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In re Marriage of Davis

The bright-line rule adopted by the *Davis* case is arguably weakened by Footnote 7 of the majority opinion, which states: "Under the facts presented by this case, we have no occasion to consider, and expressly reserve the question, whether there could be circumstances that would support a finding that the spouses were 'living separate and apart,' i.e., that they have established separate residences with the requisite objectively evidenced intent, even though they continued to literally share one roof." Add to that Justice Liu's concurring opinion, and it becomes apparent that *Davis* may not stand as the last word regarding date of separation disputes.

If Justice Liu's thoughtful concurring opinion had been authored instead by Justice Antonin Scalia, the majority might have been accused of judicial **argle-bargle** which amounted to **interpretive jiggery-pokery**. [see Justice Scalia dissents in *U.S. v. Windsor,* 133 U.S. 2675 (2013) and *King v. Burwell,* 135 U.S. 2480 (2015)]. The *Davis* majority adopts the rule and reason of *In re Marriage of Norviel*, 102 Cal.App.4th 1152 (2002), itself a divided opinion. The long parade of date of separation cases [*Baragry* (1977), *Marsden* (1982), *Von der Nuell* (1994), *Hardin* (1995), *Norviel* (2002), *Manfer* (2006)] has now culminated with the Supreme Court's opinion in the *Davis* case. *Davis* gives us what it sees as a bright line rule: Living in separate residences is "an indispensable threshold requirement" for finding that spouses are "living separate and apart" under *Family Code* section 771(a). At least one of the spouses must have the subjective intent to end the marital relationship, which intent must be objectively evidenced by words or conduct reflecting that there is a complete and final break in the marital relationship. However, as we have learned, judicial bright line rules are often softened by nuanced exceptions embedded in the footnotes. Remember how we learned to cite and rely on footnote 12 of *In re Marriage of Burgess*, 13 Cal. 4th 25 (1996), in the context of move-away cases. Footnote 7 of the majority opinion in *Davis* will most likely now be used in a similar manner in future date of separation cases.

The central basis of the *Davis* majority is its interpretation of *Family Code* section 771(a), the language of which originated in a predecessor statute enacted in 1870. The opinion then turns to "extrinsic aids," the statute's long history, its prior judicial construction, and the Legislature's use of "living separate and apart" elsewhere in the Family Code. To posit a fixed determination of date of separation as of 2015, based on an interpretation of what the Legislature meant in 1870, seems to constitute an absence of practical guidance. The *Norviel* dissent by Justice Bamattre-Manoukian, and the *Davis* concurring opinion by Justice Liu (concurred in by Justice Werdegar), strike this reader as a more realistic, workable, modern and practical approach. Perhaps the Legislature will help us out.

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