CALIFORNIA Family Law Monthly

June 2012
Volume 2012 • Issue No. 06

Mediation Confidentiality vs. Breach of Spousal Fiduciary Duty: The Clash of Enshrined Public Policy Titans

*By Marshall S. Zolla, Esq.; Deborah Elizabeth Zolla, Esq.; Vivian Carrasco Hosp, Esq.**

Many of us grew up hearing the equation $E=mc^2$, without really knowing what it meant.[1] $MC=FD^2$ [Mediation Confidentiality = Fiduciary Duty (Squared)] is the new physics of family law. This equation now forms the energy content of many family law cases because of the potential clashes between competing public policies.

Both the doctrine of mediation confidentiality and the mandate of spousal fiduciary duty are well enshrined in California law. They are both core fundamental principles that have evolved and expanded significantly over the past decade. They are both policies that courts seek to protect and preserve, and both are held in the highest judicial regard. But what happens when these two public policies clash? Which policy should prevail– the steel curtain of mediation confidentiality, or the sanctified public policy of spousal fiduciary duty?

Copyright©2012, Marshall S. Zolla, Deborah Elizabeth Zolla and Vivian Carrasco Hosp. All rights reserved. Reprinted with permission.

* Mr. Zolla is a Certified Family Law Specialist who practices in Century City. Mr. Zolla has been a contributor and member of the editorial board of the California Family Law Monthly for the past 24 years. Deborah Elizabeth Zolla and Vivian Carrasco Hosp are associates with the Law Offices of Marshall S. Zolla and concentrate their practice on complex family law matters, including prenuptial agreements, postnuptial agreements and sophisticated issues in marital dissolution proceedings.

The only published case in the family law context that deals with this conflict is *In re Marriage of Kieturakis.*[2] That case, as explained more thoroughly below, holds that when the two competing policies collide, mediation confidentiality prevails. *Rinaker v. Superior Court*[3] and *Olam v. Congress Mortgage Co.,*[4] both non-family law cases, reach a different conclusion by creating judicial exceptions to strict mediation confidentiality. Both cases employ a balancing test to weigh the competing policies and both arguably remain good law.[5] Which doctrine will prevail in any given factual context remains unclear, but it is critical for family law practitioners to be aware of the potential conflict.

Consider, for example, the way these principles may clash when a couple retains a mediator to help negotiate and draft a postnuptial agreement. In our hypothetical case, Brad asks Linda to sign a postnuptial agreement a month after they are married. The agreement is then negotiated and drafted with the help of a neutral mediator. Because they are husband and wife, each owes the other a fiduciary duty to disclose all assets and liabilities and all material facts regarding valuation of assets and liabilities, income and expenses. Years later, the parties separate. Linda discovers that Brad withheld material information during the negotiation–that merger talks regarding his business were taking place during preparation of the postnuptial agreement. The merger was later consummated, and had a material impact on the valuation of Brad's company. Linda contends that by failing to disclose the merger negotiations during preparation of their agreement, Brad breached his spousal fiduciary duty to her under Family Code Section 721.[6] In response, Brad maintains that any evidence he might present to defend against Linda's claim would directly invade mediation confidentiality. As a result, he contends, any information discussed, negotiated and exchanged is precluded under the doctrine of mediation confidentiality.

Both Linda and Brad are correct. Brad should have disclosed the merger talks and had a duty to do so under California law. But is he "off the hook" and can he escape liability because they went to a mediator to draft the agreement? If the answer is yes, then future parties in Brad's position will seek to mediate such agreements, knowing they will be fully protected regardless of any misrepresentations or breaches of fiduciary duty. If the answer is no, then full disclosure becomes more important than mediation confidentiality, and a person in Brad's position will not be able to use mediation confidentiality as a protective shield. The answer to this question is not yet clear, even after *Kieturakis*, but it is essential for practitioners to keep this issue in mind and to be aware of the possible arguments and contentions on both sides.

I. THE BLACK BOX OF MEDIATION CONFIDENTIALITY

The Ninth Circuit Court of Appeals recently reaffirmed the policy of mediation confidentiality with its ruling in *Facebook, Inc. v. Pacific Northwest Software, Inc.*[7] The facts of the case were famously portrayed in the film, *The Social Network*. Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra sued Facebook and Mark Zuckerberg in Massachusetts, claiming that Zuckerberg stole the idea for Facebook from them. Facebook countersued in federal court in California. The federal court ordered the parties to mediate.

