

# VALLEY LAWYER

OCTOBER 2017 • \$4

A Publication of the San Fernando Valley Bar Association

## Wage Theft in Licensed Residential Care Facilities

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## A Conversation with New SFVBA President Alan Kassan



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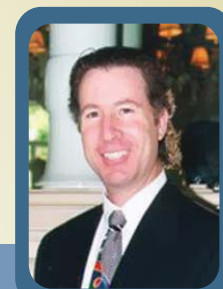


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*Photo by Ron Murray*

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### An Honor and a Responsibility

**H**AVING BEEN ELECTED President of the San Fernando Valley Bar Association is, of course, a great honor. But more than an honor, I view my presidency as a responsibility. A responsibility to continue a tradition of excellence that began some 91 years ago when the organization was founded. A responsibility to learn from the past, and to ensure our organization will continue to serve the needs of its members and our community going forward. A responsibility to lead, yes, but in so doing to effectively communicate to the lawyers and judges, and even the general public in our Valley, all the good our Association stands for, and accomplishes in our community.

Our Association bylaws begin with a lengthy mission statement, the overall of which is to promote professionalism, enhance the ideal of the legal profession as one of service to a community, and to protect meaningful access to our legal system.

We accomplish these things, and more, in a variety of ways, including sponsoring our Mediation Center, fee arbitration program and continuing legal education seminars; cultivating our practice sections; offering networking events where our members share knowledge, ideas, and business referrals; maintaining our highly regarded Attorney Referral Service, which assists Valley residents, many with very limited resources, in accessing capable legal representation; and supporting the charitable activities sponsored by our Valley Community Legal Foundation.

**ALAN E. KASSAN**  
SFVBA President



akassan@kantorlaw.net

There is a lot to manage. And therein lies the responsibility I alluded to. Thankfully, we have an excellent staff. They can never be thanked enough for all their hard work and support, and so I begin my tenure with a thank-you to Executive Director Liz Post; Linda Temkin, our Director of Education & Events; our Attorney Referral Service Director, Rosie Soto; Michael White, Editor of our award-winning *Valley Lawyer* magazine; and our office and ARS staff. I am quite sure I'll be thanking them again and again over the next 12 months. Call any of them with questions; everyone there is happy to help.

Staff can't do everything though. Nor can I alone as President. The continued success of our organization depends upon our Members, and upon the lawyers of in our community who could be, and should be members, but who have not yet come upon this revelation. Please help me with my responsibility to keep our great organization strong.

If you are a Member, I encourage you to get involved. Serve on a Committee. Join a practice section or the Valley Bar Network for professional networking. Support our civic-minded activities with the Foundation. Heck, run for the Board of Trustees, and then become President!

Get involved and you will meet great people and learn new things along the way. You'll quickly appreciate not just the good you can accomplish for the organization and the community at-large, but also for yourself. 🏠

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### A Unique Perspective

**MICHAEL D. WHITE**  
SFVBA Editor



[michael@sfvba.org](mailto:michael@sfvba.org)

**A**NSEL ADAMS ONCE WROTE THAT, “YOU DON’T make a photograph just with a camera. You bring to the act of photography all the pictures you have seen, the books you have read, the music you have heard, and the people you have loved.” The famed photographer may well have added “the professional experience you’ve accumulated” to that list—at least in Alan Kassan’s case. The new SFVBA President has, over the years, been able to meld a life-long passion for both the law and the creative arts, namely photography, with each in its own way having a subtle, but still significant, impact on the other.

During my interview with Alan for this month’s cover story, I asked him to describe that impact. “One intangible is a certain level of calmness and serenity,” he responded. “I take a much less anxious approach to my work than so many of my peers; I’ve been able to develop a creativity in both my writing and my approach to problems and problem solving. When it comes down to it, the law is solving problems and I feel that creative expression helps the process.”

So, then...is Alan Kassan a photographer than happens to be an attorney, or an attorney that happens to be a photographer?

“I’m both,” says Kassan. “For me it’s a balance. I can have the intellectual pursuits and professional pursuits and balance them, enhance my perspectives and pursue other creative outlets.”

In addition to our cover article on SFVBA President Alan Kassan, this month’s *Valley Lawyer* features a detailed look at California’s little-known filial support laws, which, under certain conditions, can require an adult to pay support to his or her parents.

