NFLR
NEVADA FAMILY LAW REPORT
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Deductibility of Attorneys' Fees in Divorce

by Daryl S. Alterwitz

INTRODUCTION

All too often the tax consequences of a divorce action are overlooked by divorce counsel. In the absence of tax planning by the practitioner, some of the favorable tax results may still be available to the client.[1] In regard to the deductibility of attorney's fees, however, every practitioner should have a basic understanding of the rules and some strategy so that his client will have reasonable and supportable grounds for deducting a significant part of those fees from his gross income.

Expenses incurred by a taxpayer may only be deducted if there is a specific provision in the Internal Revenue Code authorizing such deductions. In the commercial arena, attorney's fees are generally deductible under Section 162[2] to the extent they are ordinary and necessary expenses incurred in carrying on a trade or business. In the case of divorce, however, a deduction for attorney's fees is specifically disallowed under Section 262 to the extent the expense was incurred "for personal, living or family expenses." Within these parameters of deductible trade and business expenses and non-deductible personal expenses, Section 212 specifically authorizes deduction of an individual's legal expenses under certain prescribed circumstances. In the case of an individual incurring ordinary and necessary expenses, attorney's fees will be deductible only if they are paid 1) for the production or collection of income; 2) for the management, conservation or maintenance of property held for the production of income; or 3) in connection with the determination, collection or refund of any tax period.[3] To the extent such expense does not meet the criteria of Section 212, the expense will be either non-deductible or capitalized.[4]

For Management, Conservation or Maintenance of Property

Of these three categories, by far the most attention, and litigation, has focused on those expenses incurred for the management, conservation or maintenance of property held for the production of income. At first, this provision would appear to allow many clients to deduct substantial amounts of attorney's fees incurred incident to divorce proceedings. For example, if husband and wife operated a family business or owned a controlling interest in an enterprise as community property, then it would seem that subsequent litigation which focused on the management, conservation or maintenance of such interest would be deductible under Section 212(2). Notwithstanding the common sense inherent in this argument, legal fees incurred incident to a divorce in which the taxpayer is attempting to conserve, maintain or protect his interest in income producing property are by and large non-deductible. Such expenses fall under the general rule that attorney's fees and other costs paid in connection with a divorce, separation, or decree for support are not deductible by either the husband or wife.[5]

In *United States v. Gilmore*,[6] the United States Supreme Court disallowed taxpayer's legal expenses incurred for the conservation of his interest in his closely held corporation. The Supreme Court held that the test for deductibility should turn on "the origin and character of the claim with respect to which an expense was incurred rather than its potential consequences on the fortunes of the taxpayer."[7] Based upon this test the Court found that the expenses were non-deductible personal expenses within the scope of Section 262. The Supreme Court reiterated its position in *United States v. Patrick*,[8] and relying on the test which looks to the underlying origin and nature of the claim, disallowed the deduction for attorney's fees therein. The shadow cast by these two Supreme Court cases has all but eradicated the deductibility of attorney's fees in divorce actions under Section 212(2).

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"Best seminar I ever attended"
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These are some of the comments made by attendees of the Family Law Seminar's "Mock Trial" held in Reno, Nevada, on September 17, 1987.

Margaret G. Green, Continuing Legal Education Director of the State Bar of Nevada, said that the attendees' comments rated the seminar "Excellent" and indicated that it was one of the best seminars to date.

The FLS mock trial presented the case of *Ligament v. Ligament* (an orthopedic surgeon). The issues included evaluation of a professional practice; evaluation of the professional license; apportionment; reimbursement and pro-tanto interests; transmutation; alimony, equitable distribution of assets and liabilities, and custody.

Again this year on November 17, 1988, in Las Vegas and November 18 in Reno, the Family Law Section will present another mock trial of a contested divorce case.