After a day of mediation, the Winklevosses, their competing social networking company (ConnectU), and Facebook entered into a written settlement agreement in which the Winklevosses agreed to give up ConnectU in exchange for cash and stock in Facebook. The parties stipulated that the agreement was confidential and binding, and could be submitted into evidence only for purposes of enforcement. The settlement fell apart during negotiations over the content of the final documents, and Facebook filed a motion to enforce the agreement. The district court held that the mediated agreement was enforceable.

The Winklevosses appealed, arguing, among other things, that Facebook misled them to believe its shares were worth four times their actual value. If they had known this at the time of the mediation, they contended, they would have never signed the settlement agreement. In support of their claims, the Winklevosses presented evidence of what was said during the mediation. The Ninth Circuit agreed with the district court's decision to exclude the evidence, albeit for different reasons. The district court relied on a local ADR rule which protected mediation confidentiality. The Ninth Circuit, on the other hand, relied on a clause in the mediation agreement itself, which expressly provided that all statements made during the course of mediation were privileged, and could not be introduced as evidence in any judicial or other proceeding. The clause precluded the Winklevosses from introducing any evidence of what Facebook said, or did not say, during the mediation. Thus, the plaintiffs could not establish that Facebook misled them as to the value of its shares, and their claims failed. In spite of Facebook's alleged fraud, the Court of Appeal relied upon and upheld the policy of mediation confidentiality. The Ninth Circuit found no basis for allowing the Winklevosses to back out of a deal that appeared favorable in light of subsequent market activity, a deal they reached with the help of a team of lawyers and a financial advisor.[8]

Another recent major mediation confidentiality case is *Cassel v. Superior Court*,[9] in which the California Supreme Court continued its strict adherence to the doctrine that mediation confidentiality has no exceptions, absent an express waiver. In *Cassel*, the petitioner-client filed a complaint against his former attorneys, alleging that they had breached their professional duty by providing improper advice during mediation in order to force him to settle his case. The petitioner wanted to use conversations he had with his attorneys preceding and during the mediation to establish his case. The trial court ruled that discussions between the client and his attorneys prior to and during mediation were inadmissible. The Court of Appeal reversed, reasoning that the mediation confidentiality statutes were not intended to prevent a client from using communications with his or her attorney outside the presence of other mediation participants in a legal malpractice case against the attorney.

Relying on its past decisions,[10] the California Supreme Court reversed, strictly construing the mediation confidentiality statute, Evidence Code § 1119, to hold that the petitioner's discussions with his attorneys before and during the mediation were protected by mediation confidentiality, thus leaving the petitioner-client without the ability to introduce evidence of his attorney's alleged misconduct. The Court expressly invited the legislature to reconsider the strictness of Evidence Code Section 1119. Justice Chin's concurrence acknowledged that shielding attorneys from being held accountable for negligent or fraudulent conduct during mediation "is a high price to pay to preserve total confidentiality in the mediation process."[11]

In contrast to *Facebook* and *Cassel*, which upheld mediation confidentiality as absolute, a recent Second Circuit opinion, *In re Teligent,*[12] found that limited exceptions do exist. In *Teligent*, the parties had agreed to be bound by protective orders that imposed limitations on disclosure of communications made in mediation. The Second Circuit held that lifting the protective orders to allow for disclosure of mediation communications would be warranted only if the party seeking disclosure could establish three conditions: (1) a special need for the confidential material, (2) resulting unfairness from lack of discovery, and (3) the need for the evidence outweighed the interest in maintaining confidentiality.[13]

Is the Second Circuit's recent opinion sanctioning exceptions to strict mediation confidentiality likely to influence California's viewpoint on mediation confidentiality? *Facebook* from the Ninth Circuit, *Cassel* from the California Supreme Court, and *Kieturakis* all indicate that the answer is no. These cases preserve strict adherence to the doctrine of mediation confidentiality. Their holdings represent, at this time, both the legislative and judicial embodiment of California's public policy.