The article by attorneys Diana Zitser and Brandon Johnson shows how those laws can significantly impact every member of a family and shine a spotlight on how they interact with one another.

In addition, Lauren Peterson’s MCLE article examines the all-to-common practice of wage theft in the residential care industry, while Sarah Scott offers a counterpoint to an article in the June issue of *Valley Lawyer* on “Gender Identity, Disability and Discrimination in a Changing Workplace.”

All in all, an eclectic blend of topical and timely subjects that we hope will both inform and provoke discussion.

Regards. 

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SUN	MON	TUE	WED	THU	FRI	SAT
<b>LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)</b>						
1  <b>VBN</b> 5:30 PM <b>CHABLIS RESTAURANT TARZANA</b>	2	3 <b>Valley Lawyer Member Bulletin</b> Deadline to submit announcements to editor@sfbva.org for November issue.	4	5	6 <b>Bankruptcy Law Section 9th Circuit Opinions</b> 12:00 NOON <b>SFVBA OFFICES</b>	7
8	9	10 <b>Probate &amp; Estate Planning Section</b> E-Filing: How to Navigate the System 12:00 NOON <b>MONTEREY AT ENCINO RESTAURANT</b> E-filing is now a reality. George Knecht, co-founder of Green Filing, and Lili Daniel of One Legal, will discuss e-filing and the best means to simplify the filing process. (1 MCLE Hour)	11	12 <b>Membership &amp; Marketing Committee</b> 6:00 PM <b>SFVBA OFFICES</b>	13	14 Judge Julia Brand, Ray Aver and Stephen Burton will review the relevant 9th Circuit opinions of the last year. (1.25 MCLE Hours; Bankruptcy Law Legal Specialty credit pending)
15	16	17 <b>Taxation Law Section</b> Statutes of Limitation, Mitigation and Claim of Right 12:00 NOON <b>SFVBA OFFICES</b> Former U.S. Department of Justice attorney Lydia Turanchik will discuss the ramifications of the statute of limitation that apply to IRS and state tax return filings and examinations. (1 MCLE Hour)  <b>ARS Committee</b> 6:00 PM <b>SFVBA OFFICES</b>	18 <b>Workers' Compensation Section</b> Case Law 12:00 NOON <b>MONTEREY AT ENCINO RESTAURANT</b> Mark Kahn presents his annual review. (1 MCLE Hour)	 <p><b>Installation Gala</b> <i>Party Under the Stars</i> <b>THURSDAY OCTOBER 19, 2017</b></p> <p>See page 33</p>		
22	23	24 <b>Update on Arbitration</b> 12:00 NOON <b>WEBINAR</b> Susan Barilich, P.C. will lend her expertise on litigation, trials and arbitrations, and what is permitted in an arbitration as opposed to a trial. (1 MCLE Hour)  <b>Editorial Committee</b> 12:00 NOON <b>TONY ROMA'S</b>	25	26 <b>Inclusion &amp; Diversity Committee</b> Dinner at My Place 6:30 PM <b>WOODLAND HILLS</b> See page 42	27 <b>Inclusion &amp; Diversity Committee</b> 8:15 AM <b>SFVBA OFFICES</b>	28
29	30	31 				