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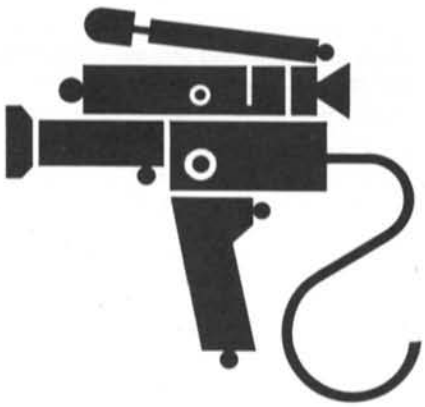

Video Tapes Available

Video tapes of the mock trial portion of the September 17, 1987, Family Law Seminar in Reno are available (6 CLE credits). Tuition for the "Family Law Seminar" video tapes will be $95 for Family Law Section members and $110 to non-members of the Family Law Section. Contact Maggie Green at the State Bar office for details.

NFLR Seeks Family Law Articles

The *Nevada Family Law Report*, published quarterly by the Family Law Section of the State Bar of Nevada, seeks to provide interesting and substantive family law material to educate both the bench and the bar. **NFLR needs articles for future issues.** If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation, or discussions of family laws trends and issues, please request author's guidelines from NFLR, 243 South Sierra Street, Reno, NV 89501, and contact an articles editor to discuss your idea.

Articles published in the NFLR are eligible for continuing legal education credits. Authors must request an application for approval of authorship in publication from Karen Bernhardt, executive director of the State Board of Continuing Legal Education, 295 Holcomb Avenue, Suite 5A, Reno, NV 89502. Telephone: 329-4443. The CLE Board then reviews the article and application.

For Determination, Collection or Refund of Tax

In contrast to the disallowance of deductions under Section 212(2), taxpayers may readily deduct those attorney's fees which are paid "in connection with the determination, collection or refund of any tax."[9] Section 212(3). It is clear from the language of the statute and regulations that these deductions are allowed not only for expenses incurred in connection with any proceeding to collect a tax refund or contest a tax liability, but the statute also allows deductions for fees paid independent of any proceeding or contest as long as such expenses were "paid or incurred by a taxpayer for *tax counsel.*"[10] Thus, to the extent a client is involved with "tax counsel" in connection with the "determination . . . of any tax," such attorney's fees should be deductible. It is the responsibility of counsel to understand how these expenses can be allocated and substantiated so that his client may most effectively utilize the deductions to which he is entitled.

In order for an expense to be deductible under Section 212(3) of the Code, it must relate solely to tax counsel. If such expenses were incurred in connection with an activity that is not solely concerned with tax matters, the expense for tax counsel must be properly allocated and substantiated. In Revenue Ruling 72-545,[11] the Treasury Department provided guidance for the allocation and substantiation of attorney's fees in divorce actions.

In Rev. Rul. 72-545, the Internal Revenue Service described three scenarios in which there existed a reasonable basis for allocating to tax counsel a portion of legal fees incurred in connection with the divorce proceedings. In the first situation, the taxpayer engaged a law firm which limited its practice to matters involving state and federal taxation, and all of the fees incurred to advise him of the federal income tax consequences of a proposed property settlement agreement were deductible.

In the second situation, the taxpayer engaged tax counsel to advise him of the Federal income, gift and estate tax consequences of establishing a trust to make periodic payments to his wife in discharge of his obligation under state law to support his wife, with the remainder interest in the property passing to their children at death. The law firm handled both tax and non-tax aspects of divorce, and the statement of the firm sent to the taxpayer allocated a portion of the total fee to tax matters. The allocation was based primarily upon 1) the time required; 2) the difficulty of the tax questions presented; and 3) the amount of taxes involved. Based upon such allocations, and the fact that the allocations were substantiated in the statement which the firm sent to the taxpayer, all of the fees incurred by tax counsel were deductible.

> Thus, it is clear that in order for your client to obtain a deduction under Section 212(3), he or she should receive an itemized bill, allocating the total fees between services performed for tax and non-tax issues.