II. THE ENSHRINED PUBLIC POLICY OF SPOUSAL FIDUCIARY DUTY

Evolution of the spousal fiduciary duty embodied in Family Code Section 721 has been a major development in the field of family law during the past decade.[14] As illustrated below, California courts have consistently upheld the sanctity of spousal fiduciary duty as a matter of public policy.

In *In re Marriage of Burkle,*[15] the Court of Appeal held that the parties' 1997 postnuptial agreement was valid and enforceable because mutual reciprocal advantages existed. *Burkle* teaches three important lessons. First, a presumption of undue influence does not arise in an interspousal transaction unless one spouse obtains an "unfair" advantage – a mere advantage is not enough. By drawing this distinction, the court narrowed the scope of the fiduciary duty between spouses. Second, even if a presumption of undue influence arises, it may be rebutted. Third, the statutory requirement that parties to a dissolution proceeding serve Declarations of Disclosure does not apply to spouses who execute a postnuptial agreement when no imminent dissolution of the marriage is anticipated.

In *In re Marriage of Feldman,*[16] the husband was sanctioned for his failure to update disclosures and provide the wife with information regarding his financial dealings during their marital dissolution proceeding. *Feldman* teaches that if you do not keep disclosures properly updated to reflect material changes in assets or debts, you will be sanctioned pursuant to Family Code Section 2107.

In re Marriage of Fossum[17] held that a wife who took a cash advance on a credit card without disclosing the fact to her husband violated her fiduciary obligation to him under Family Code Section 721. The Court of Appeal also held that where a breach of spousal fiduciary duty has been established, an award of attorney's fees is mandatory under the provisions of Family Code Section 1101(g).

In re Marriage of Margulis[18] is an important recent opinion concerning the burden of proof for establishing a breach of spousal fiduciary duty. That case held that when the non-managing spouse presents *prima facie* evidence that community assets have disappeared while under the control of the managing spouse post-separation, the burden of proof shifts to the managing spouse to account for the missing assets, or that spouse will be charged for their value. Family Code provisions impose on the managing spouse "...affirmative, wide-ranging duties to disclose and account for the *existence*, *valuation*, and *disposition* of all community assets from the date of separation through final property division."[19] The fiduciary relationship between spouses requires the managing spouse to reveal any self-dealing or other conduct that impaired the value of the property and entitles the other spouse to compensation. *Margulis* reinforces the duty of spouses to account for assets under their management and control, strengthening the doctrine of the fiduciary duty owed by one spouse to the other.

III. CLASH OF PUBLIC POLICIES – HOW TO RESOLVE THE CONFLICT

A. Argument that Spousal Fiduciary Duty Prevails

Litigants contending that spousal fiduciary duty should prevail over mediation confidentiality must distinguish the facts of *In re Marriage of Kieturakis*, which is the only authority to hold that the presumption of undue influence does not apply to mediated settlement agreements.[20] In *Kieturakis*, the wife challenged the parties' mediated settlement agreement, alleging fraud, duress and lack of disclosure, but, at the same time, refused to waive mediation confidentiality. The trial court found that the husband had the burden of proof, based on the presumption of undue influence that attaches to unequal marital transactions. The wife's refusal to waive mediation confidentiality would have prevented the husband

from meeting his burden. Commenting that it was confronted with the most difficult legal issue it had ever faced, the trial court admitted evidence from the mediation on the ground it had to do so in the spirit of fairness and justice, and ruled in favor of the husband.

The Court of Appeal affirmed, but found that husband did not have to rebut the presumption of undue influence because the presumption does not apply to mediated settlement agreements. According to the appellate court, policies favoring mediation and finality of judgments trump the presumption of undue influence and the concept of spousal fiduciary duty. The court further held that the burden of proving undue influence under such circumstances is placed upon the party seeking to set aside a mediated agreement under Family Code Section 2122.