SUN	MON	TUE	WED	THU	FRI	SAT
			<b>Valley Lawyer Member Bulletin</b> Deadline to submit announcements to editor@sfvba.org for December issue.	<b>Membership &amp; Marketing Committee</b> 6:00 PM <b>SFVBA OFFICE</b>		
5	 <b>5:30 PM</b> <b>CHABLIS RESTAURANT</b> <b>TARZANA</b>	7	8	9	10	11
12	13	<b>Probate &amp; Estate Planning Section</b> <b>12:00 NOON</b> <b>MONTEREY AT ENCINO RESTAURANT</b> (1 MCLE Hour)  <b>Board of Trustees</b> <b>6:00 PM</b> <b>SFVBA OFFICE</b>	<b>Workers' Compensation Section</b> Substantial Medical Evidence <b>12:00 NOON</b> <b>MONTEREY AT ENCINO RESTAURANT</b>  Judge Clint Feddersen will discuss what is considered substantial medical evidence in workers' comp cases. (1 MCLE Hour)	16	17	18
19	<b>Family Law Section Hot Tips</b> <b>5:30 PM</b> <b>MONTEREY AT ENCINO RESTAURANT</b>  Gary Weyman presents his annual update, a must attend for all family law attorneys. Approved for Family Law Legal Specialization (1.5 MCLE Hours)	20	21	22	23	24
26	27	<b>Taxation Law Section</b> Tax Ramifications of Foreign Investment in the United States <b>12:00 NOON</b> <b>SFVBA OFFICE</b>  Venable tax attorney Bryan Kelly will present a primer on the income tax and FIRTAs ramifications of foreign investments in U.S. real estate. This luncheon is a must attend to all real estate lawyers and professionals who advise foreign nationals contemplating investing in U.S. real estate. (1 MCLE Hour)  <b>ARS Committee</b> <b>6:00 PM</b> <b>SFVBA OFFICES</b>  <b>Editorial Committee</b> <b>12:00 NOON</b> <b>SFVBA OFFICE</b>	28		29	30
<div> <h2>CALLING ALL VETERANS</h2> <p>Contact <i>Valley Lawyer</i> Editor Michael White at michael@sfvba.org or (818) 227-0493 to be featured in next month's cover story honoring SFVBA members who have served our nation in uniform.</p>  <p>Deadline to be included is October 6, 2017.</p> </div>						



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By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 19.

By Lauren J. Peterson

# Wage Theft in Licensed Residential Care Facilities for the Elderly





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In the residential care industry, the concern over the issue of wage theft extends beyond simple enforcement of wage and hour laws. Making sure that caregivers are properly compensated and not overworked is essential to preserve their ability to provide the best possible care in residential care facilities for the elderly.

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## CAREGIVERS WORKING IN RESIDENTIAL CARE facilities for the elderly (RCFEs) provide an important service to elderly individuals and their families.

Providing adequate care in a facility setting, where there are usually multiple residents with serious health conditions, is a demanding job.

RCFE caregivers assist residents with activities that able-bodied individuals may take for granted, such as brushing teeth, using the restroom, changing clothes, and eating. To meet the residents' needs, caregivers often work long hours, sometimes up to 24 hours a day, but in spite of the valuable services that facility caregivers provide, many facility owners grossly underpay their workers.<sup>1</sup>

Wage theft in any industry is an important social concern. In the residential care industry, this concern extends beyond simple enforcement of wage and hour laws. Insuring that caregivers are properly compensated and not overworked is essential to preserve their ability to provide the best possible care.

California law protects caregivers working in RCFEs from wage theft. RCFE caregivers are entitled to minimum wage and overtime compensation as well as meal and rest breaks. A failure to pay RCFE caregivers according to California law may result in substantial liability for RCFE employers, who are subject to harsh penalties,<sup>2</sup> fines and even criminal prosecution.<sup>3</sup>

### Caregivers Are Entitled to Minimum Wage, Overtime and Double Time Compensation

All caregivers working in RCFEs are entitled to minimum wage and most are also entitled to overtime compensation pursuant to Industrial Welfare Commission Wage Order 5-2001.<sup>4</sup> Although the Industrial Welfare Commission was defunded in 2004, its Wage Orders are still in effect.<sup>5</sup>

Wage Order 5 applies to the public housekeeping industry, which is defined to include "rest homes, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care."<sup>6</sup> Caregivers working in private homes, however, are subject to Wage Order 15 and California's Domestic Worker Bill of Rights.<sup>7</sup>

Wage Order 5 is explicit that "every employer shall pay to each employee wages not less than minimum wage."<sup>8</sup> There is no legally recognized exemption to this minimum wage mandate for caregivers working in RCFEs.

With some exceptions, caregivers working in RCFEs must be paid overtime compensation for all hours worked

in excess of eight per day or 40 per week, and double time compensation for all hours worked in excess of 12 per day.<sup>9</sup> One exemption from this requirement applies to "personal attendants" employed by non-profit organizations. To be exempt, a personal attendant's primary duties must be to "supervise, feed or dress a ...person who by reason of advanced age, physical disability or mental deficiency needs supervision."<sup>10</sup>

Although most facility caregivers meet these requirements, Wage Order 5 expressly limits this exemption to employees working for non-profits.<sup>11</sup> Caregivers working at for-profit RCFEs cannot qualify as personal attendants and must be paid according to California's overtime rules.