In the third situation, a single practitioner handled both the tax and non-tax matters, and the practitioner's statement to the taxpayer allocated the fee between the tax advice relating to the deductibility of dependents for Federal income tax purposes and other non-tax matters. The allocations were primarily on 1) the amount of the attorney's time attributable to each; 2) the fee customarily charged in the locality for similar services; and 3) the results obtained in the divorce negotiations. The allocation based on such criteria, and the substantiation of the allocations set forth in the statement to the taxpayer were sufficient to allow the taxpayer to deduct all of his attorney's fees attributable to tax counsel.

In the absence of any allocation by the attorney and substantiation in the form of an itemized statement, it is likely that any deduction by the taxpayer will be denied. In *Hall v. United States,*[12] the Plaintiff obtained a Nevada divorce, and upon his return to Florida the divorce was challenged. Plaintiff's counsel in Florida failed to itemized the final bill and allocate the fees between tax and non-tax matters. In denying the Plaintiff any deduction for legal fees, the court stated that the burden of proof is upon the Plaintiff to establish the deductibility of an expense in a recovery suit. "The Plaintiff must show that there is a reasonable basis for allocating a portion of his legal fees to tax counseling advice. This court has found that a good faith allocation *by the attorney who performed the services* may be sufficient to meet Plaintiff's burden."[13]

Thus, it is clear that in order for your client to obtain a deduction under Section 212(3), he or she should receive an itemized bill, allocating the total fees between services performed for tax and non-tax issues. The allocations must be made in good faith by the attorney, based upon the time involved, the complexity of the issues, the potential tax liability involved, and the fee that is customarily charged for those services. In order for an attorney to make such allocations, he or she must have a general idea as to the tax issues involved in each case. Although it is beyond the scope of this article to set forth all possible tax consequences associated with divorce, it is appropriate to list some of the more significant tax considerations:

- Tax free transfers incident to divorce;[14]
- Deduction from and inclusion in gross income of alimony payments;[15]
- Non-deductibility and non-inclusion of child support;[16]
- Dependent child deductions and child care credit;[17]
- Division of a retirement plan pursuant to a Qualified Domestic Relations Order.[18]

For Collection or Production of Income

Among the tax consequences listed above, the inclusion and deduction of alimony payments is the most significant for purposes of deductibility of attorney's fees. The costs of tax advice can be deductible by both the payor spouse as well as by the recipient of alimony or property. In the case of the payor spouse, the deductibility of fees will be subject to the limitations of Sections 212(3) set forth above, and the costs of legal counsel must be allocated and substantiated by the practitioner. In the case of the recipient

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spouse, however, the payee will often be able to deduct his or her legal expenses on a broader scale. To the extent the expenses were incurred for the production or collection of income (in the form of alimony or otherwise), such expenses will be deductible under Section 212(1). Treasury Regulations Section 1.262-1(b)(7) states in pertinent part that "an attorney's fees and the part of the other costs paid in connection with a divorce, legal separation, written separation agreement or a decree for support, which are properly attributable to the production or collection amounts includable in gross income under Section 71 are deductible by the wife under Section 212. Legal expenses incurred to *obtain* an alimony award, to *increase* an award, or to *collect* an award fall into the deductible income producing category.[19] It should be pointed out, however, that only those legal fees incurred in obtaining, increasing or collecting *income* (in the form of alimony or otherwise) are deductible, and those fees incurred to otherwise obtain non-income producing assets are not deductible pursuant to Section 212(1).

In light of the considerations above regarding the deductibility of attorney's fees by both payor spouse and payee spouse, many customary practices in divorce settlements should be reconsidered. In particular, it is a customary practice for the payor spouse (or husband) to pay the attorney fees of the payee spouse (or wife). It is important to point out that a spouse may only deduct those legal fees, subject to the restrictions set forth above, that are incurred on his or her own behalf, and payment by the payor spouse of the otherwise deductible attorney fees of the payee spouse are not deductible by the payor spouse. In this regard, it would be advisable for the payee spouse to pay his or her own attorney's fees in order to utilize the deduction, and the agreement between the parties be restructured so that the deductible alimony payments made by the payor spouse are increased enabling the payee spouse to pay his or her own legal expenses. Before this technique is utilized, however, counsel must make sure that payor spouse is not otherwise obligated to pay the payee spouse's legal fees.

