support.

Last but not least…TAXES!

***Cook v. Commissioner* Tax Court Memo 2019-48**

Child lived with Mother and Father paid support. On his taxes, Father claimed child as dependent, filed Head of Household, claimed child credit and earned income credit. IRS disallowed all.

Tax court finds that Father cannot claim child as dependent if not his qualifying child; cannot claim the dependency exemption unless Mother (the custodial parent) execute IRS form 8332 or its equivalent; cannot claim head of household, child tax credit or earned income credit because child is not qualifying child. [PRACTICE TIP: Parties can agree to release dependency exemption with form 8332 or equivalent. Parties cannot agree to release head of household status.]