Wage Order 5 also contains special overtime rules for resident managers of RCFEs who work 40 or fewer hours in a workweek, except on an emergency basis.<sup>12</sup> However, the resident manager rules only eliminate the daily overtime requirement, meaning that legitimate resident managers must be paid overtime for all hours worked in excess of 40 in a week.<sup>13</sup>

Caregivers working in RCFEs who do not qualify for the exemptions described in Wage Order 5 must be paid overtime and double time compensation for all applicable hours worked. Many RCFE employers pay caregivers a salary, regardless of the actual number of hours worked. However, paying an employee in any industry a salary does not automatically exempt that employee from minimum wage or overtime. Many times the salary paid is far less than the legally required minimum wage.

Moreover, paying a non-exempt employee a salary only compensates that employee for non-overtime hours, notwithstanding a private agreement to the contrary.<sup>14</sup> As such, paying a salary to a non-exempt RCFE caregiver who works more than eight hours a day or 40 hours a week that caregiver has not been paid anything for hours worked in excess of eight a day or 40 per week. This is true even if the agreed upon salary equals or is greater than the minimum wage and overtime wage for all hours worked.

For example, Tony is a live-in caregiver who works in a for-profit RCFE. Tony receives \$100 each day regardless of the quality or quantity of work performed. He lives in the facility and is required to be physically present 24 hours every day, Monday through Friday. The \$100 daily rate is a salary because it is a "fixed rate of pay as distinguished from an hourly wage."<sup>15</sup> In this situation, Tony's salary equates to about \$4.17 per hour for 24 hours of work, far less than the California minimum wage.<sup>16</sup> Further, because that salary does



**Lauren J. Peterson** is an associate employment law attorney at the firm of Chaleff Rehwald in Woodland Hills. She advocates for caregivers working in RCFEs and private homes and can be reached at [lauren@cr.legal](mailto:lauren@cr.legal).



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not compensate Tony for any overtime hours worked, Tony receives no compensation for 16 hours of work each day.

Of the 16 hours Tony works without compensation each work day, four of those hours must be paid at the overtime rate, which is one and one-half times Tony's regular rate of pay.<sup>17</sup> The other 12 unpaid hours must be paid at Tony's double time rate, which is two times Tony's regular rate of pay.<sup>18</sup>

This leads to the question of how to calculate a non-exempt employee's regular rate of pay when the employee receives a daily salary. When an employee receives a salary, the regular rate of pay is calculated pursuant to Labor Code §515(d)(1), which states, "[f]or the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary."<sup>19</sup>

In Tony's case, his weekly salary is calculated by multiplying \$100 per day by five days worked a week. The result is a weekly salary of \$500, which is then divided by 40 hours, to get Tony's regular rate of \$12.50 per hour. Tony's overtime rate is \$18.75 per hour and his double time rate is \$25 per hour.

So, if Tony works 24 hours each weekday, he is entitled to a total of \$75 each workday in unpaid overtime—four overtime hours x \$18.75 per hour. Additionally, Tony's employer owes him double time compensation for 12 double time hours, payable at the double time rate of \$25 per hour. Based on these numbers, Tony's employer would have underpaid Tony a total of \$375 each day worked. This amounts to \$1,875 owed each week—\$375 x 5 days worked a week—and \$97,500 owed in unpaid wages each year, or \$1,875 x 52 weeks a year.

The above example demonstrates the staggering liability that results when RCFE employers improperly pay an RCFE caregiver a daily salary. With some exceptions, RCFE caregivers must also be provided uninterrupted meal and rest breaks each workday.<sup>20</sup> If proper meal and rest breaks are not provided, the RCFE employer must pay the employee one hour of pay at the employee's regular rate of pay for up to one meal and one rest break missed a day.<sup>21</sup>

In addition to the unpaid wages owed, caregivers are entitled to interest on all amounts due, with employers also liable for attorneys' fees and costs in enforcing the claims pursuant to Labor Code §1194, as well as the additional penalties discussed below.<sup>22</sup>

### **Independent Contractor Myth**

California's minimum wage and overtime laws only apply to employees, not independent contractors. To skirt these laws, and sometimes for other reasons, RCFE employers often misclassify caregivers as independent contractors, with the state frequently imposing monetary penalties on employers who do so.<sup>23</sup>



right to control is whether the hirer can discharge the worker without cause, because the power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities."<sup>35</sup>

RCFE employers also control their caregivers' work hours because they are required to ensure 24-hour supervision of the residents in their care.<sup>36</sup>

The bottom line is that Title 22 and the Health and Safety Code require the RCFE licensee to maintain a high level of control over their caregivers that makes it virtually impossible for RCFE employers to classify their caregivers as true independent contractors under any standard.