Capitalization of Fees

To the extent legal expenses incurred in a divorce proceeding are non-deductible under section 212, it may be possible to include such amounts in the basis of the property which is the focus of the dispute. Where the fees are expended in order to retain ownership of specific property, protect title or otherwise preserve the asset, the basis of those assets in controversy may be increased by the amount of the otherwise non-deductible legal fees.[20] In essence, there must be some direct relationship between the expenditure and the asset whose basis is to be increased. It should be pointed out, however, that an increased basis is much less desirable than a current expense since the increase in basis will only benefit the taxpayer when the asset is ultimately sold and the amount of gain resulting therefrom is reduced by the increase in basis.

Conclusion

Even though all fees in a divorce proceeding are not deductible, a significant portion of those fees may be deductible if the practitioner makes a good faith effort to allocate the fees between tax counsel and non-tax counsel. Where the attorney substantiates this allocation by including it in the client's statement, those fees incurred for tax counsel will be an allowable deduction. In the case of alimony payments, all fees incurred in order to obtain, increase or collect such amounts of income will be deductible under Section 212(1). For this reason, it is essential that the practitioner have a basic understanding of the deductibility of his own fees and the tax consequences of divorce proceedings in general, so that he may most effectively represent and benefit his client.

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NOTES

[1]For example, a trial attorney may work out a divorce settlement, in which, without his assistance or understanding, the transfer of property to the former spouse incident to the divorce is tax free under Section 1041, or the alimony payments to the former spouse are deductible under Section 215 of the Internal Revenue Code.

[2]All references to "Sections" are references to the Internal Revenue Code of 1986 as amended from time to time.

[3]Section 212. In addition to the limits of Section 212, itemized deductions, such as deductible attorney's fees, will only be allowed to the extent all itemized deductions exceed two percent (2%) of a taxpayer's adjusted gross income. See Section 67.

[4]To the extent an expense is not currently deductible but otherwise improves or preserves the value or perfects or protests title to the asset, such expense will be capitalized and added to the basis of the property to reduce the amount of gain on a subsequent sale of the property.

[5]See Treas. Reg. Section 1.262-1(b)(7).

[6]*United States v. Gilmore*, 372 U.S. 39 (1962)

[7]Id at 49.

[8]*U.S. v. Patrick*, 372 U.S. 53 (1963).

[9]Section 212(3).

[10]Treas. Reg. Section 1.212-1.

[11]Rev. Rul. 72-545, 1972-2 CB 179.

[12]*Hall v. U.S.*, 78-1 U.S. Tax Cas. (CCH), Paragraph 9126.

[13]Id at 83090 (Citations omitted).

[14]Section 1041.

[15]Sections 71, 215, 1041.

[16]Sections 71(c) and 215.

[17]Sections 152(e) and 21.

[18]Sections 414(p), 72(m) (10).

[19]See *Elliott v. Commissioner*, 40 TC 304, 314 (1963), *acqd* in 1964-1 CB (Part 1) 4; *Wild v. Commissioner*, 42 TC 706 (1964), *acqd* in 1967-2 CB 4, *gov't appeal dismissed* (1st Cir. 1965).

[20]See *Gilmore v. U.S.*, 245 F. Supp. 383 (ND Cal. 1965).

CALENDAR

Family Law Seminar

November 17, 1988 Las Vegas

November 18, 1988 Reno

Sponsored by the State Bar of Nevada and the Family Law Section

Bad Faith Action Against Homeowner Insurer Arising out of Sexual Molestation of a Child

by Lance Schaeffer

In the fall of 1984, Suellis Kelley discovered that her closest and most trusted adult male friend and next door neighbor had for the preceding nine months been engaging in a series of "playful acts" with her four year old daughter which had steadily increasing sexual overtones. The trusted friend's conduct had culminated in several overt sexual acts including oral genital contact with the child.