It is important to note that *Kieturakis* did not hold that mediation evidence can never be admissible. *Kieturakis* acknowledged that *Olam v. Congress Mortgage Co.*[21] created a nonstatutory exception to mediation confidentiality when a balancing of the need to do justice in a particular case against policies favoring mediation weighs in favor of compelling a mediator to testify. Although *Kieturakis* states that *Olam* is "questionable authority," given the California Supreme Court's refusal in *Foxgate* and *Rojas* to recognize nonstatutory or good cause exceptions, it expressly leaves open the question of *Olam's* continued viability. "We need take no position on *Olam*'s viability because the outcome would be the same in this case whether or not the decision to compel evidence from the mediator could be sustained. . .Here, as in *Olam*, the mediator could be seen as the source of the most probative evidence on the merits of the parties' dispute, and compelling that evidence could be viewed as doing relatively little damage to mediation confidentiality."[22] Thus, it can legitimately be contended that the court left open the possibility that mediation evidence could be admissible in some circumstances, even absent a waiver of the mediation privilege.

Given the protected status of spousal fiduciary duty and the public policy it was designed to protect (Family Code §§ 721 and 1100), it remains a colorable argument that limitations on spousal fiduciary duties and remedies should be created by the Legislature, not the courts. As the California Supreme Court noted in *Rojas v. Superior Court*, ". . .the Legislature clearly knows how to establish a 'good cause' exception to a protection or privilege if it so desires."[23]

Kieturakis was questioned in a thoughtful law review article,[24] which observed that "critics of *Kieturakis* object to fixed rules favoring mediation confidentiality over other important policies. . . . [and] have expressed concern about the potential consequences that will result if mediated agreements are 'effectively exempt from the established standards [of contract common law].' The chief concern of this view relates to the potential for parties to abuse the system, in that 'an individual intending abusive negotiation strategies like fraud or coercion could insist on negotiating in a mediation and then cling to his right of confidentiality when enforcing the suspect agreement.' "[25] The article contrasts the inflexible, bright-line approach taken in *Kieturakis* with a balancing-test approach, which stresses "the need for judicial discretion based on the circumstances of each case, while insuring a basic level of confidentiality by calling for in camera review of the confidential material." Under this approach, "even if a judge determined that the 'need for mediation evidence' outweighed the purposes served by confidentiality, the mediation evidence in question would not become a matter of public record, but would be disclosed to the judge(s) only," thereby "afford-[ing] more protection than would a rule of bare disclosure."[26] While questioning "whether the flexibility gained by a balancing approach would outweigh the loss of the full protection of confidentiality and the lack of a uniform legal rule," the author surmised that if a balancing approach were adopted, "California judges could use their discretion to shape a discernible rule by identifying some specific factors relevant to each side of the balance."[27] Attorneys contending that spousal fiduciary duty should prevail over a strict application of mediation confidentiality can (under *Olam* and *Rinaker*) and should argue that the court should adopt a balancing approach.

Courts have long been faced with deciding between competing public policies and presumptions. The California Supreme Court did so in *In re Marriage of Schnabel*[28] where it employed a balancing test to weigh a spouse's need for discovery against the financial privacy interests of a third party. In a similar vein, courts must at times decide between competing presumptions and burdens of proof. For example, in *In re Marriage of Haines,*[29] the court held that when the title presumption in Evidence Code Section 662 conflicts with the presumption of undue influence in Family Code Section 721, the presumption of undue influence must prevail.

Likewise, in *Marriage of Margulis*, discussed above, the court was faced with competing burdens of proof under Evidence Code Section 500[30] and Family Code Section 721. *Margulis* "illustrates the importance of shifting to the managing spouse the burden of proof on missing assets ...[as well as] how shifting this burden of proof furthers the statutory purposes of requiring complete transparency and accountability in the management of community assets and of providing a remedy to the nonmanaging spouse when a breach of that fiduciary duty occurs."[31] *Margulis* arguably suggests that the presumption of undue influence should have been applied in *Kieturakis*, and that the burden of proof should be on the spouse who allegedly gained an advantage through a transaction with his wife. Perhaps the *Margulis* opinion evidences a shift in California towards a heightened judicial propensity to elevate the importance of the doctrine of spousal fiduciary duty.

B. Argument that Mediation Confidentiality Should Prevail

Those litigants contending that the doctrine of mediation confidentiality should prevail will argue that mediation confidentiality must protect all communications that take place during mediation, regardless of whether such communications allegedly constitute fraud, misrepresentation or breach of fiduciary duty. In the context of a mediation between spouses, evidence of a breach of fiduciary duty would remain precluded by mediation confidentiality, leaving the spouse against whom the breach was committed without the ability to prove his or her case, and thus, without a remedy.