Additionally, the mere fact that an employer issues the caregiver an IRS 1099 form rather than a W-2 form is not, in and of itself, determinative of independent contractor status.<sup>37</sup>

In some instances, RCFE owners hire undocumented workers and argue that undocumented status precludes employment status. That position is simply incorrect. California Labor Code §1171.5 prohibits RCFE employers from using a caregiver's immigration status as a defense to claims for unpaid wages. In enacting §1171.5, the California legislature made a clear statement: "All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."<sup>38</sup> In effect, all employees in California are entitled to protection from wage theft, regardless of their immigration status.

### Enforcement of Wage Theft Claims

RCFE caregivers who have been the victims of wage theft may enforce their right to unpaid wages either by filing a claim with the California Labor Commissioner's office or by filing a lawsuit. In either venue, an RCFE caregiver can seek to recover all unpaid wages, as well as premiums for meal and rest period violations.<sup>39</sup> The RCFE caregiver is also entitled to interest on all amounts due.<sup>40</sup>

Additionally, victims of wage theft who have been terminated or resigned from their employment may be entitled to a waiting time penalty pursuant to Labor Code §203 for the employer's willful failure to pay all wages due at the time the caregiver's employment ended.<sup>41</sup> This penalty is calculated at the caregivers' daily rate of pay, for up to thirty days.<sup>42</sup>

Further, if an RCFE caregiver has not been paid at least minimum wage for all hours worked, the caregiver may be entitled to liquidated damages in an amount equal to all minimum wages owed pursuant to Labor Code §1194.2, plus interest.<sup>43</sup>

If an RCFE caregiver elects to file a lawsuit, he or she is also entitled to recover attorneys' fees and costs<sup>44</sup> and may seek additional penalties pursuant to Labor Code §226 in an amount up to \$4,000 if the RCFE employer has failed to provide

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pay stubs that comply with the numerous requirements of that statute.<sup>45</sup> However, neither of these remedies are available if the RCFE caregiver proceeds through the California Labor Commissioner.

From a business perspective, because of the substantial risks RCFE employers face in defending wage theft actions, it is generally more expensive for employers to violate wage and hour laws than it is to pay workers required overtime and minimum wages. More importantly, RCFE employers must ensure that RCFE caregivers are properly compensated for their hard work so that they can provide the best possible care in residential facilities. 

<sup>1</sup> The California Labor Commissioner's Office has issued several press releases documenting awards issued by the Labor Commissioner's office to RCFE caregivers ranging from \$443,000 to over \$3,000,000. These awards tend to indicate an industry practice of substantially underpaying workers. See DLSE News Release Nos. 13-25, 2014-101, 2015-74, 2016-32, and 2016-96.

<sup>2</sup> Cal. Labor Code §§203 and 1194.2.

<sup>3</sup> Cal. Labor Code §1199.

<sup>4</sup> IWC Wage Order 5 is codified at 8 Cal. Code Regs. §11050.

<sup>5</sup> *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 735 (2009) ("Although the IWC was defunded effective July 1, 2004, its wage orders remain in effect.").

<sup>6</sup> 8 Cal. Code Regs. §11050, subdiv. 2(P)(4) (emphasis added).

<sup>7</sup> The Domestic Worker Bill of Rights is codified at Cal. Labor Code §1450, et seq.

<sup>8</sup> *Id.* §11050, subdiv. 4(A) (emphasis added).

<sup>9</sup> *Id.* §11050, subdiv. 3(A)(1).

<sup>10</sup> *Id.* §11050, subdiv. 2(N).

<sup>11</sup> *Id.*

<sup>12</sup> 8 Cal. Code Regs. §11050, subdiv. 3(E).

<sup>13</sup> *Id.*

<sup>14</sup> Cal. Labor Code §515(d)(2).

<sup>15</sup> *Negri v. Koning & Associates*, 216 Cal.App.4th 392, 397 (2013); "A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage."