There was nothing unusual about her friend and neighbor, Robert Hahn, from which his close friends or even his family could have predicted that he might sexually molest a young girl with whom he appeared to have a close, affectionate, and healthy adult/child relationship. He was a divorced father of a pre-teenage daughter. He shared custody of his daughter with his ex-wife. He was successful in his career and had never been in any legal trouble.

Suellis Kelley's life was shattered by the discovery that her most trusted friend had been sexually molesting her only child. She herself had suffered sexual molestation as a child and was painfully aware of the lifelong impact that it can have on a child and on the child's family. Additionally, the betrayal by a close, trusted male friend is particularly and poignantly injurious to any adult woman who had also been a victim of child sexual abuse.

The psychiatric examinations of the molester, Robert G. Hahn, revealed a startling assessment of Hahn. The assessment was that his sexual "play" with the four year old girl was not intended to and did not harm the child physically and that Hahn in fact loved the child and was very protective of her. The attorneys for Suellis Kelley and her daughter discovered that the leading experts in the field acknowledged that Hahn fit the profile of a child molester who retreats into a love relationship with a child and who would not do anything to intentionally harm his "loved one."

Rather than keep the molestation private between the two families involved (like her family had with her own molestation as a child) Suellis Kelley went to the authorities and sought criminal prosecution of Hahn. Penal Code §288(a) [Lewd Acts With A Minor Under 14 Years of Age] requires no intent to injure, nor does it require any injury, in order to obtain a conviction. Hahn plead guilty to one violation of §288(a) and was sentenced to four years in prison.

As a consequence of the lack of evidence of any actual intent to cause harm to the child, when Suellis and her daughter later brought civil actions against Hahn, those actions proceeded to trial on theories of negligence as to the daughter and negligent infliction of emotional distress as to the mother. Claims were made against Hahn's insurer, J.C. Penney Casualty, an operating subsidiary of J.C. Penney Company, Inc. Penney refused to engage in any settlement negotiations and denied coverage under its homeowner's policy which contained comprehensive personal liability insurance for Hahn.

Penney contended there was no coverage as to the daughter's's claim, notwithstanding Hahn's lack of "a preconceived design to inflict injury" as required under California's "black letter law" on the intentional harm exclusion contained in insurance policies and Insurance Code §533. (*Clemmer v. Hartford Ins.*, (1979) 22 Cal. 3d 865, 887; *Allstate v. Overton*, (1984) 160 Cal. App. 3d 850; *Congregation of Rodef Sholom v. American Motorists Ins. Co.*, (1979) 91 Cal. App. 3d 690; *Peterson v. Superior Court*, (1982) 31 Cal. 3d 147, 159.

Penney refused to even attempt to negotiate a settlement despite the fact that its insured's liability seemed "reasonably clear" (Insurance Code §790.03(h)(5)). Penney based its refusal on dicta in the Court of Appeals decision in *Kim v. Allstate*, (1984) 160 Cal. App. 3d 326 (_____), which had indicated that the court could *presume* an intent to injure the child any time there was a violation of Penal Code §288(a).

The Court in *Kim* clearly intended its dicta to help protect children from sexual abuse. It is more than a little ironic that the court's dicta has, in effect, placed child sexual abuse victims in a uniquely disadvantaged status. They are the only class of injured plaintiffs against whom the tortfeasor's insurer can deny coverage under the intentional harm exclusion even when it has been established that the normally requisite "preconceived design to inflict injury" is lacking.

Penney also refused to settle Suellis's negligent infliction of emotional distress claim contending that she could not recover against the insured on a theory of negligent infliction of emotional distress since she had not been present during any of the acts of the defendant. In effect, Penney contended that the decision in *Dillon v. Legg*, (1968) 68 Cal. 2d 728, was controlling, while the Kelley's attorney believed that the more recent decision in *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916 (1980), clearly established authority for her recovery on the facts of her case.