Two core arguments support this position. First, the policy of mediation confidentiality is embodied in *Evidence Code* 1119, as referenced above. In *Foxgate*,[32] the California Supreme Court held: "...there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's [*sic*] reports. Neither a mediator nor a party may reveal communications made during mediation." Thus, absent an express statutory exception or an express written waiver, disclosure of communications made during mediation is prohibited. The result of this, of course, is that one party has control over the other party's ability to present evidence. In some cases, this means that one spouse, who owes the highest duty of good faith and fair dealing to the other spouse, can exercise substantial control over the outcome of disputes concerning mediated marital agreements.

Second, *In re Marriage of Kieturakis*[33] stands for the proposition that the presumption of undue influence in marital transactions must yield to the policy favoring mediation confidentiality. Under *Kieturakis*, the party challenging the mediated marital agreement shoulders the burden of proof, as noted above. That burden may be impossible to meet if the party is precluded from introducing evidence of any communication, writing, or negotiation that took place during mediation. Proponents of mediation confidentiality will therefore argue for a broad interpretation of *Kieturakis*.

Against the backdrop of these *Kieturakis*-supported arguments, a nonsuit pursuant to Code of Civil Procedure Section 581c is a potential, aggressive procedural option.[34] A motion for nonsuit can be made after an opening statement and serves as a demurrer to the introduction of evidence.[35] Proponents of this proactive procedure will contend that a nonsuit is appropriate because the subject agreement was negotiated and consummated during the course of mediation. Assuming the parties have not both expressly waived mediation confidentiality under *Evidence Code* Section 1122(a)(1), anything said during mediation is inadmissible. The only document admissible is the agreement itself, pursuant to *Evidence Code* Section 1123(b). This results in a core problem for the challenging party because either (a) the challenging party must rely on inadmissible evidence precluded by mediation confidentiality to establish his or her *prima facie* case; or (b) the party opposing the contract challenge is precluded by mediation confidentiality from putting on exculpatory defense evidence. That preclusion itself acts to prevent the challenging party from putting on a *prima facie* case, thus the possibility of a non-suit as a matter of law.

IV. CONCLUSION

In re Marriage of Kieturakis appears to make it almost impossible to invalidate a mediated agreement between spouses, in spite of a breach of fiduciary duty. Clients seeking to uphold such an agreement will rely on *Kieturakis* and maintain that tearing the fabric of the firm judicial curtain protecting mediation confidentiality would be detrimental to couples who wish to resolve their differences through the favored process of mediation. Breaking this rigid judicial barrier of mediation confidentiality might arguably discourage alternative dispute resolution and potentially lead to increased litigation in a state where courts already face financial shortfalls and overly burdened courtrooms.

On the other hand, the rigid bright-line rule imposed by *Kieturakis* could very well deter couples from even considering mediation, for fear that if fraudulent misrepresentation occurs, the mediated agreement will nevertheless be upheld. To address this not unreasonable concern, courts should not automatically reject the presumption of undue influence, as this would severely limit, if not completely eliminate, the fiduciary duties one spouse owes to the other as a matter of law. The burden of proving a breach of fiduciary duty should not shift solely on reliance on the narrow reasoning of the *Kieturakis* opinion. The more recent case of *In re Marriage of Margulis*,[36] which places the burden of proof squarely on the party alleged to have committed the breach (though not citing *Kieturakis*), provides legal authority to support this view. A more nuanced approach would have the courts employ a balancing test on a case-by-case basis to weigh the two competing public policies in order to achieve ultimate fairness, which is, after all, the correct public policy goal.

This tension between strict application of one public policy doctrine and a balancing test that takes into account another equally sanctified public policy doctrine is not unknown to tradition, literature,[37] or the law. The phrase "quality of mercy" appears in many cases expounding equitable principles.[38]

California practitioners have not seen the last word on the resolution of the tension between mediation confidentiality and breach of spousal fiduciary duty. Resolution may not come readily from the Legislature (as invited by the Supreme Court in *Cassel*), it may not come unbidden from the courts, but the progenitor of its ultimate resolution will surely come from the work of concerned, competent, creative California lawyers.