<sup>16</sup> Under IWC Wage Order MW-2017, beginning January 1, 2017, the California minimum wage for employers of 25 or fewer employees is \$10.00 per hour. The minimum wage for employers of 26 or more employees is \$10.50 per hour.

<sup>17</sup> 8 Cal. Code Regs. §11050, subdiv. 3(A); Cal. Labor Code §510(a).

<sup>18</sup> *Id.*

<sup>19</sup> Cal. Labor Code §515(d)(1).

<sup>20</sup> 8 Cal. Code Regs. §11050, subdiv. 11(A) & 12(A); Cal. Labor Code §226.7.

<sup>21</sup> *Id.* §11050, subdiv. 11(B) & 12(B); Cal. Labor Code §226.7.

<sup>22</sup> Cal. Labor Code §1194.

<sup>23</sup> Cal. Labor Code §226.8.

<sup>24</sup> *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) ("[t]he rule ... is that the fact that one is performing work and labor for another is prima facie evidence of employment and such a person is presumed to be a servant in the absence of evidence to the contrary"); See also Cal. Labor Code §3357.

<sup>25</sup> 8 Cal. Code Regs. §11050, subdiv. 2(E).

<sup>26</sup> *Id.* §11050, subdiv. 2(H).

<sup>27</sup> *Martinez v. Combs*, 49 Cal. 4th 35 (2010).

<sup>28</sup> *Id.* at 64.

<sup>29</sup> *S.G. Borello & Sons, Inc. v. Dep't. of Indus. Relations*, 48 Cal.3d 341 (1989).

<sup>30</sup> *Id.* at 350 (internal quotations omitted).

<sup>31</sup> Cal. Health & Safety Code §§1569.10, 1569.44, 1569.45.

<sup>32</sup> 22 Cal. Code Regs. §87205(a).

<sup>33</sup> 22 Cal. Code Regs. §87405(h)(4).

<sup>34</sup> 22 Cal. Code Regs. §87413(a)(2).

<sup>35</sup> *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (2014) (internal quotations omitted).

<sup>36</sup> Cal. Health & Safety Code §1569.618(b); 22 Cal. Code Regs. §87405(h)(3).

<sup>37</sup> *Toyota Motor Sales v. Superior Court*, 220 Cal.App.3d 864, 877 (1990).

<sup>38</sup> Cal. Labor Code §1171.5(a).

<sup>39</sup> Cal. Labor Code §§98, 1197, 1194, and 226.7.

<sup>40</sup> Cal. Labor Code §1194.

<sup>41</sup> Cal. Labor Code §203.

<sup>42</sup> *Id.*

<sup>43</sup> Cal. Labor Code §1194.2.

<sup>44</sup> Cal. Labor Code §1194.

<sup>45</sup> Cal. Labor Code §226.





# Test No. 108

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Caregivers working in RCFEs are covered by the same minimum wage and overtime laws as caregivers working in private homes.  
☐ True ☐ False
2. RCFE caregivers who receive a salary are exempt from minimum wage.  
☐ True ☐ False
3. A personal attendant caregiver working in an RCFE operated by a non-profit organization is exempt from the overtime requirements set forth in Wage Order 5-2001.  
☐ True ☐ False
4. If a non-exempt RCFE caregiver receives a weekly salary of \$1,000, that salary compensates the caregiver for all overtime and double time wages earned.  
☐ True ☐ False
5. When an employee receives a salary, the regular rate of pay is calculated by dividing the employee's weekly salary by 40.  
☐ True ☐ False
6. RCFE caregivers are never entitled to meal breaks during their workday.  
☐ True ☐ False
7. California's minimum wage and overtime laws apply to employees as well as independent contractors.  
☐ True ☐ False
8. California law presumes that one who performs work for another is an independent contractor.  
☐ True ☐ False
9. In a dispute where an employer claims that a worker is an independent contractor, the worker bears the burden of proving that a legitimate employment relationship exists.  
☐ True ☐ False
10. Under *Martinez v. Combs*, employees can prove an employment relationship exists three alternative ways.  
☐ True ☐ False
11. An employee need only establish employment under one of the three tests described in *Martinez v. Combs*, whereas an employer will bear the burden of negating all three tests.  
☐ True ☐ False
12. Under California's common law test for employment, in evaluating whether a worker is an employee or an independent contractor, the right to control the manner and means of accomplishing the work is the most important factor.  
☐ True ☐ False
13. In California, RCFEs are not required to be licensed.  
☐ True ☐ False
14. RCFE employers have no obligation to supervise RCFE caregivers to ensure that RCFE residents receive sufficient care.  
☐ True ☐ False
15. RCFE employers must control the hours RCFE caregivers work to ensure 24 hour supervision of the residents every day.  
☐ True ☐ False
16. Regulatory standards require RCFE employers to terminate caregivers who perform in an unsatisfactory manner.  
☐ True ☐ False
17. Workers who receive I.R.S. 1099 forms are definitively independent contractors under California law.  
☐ True ☐ False
18. An employer can avoid liability for wage theft claims by demonstrating that the employee making the claims is not eligible to work in the United States because of immigration status.  
☐ True ☐ False
19. Victims of wage theft may seek to enforce their rights by filing a claim with the California Labor Commissioner.  
☐ True ☐ False
20. Victims of wage theft are never entitled to recover attorneys' fees and costs in pursuing their claims.  
☐ True ☐ False