The trial against Penney's insured resulted in jury verdicts of $400,000 in favor of the daughter and $100,000 in favor of her mother. The trial judge, Judge William Kennedy, had expressly rejected the defendant's contention that *Dillon v. Legg* was controlling, holding that on the facts presented, the mother had stated a proper cause of action for "negligent" infliction of emotional distress. There was no appeal of either verdict by the defendant and those decisions became final in the June of 1986.

Notwithstanding that there was coverage on the face of its policy for each of the negligence judgments entered against its insured, J.C. Penney refused to satisfy either judgment against its insured or to even attempt to negotiate settlement or advance medical payments to insure that the Kelleys could obtain the counseling for which there was an immediate and serious need.

Instead, Penney proceeded with a declaratory relief action which had named its insured and the Kelleys seeking a judgment that it had no coverage for the negligent judgments against its insured. Penney, having lost on its *Dillon v. Legg* defense to the mother's claim, announced its intention to try to prove that the insured had intended to harm the mother by molesting her daughter.

In May of 1987 Penney's declaratory relief action came to trial before Judge Duffy in Department 1. Penney could offer no evidence that its insured had ever acted with a preconceived design to harm even the daughter much less her mother. In fact, Penney's expert witness, psychiatrist Dr. ____ Goldbanz, admitted under cross examination that he found no evidence that Hahn had ever, in fact, intended any harm, that Hahn fit the profile of an individual who loved the child and would not have knowingly or intentionally caused her harm.

Judge Duffy ruled that as to Suellis Kelley the earlier trial on the issue of negligence of Hahn and the resulting final negligence judgment against its insured estopped Penney from contesting coverage in a subsequent declaratory relief trial.

However, Judge Duffy ruled that as to the daughter's judgment, since the issue of negligence to her had been admitted in the earlier trial against Penney's insured, there was only a rebuttable presumption of coverage. Judge Duffy, expressly relying on the dicta in *Kim v. Allstate*, held that the insured's admission of over twenty instances of sexually motivated "play" and his guilty plea to one violation of Penal Code §288(a) brought the daughter's injury within the intentional injury exclusion of Insurance Code §533. Therefore he held that there was no coverage under J.C. Penney's policy for the daughter's judgment.

Despite the finality of Suellis's judgment against its insured and Judge Duffy's ruling that it was estopped to deny coverage for her judgment, Penney continued to refuse to pay her judgment, or even attempt settlement or advance medical payments for the mother's counseling. Instead, Penney is seeking a stay of the bad faith action against it contending that it is "premature" until after its intended appeal of Judge Duffy's decision has been concluded.

The mother's attorney contends that there is no law to support Penney's current position, that it flies in the face of the letter and spirit of Insurance Code §790.03, and that it conflicts with the recent decision in *California State Automobile Association v. Superior Court (Sousa)* (1986) 184 Cal. App. 3d 1428, 1432 (insured may file bad faith action as a cross complaint in the insurer's declaratory relief action on coverage). Additionally, Penney had entered into an express written stipulation to proceed immediately with the bad faith action "after the trial" in the coverage action.

If Penney's attitude and conduct seem surprisingly stubborn or callous, the mother's attorney offers the following "warnings" and insights for those attorneys who are willing to, but have not yet represented child sexual abuse victims or their families:

1. Be aware from the outset that society as a whole has some very deeply imbedded biases and blind spots in the area of child sexual molestation. As a consequence you will encounter some irrational responses and an unwillingness to confront and thoughtfully deal with some of the issues in child sexual molestation as well as the emotional and legal aftermath. The unfortunate and poorly reasoned dicta in the decision of *Kim v. Allstate* is an example.

2. Dealing with child sexual molestation in the legal arena is an area fraught with unique problems and considerations. There is a phenomenon known as "secondary trauma" for the victims and their families currently inherent in the legal process. In the Kelley case this was so severe that it resulted in three separate hospitalizations of Suellis Kelley and one very-nearly-successful suicide attempt.

