CALIFORNIA Family Law Monthly

*In re Marriage of Swain*

By now we are getting familiar (if not entirely comfortable) with the game changing protocols of *Sanchez* case-specific hearsay exclusions concerning expert testimony [see, Game Changer: In *People vs. Sanchez*, the California Supreme Court Changed the Rules of Admissible Expert Testimony, 2017 Cal.Fam.Law Monthly, 173-175 — (September, 2017)].

Now comes *In re Marriage of Swain*, where Justice Elwood Lui gives us another paradigm shift. Wife's Declaration was held inadmissible hearsay because she was not present at the post-judgment hearing to terminate Spousal Support to be cross-examined. Reiflerizing seems long gone, but perhaps has been given a slim lifeline in the *Swain* opinion ["This raises the question whether the holding in *Reifler* remains valid, or whether the exception to the hearsay rule in Code of Civil Procedure section 2009 no longer applies at all to the use of declarations for family motions that seek 'substantive relief regarding the fundamental issues in controversy.']

*Sanchez* has made expert testimony more rigorous, requiring careful preparation of admissible foundational facts. *Swain* teaches that if you want or need a Declaration to be admitted in evidence to support your case, the Declarant must be present. The opinion examines the history of Family Code section 217, adopted in response to the Supreme Court's *Elkins* decision. On its face, section 217 addresses the admissibility of live testimony, not the inadmissibility of written testimony. However, explains the court, the two issues are obviously related. The court determines that it is reasonable to conclude that, in enacting section 217, the Legislature intended to abrogate the distinction made in *Elkins* between marital dissolution trials and family law motions that do not result in a judgment.

So, what did the *Swain* court do, and what did it not do? The opinion stated that it need not answer the general question whether section 217 makes written declarations submitted in connection with family law motions subject to the hearsay rule in every case. The court concluded that, at a minimum, the hearsay exception in CCP section 2009 does not apply to a motion to modify a family law judgment where the opposing party seeks to exclude the declaration on the ground that he or she is unable to cross-examine the declarant.

Does this leave room for debate as to *Swain's* application in a given situation? Perhaps. But the lesson is clear. Produce the declarant if you want to be safe. And, PROTECT YOUR RECORD -- ALWAYS MAKE YOUR OBJECTION IF THE OPPOSING DECLARANT IS NOT PRESENT FOR CROSS-EXAMINATION.

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