## MCLE Answer Sheet No. 108

### INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$20 testing fee for SFVBA members (or \$30 for non-SFVBA members) to:

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5567 Reseda Boulevard, Suite 200  
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### METHOD OF PAYMENT:

- ☐ Check or money order payable to "SFVBA"  
☐ Please charge my credit card for \$\_\_\_\_\_.

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Authorized Signature \_\_\_\_\_

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

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### ANSWERS:

Mark your answers by checking the appropriate box. Each question only has one answer.

- |     |                               |                                |
|-----|-------------------------------|--------------------------------|
| 1.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 4.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
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| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |

# A Scary Lesson: Terror in the Courtroom

By Barry P. Goldberg

**Y**OU MAY NOT BELIEVE IN EVIL spirits but the California Court of Appeal gave the “undead” a major victory in an unpublished 2015 decision. Delivered right before Halloween, the Court of Appeal upheld the right of “The Haunted Hotel” to scare you and your friends to the point of injury without facing civil liability in the case of *Griffin v. The Haunted Hotel*.<sup>1</sup>

Since many will attend “scare” events this Halloween at Universal Studios, Knotts “Scary” Farm and other venues, the facts in the *Griffin* are instructive. Scott Griffin, a normal and mortal human, purchased a ticket to experience The Haunted Trail, an outdoor haunted house type attraction, where actors jump out of dark spaces often inches away from patrons, holding prop knives, axes, chainsaws, or severed body parts. He survived the experience safely—or so he thought!

After passing what he believed was the exit and “giggling and

laughing” with his friends about how much fun they had, Griffin unexpectedly was confronted by a final scare known as the “Carrie” effect—so named because, like the horror film *Carrie*, patrons are led to believe the



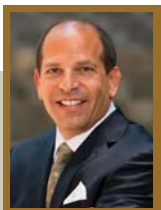
attraction is over, only to be met by one more extreme fright. In this case, the final scare (or one for the road) was delivered by an actor wielding a gas powered chainsaw, who approached Griffin, frightened him, and gave chase when Griffin ran away. Griffin was injured when he fell while fleeing.

Griffin alleged negligence and assault. The court found that the risk that a patron will be frightened, run, and fall is inherent in the fundamental nature of a haunted house attraction. Therefore, any action is barred by

the legal doctrine of primary assumption of the risk. “Under the primary assumption of risk doctrine, there is no duty to eliminate or protect a plaintiff against risks that are inherent in a sport or [recreational] activity.”<sup>2</sup>

One of the arguments made by the injured Griffin was that he subjectively thought that the attraction was over. Therefore, he had no reason to believe that he would endure further (and probably anticipated)

scares. However, this Haunted Trail was counting on the patron to relax before handing him the Carrie effect by chasing the patron out a false exit. When patrons have walked through the opening in the fence, they regroup on the park access road, thinking the attraction is over. But this is a fake



**Barry P. Goldberg** has a personal injury practice in Woodland Hills. He is Secretary of the San Fernando Valley Bar Association and Co-Chair of its Attorney Referral Service Committee. He can be reached at [bpg@barrypgoldberg.com](mailto:bpg@barrypgoldberg.com).

exit. The access road is controlled by Haunted Hotel. A chainsaw-wielding actor with a gas powered chainsaw suddenly appears, starts the chainsaw, and charges at the patrons—providing a final scare. Although the chain has been removed from the chainsaw, it “still has the whole sound, the whole smell of a chain saw, and that’s what gives the effect of—people think it’s a real chain saw.” During this last encounter, patrons are most prone to run away, with the actor giving chase.