3. The fragile psychological state of the victims and their families raises particularly challenging problems for their attorneys. First of all they may not be strong enough to withstand the pressure of appearing and testifying in the trial against the molester. Additionally, the attorney faces the ongoing dilemma of how to discharge his or her duty to keep the clients advised of significant developments in the litigation without substantially adding to the "secondary trauma" which their clients will undoubtedly suffer.

4. While many homeowner insurance carriers are settling claims of child sexual molestation, others, like Penney, are relying on the dicta in *Kim v. Allstate* to justify treating child sexual molestation victims and their families as though Insurance Code Section 790.03 does not apply and the Supreme Court's decision in *Clemmer*, and the ensuring line of cases, are no longer controlling law on an insurer's burden of proof on the intentional harm exclusion.

5. Your representation may well involve far more time than similar cases that do not involve the very substantial problems of "secondary trauma."

6. If you fully understand and appreciate your client's anguish and the dilemma of dropping their claim or walking into the teeth of the secondary trauma that inevitably awaits them in the litigation process, you may well experience unexpectedly powerful emotions. (For the first time in 17 years of practice I openly wept in the liability trial).

On the more positive side, I have never been more clear about or more in touch with the feelings that compelled me to chose a career as a trial attorney than I have been in handling this matter.

7. On the more positive side, I have never been more clear about or more in touch with the feelings that compelled me to chose a career as a trial attorney than I have been in handling this matter. There are unconscious but deeply imbedded reactions to the entire subject of sexual molestation of children that tend to stack the deck against the victim's ultimate recovery in situations where victims of gunshot wounds (Clemmer), physical assault and battery (*Allstate v. Overton* and *Gray v. Zurich)*, arson damage (*Rodef Shalom)*, and drunken drivers *(Peterson v. Superior Court*) would routinely recover from the defendant's insurer unless the insurer sustained its burden of proving a "preconceived design to inflict injury."

How else can you explain that a child should be denied recovery based upon an apparently conclusive presumption that if even an otherwise loving and normal parent fondles the sleeping child with a sexual intent that he acted with a preconceived design to inflict injury on the child. While the parent's act would clearly constitute a violation of Penal Code §283(a), there is no way to reconcile the dicta in *Kim* with an unbroken line of cases requiring a finding of an actual intent to injure in order to exculpate an insurer via the intentional harm exclusion.

Attempting to uncover unconscious bias in the culture and eliminate it from the legal process so that your client will receive fair treatment under the law is perhaps an attorney's highest calling.

Lance Schaeffer is a San Diego trial attorney. He tried the case described here and eventually prevailed in an action to recover from the neighbor's homeowners policy.

Nevada Supreme Court Reaffirms Fox

In the March/April 1987 issue of *Inter Alia,* the journal of the State Bar of Nevada, Ronald J. Logar, a member of Washoe County Bar, published "Equitable or Equal - Where Are We?" The analysis of Nevada's property distribution law centered upon the conflict of various decisions addressing adjudication of marital assets pursuant to NRS 125.150.

The article discussed the decision in *Weeks v. Weeks,* 75 Nev. 411, 345 P.2d 228 (1959), wherein the Court affirmed as modified an equal division of the community property. The Court stated, without citation to any authority, "Equal distribution of the community property appears to be the rule in most cases." *Id.* at 230. In contrast, the court in *Fox v. Fox,* 81 Nev. 186, 401 P.2d 53 (1965), stated that the trial court is "not compelled to make an exact distribution to the parties of either the community property itself or the value thereof."

Significantly, the Court recently reaffirmed *Fox* in *Robinson v. Robinson,* App. 17450 (March 31, 1987) in its order dismissing the appeal by wife. Here, wife contended that the trial court abused its discretion in awarding to husband his retirement benefits which amounted to the husband receiving more than an equal division of the marital assets. The Court pointed out that the wife received "liquid assets" whose worth was certain; husband received, in part, the retirement benefits whose value at trial was not certain. The Court referenced *Shane v. Shane,* 84 Nev. 20, 435 P.2d; 753 (1968).