---

1 $E=mc^2$, where E is energy, m is mass and c is the speed of light in a vacuum. Albert Einstein proposed his mass-energy equivalence equation in 1905. In physics, mass-energy equivalence is the concept that the mass of a body is a measure of its energy content. Even the imitable laws of physics are susceptible to technological re-interpretation. Neutrinos, subatomic particles moving *faster* than the speed of light, were reported last year. If substantiated, this discovery would upend the foundation of modern physics. [Lemonick, Michael D. "Faster than Light: A new study may upend Einstein." Time 10 Oct. 2011:17]. Now you know why we are lawyers, not physicists.

2 *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56.

3 *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155.

4 *Olam v. Congress Mortgage Co.*(1999) 68 F.Supp.2d 1110.

5 *See In re Marriage of Kieturakis, supra*, 138 Cal.App.4th at 77-78 (citing both *Rinaker v. Superior Court* and *Olam v. Congress Mortgage Co.*,).

6 Section 721(b) provides that "in transactions between themselves, [spouses] are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other" and which impose "the highest duty of good faith and fair dealing" in such transactions.

7 *Facebook, Inc. v. Pacific Northwest Software, Inc* (2011) 640 F. 3d 1034.

8 *Id.* at 1042.

9 *Cassel v. Superior Court* (2011) 51 Cal.4th 113.

10 *See Foxgate Homeowners' Assn., Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1; *Rojas v. Super. Ct. (Coffin)* (2004) 33 Cal.4th 407; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570.

11 *Cassel, supra*, 51 Cal.4th at 138.

12 *In re Teligent*, 640 F.3d 53(2d Cir. 2011).

13 *Id.* at 58.

14 Earlier fiduciary duty cases are discussed at length in the authors' previous article regarding spousal fiduciary duties. *See* Marshall S. Zolla and Deborah Elizabeth Zolla, *Marital Duty*, Los Angeles Lawyer (February 2004).

15 *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712.

16 *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470.

17 *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336.

18 *In re Marriage of Margulis* (2011) 198 Cal.App.4th 1252.

19 *Id.* at 340.

20 *In re Marriage of Kieturakis, supra*, 138 Cal.App.4th 56.

21 *Olam, supra*, 68 F.Supp.2d 1110.

22 *Kieturakis, supra*, 138 Cal.App.3d at 94.

23 *Rojas v. Superior Court, supra*, 33 Cal.4th at 423.

24 Annalisa L. H. Peterson, *When Mediation Confidentiality and Substantive Law Clash: An Inquiry into the Impact of In re Marriage of Kieturakis on California's Confidentiality Law* (2007) 8 Pepp. Disp. Resol. L.J. 199.

25 *Id.* at 206, *quoting* Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened* (2003) 2003 J. Disp. Resol. 135, 138 (2003).

26 *Id.* at 208, *quoting* Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality* (2001) 35 U.C. Davis L. Rev. 33, 102.

27 *Id.*

28 *In re Marriage of Schnabel* (1993) 5 Cal.4th 704.

29 *In re Marriage of Haines* (1995) 33 Cal.App.4th 277.

30 *Evidence Code* Section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he is asserting."

31 *In re Marriage of Margulis, supra*, 198 Cal.App.4th at 1274.

32 *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., supra*, 26 Cal.4th at 4.

33 *In re Marriage of Kieturakis, supra*, 138 Cal.App.4th at 56.

34 This occurred in the trial court in *In re Marriage of Musk* (Los Angeles Superior Court Case No. BD487602) in May 2010.

35 Code of Civil Procedure § 581c(a); *Darr v. Lone Star Industries, Inc.* (1979) 94 Cal.App.3d 895, 899.

36 *In re Marriage of Margulis, supra*, 198 Cal.App.4th at 1252.

37 *See* Portia's "quality of mercy" speech in The Merchant of Venice, Act IV, Scene 1, 185.

38 See, for example, *Fields v. Brown* (9th Cir. 2007) 503 F.3d 755; citing and quoting from *Mayfield v. Woodford* (2001) 270 F.3d 915.