While it is significant that the Court reaffirmed the rule in *Fox,* until the Court clarifies the "presumption" established in *Weeks,* confusion will continue as to the Court's discretion in dividing community assets. Ed.

NOTICE: The law firm of LePome, Willick & Gorman would very much appreciate any information regarding military retirement benefits cases in Nevada. If cases have gone to trial, please let us know the results. If you are in litigation, we can assist. If on appeal, we would like to appear as amicus curiae. Please call Marshal Willick or Bob LePome at 348-3440 (Las Vegas) or 329-9559 (Reno).

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Jurisdictional Competition in Custody Disputes (PKPA)

On January 12, 1988, the U.S. Supreme Court rendered its decision in *Thompson v. Thompson,* No. 86-954. It addressed whether federal courts have jurisdiction to resolve custody issues under the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. Section 1738 A.

The longstanding problem of interstate child snatching and forum shopping was first addressed legislatively in the 1960's with the adoption in many states of the Uniform Child Custody Jurisdiction Act (UCCJA) (NRS Chapter 125A). The Act was intended (1) to avoid jurisdictional competition and conflict with courts of other states in matters of child custody, and (2) to promote cooperation with the courts of other states to determine the appropriate forum for hearing such cases. Since it was possible under the Act for two states to have concurrent jurisdiction, or "questionably" exercise concurrent jurisdiction, the parties were often back to where they were before adoption of the Act. Litigants were hopeful that the impasse would be corrected by Congress, when in early 1980 it enacted the PKPA for the stated purpose of avoiding jurisdictional competition and conflict between state courts.

In *Thompson,* a jurisdictional stalemate was created when wife Susan commenced an action for dissolution and custody of their minor son. The California court initially awarded the parents joint custody. However, when Susan decided to move to Louisiana to take a job, the court then entered an order awarding Susan sole custody pending a report of a court-appointed investigator, at which time the court would make a more studied determination.

While in Louisiana, Susan petitioned the Louisiana court to enforce the California custody decree and to modify the father's visitation privileges. The Louisiana court granted Susan's petition and awarded her sole custody. Two months later, the California court having received the investigator's report, entered an order awarding sole custody to the father, David. David then challenged the Louisiana decree in Federal District Court. He did not attempt to enforce the California decree in the Louisiana State Court. Susan's motion to dismiss was granted by the Federal District Court. This impasse was specifically addressed by the U.S. Supreme Court on certiorari.

On January 12, 1988, Justice Marshall, writing for a unanimous court denying certiorari, held that the PKPA *does not* provide an implied cause of action in federal court to determine which of two conflicting state court decisions is valid.

The court examined all relevant provisions of the PKPA, including its legislative history. It found that the context in which the PKPA was enacted — the existence of jurisdictional deadlocks among the states in custody cases and a nationwide problem of interstate parental kidnapping — suggests that Congress' principal aim was to extend the requirements of the Full Faith and Credit Clause to custody determinations and not to create an entirely new cause of action.

This opinion was contrary to several prior federal court decisions in the Third, Fourth and Fifth Circuit Courts. These circuits entertained actions to solve conflicting state court jurisdictional claims, concluding that a federal cause of action must exist under PKPA, for to hold otherwise would render the PKPA "virtually negatory." *Flood v. Branten,* 727 F.2d 303, 312 (3rd Cir. 1984).

The court's decision in *Thompson* is a tremendous setback for litigants and family lawyers who necessarily relied upon the perceived protection afforded by the PKPA when enacted in 1980. Child snatching and forum shopping in custody disputes grew out of a lack of uniformity in jurisdictional treatment of custody matters. It was where a state did not consider itself bound to enforce a sister state's decision under the Full Faith and Credit Clause of the U.S. Constitution that the public and family practitioners clamored for federal action.

Where the Thompson case has resolved the conflict with the Circuits, it leaves the public with a law that cannot be enforced. Congress must again address the issue in light of the *Thompson* decision. Ed.

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