Families “actually come and camp out and watch” because “it’s fun to see when someone gets freaked out when a chain saw comes and chases an individual” for the final scare. Mr. Griffin failed to see the humor! His lawyers argued that he was not injured on the actual Haunted Trail. Thus, he never assumed any risk at the false exit.

The court was unsympathetic to Mr. Griffin: “the point of The Haunted Trail is to scare people, and the risk

that someone will become scared and react by running away cannot be eliminated without changing the basic character of the activity. As the trial court aptly noted, “[W]ho would want to go to a haunted house that is not scary?” (See also Moar, *Case Law from the Crypt, The Law of Halloween* 83-Oct N.Y. St. B.J. 10, (Oct. 2011) [discussing haunted house personal injury cases and concluding, “Patrons in a Halloween haunted house are expected to be surprised, startled and scared by the exhibits but the operator does not have a duty to guard against patrons reacting in bizarre, frightened and unpredictable ways.”].)”

The lesson this Halloween—if you and your friends go somewhere to be frightened—you assume the risk of an injury if you run and fall.

Happy Halloween! 

<sup>1</sup> *Griffin v. The Haunted Hotel*, 4th App. Dist. D066715 (October 23, 2015).

<sup>2</sup> *Calhoon v. Lewis*, 81 Cal.App.4th 108, 115 (2000).



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*Photos by Ron Murray*



By Michael D. White

# A Conversation with New SFVBA President Alan Kassan

On October 18, attorney Alan Kassan will be sworn in as the San Fernando Valley Bar Association's eighty-seventh President at the SFVBA Installation Gala at the Skirball Center.



**A** VALLEY NATIVE AND GRADUATE OF THE University of San Diego School of Law, Alan Kassan entered practice in 1984 and has more than three decades of experience in the area of insurance and employment law. He has served as a SFVBA Trustee for the past five years, Chairperson of the Bar's Membership & Marketing Committee for the last four years, and is a partner at the Northridge-based law firm of Kantor & Kantor.

Kassan was the motive force behind the creation of the Bar's successful Valley Bar Network program and, in addition to his involvement with the SFVBA, he has acted as a Judge Pro Tem, a volunteer mediator, and has been active with a variety of professional and non-profit groups, including the American Bar Association, the Los Angeles County Bar Association, and the California Employment Lawyers Association.

An avocational landscape photographer, Kassan and his wife have four grown sons and reside in Granada Hills. He recently sat down for an interview with *Valley Lawyer* to share his vision for the Bar, his path to the law, his motivation for becoming a lawyer, and some reflections on his self-described "artistic bent."

**Q ■ How would you say you've gotten to where you are today?**

**A ■** I started college at the University of California San Diego and really thought I'd go into some scientific field. One of the last classes I took at UC San Diego was an experimental social psychology class, which is still, to this day, my favorite college class. I transferred to UC Santa Barbara for spring quarter to take statistics, since it wasn't offered at UCSD that quarter and I needed it before I could take upper division courses in experimental psychology, which I had then decided upon as my major.

My thought was, I'd take the class in Santa Barbara and then go back to San Diego to finish. While at UCSB I met so many great people I decided to stay there. My plan was to go to graduate school to get an advanced degree in experimental psychology. But I took some time off between college and graduate school in order to contemplate my future and to make some money. Since I'd always had an interest in photography, I started taking pictures of homes for Realtors.

One of my Realtor clients convinced me I could make a lot more money selling real estate. So, I got my real estate license. I very quickly realized I didn't want to sell houses, so I got a job selling investment and commercial real estate. I really liked that and stuck with it for a few years. That's how I got interested in contracts and the law.

My focus started to shift while I was working at this firm. After a while, I started to pine for more intellectual stimulation. It was a good job and I didn't want to quit, so I decided to go to law school at night just to see if I would like it. As I progressed, I came to really like the world of the law, quit my job, and jumped into school full-time.

**Q ■ Your father is an attorney. Did you ever feel pressure to follow in his footsteps?**

**A ■** No. I really didn't appreciate what my father did as a lawyer and didn't even pay that much attention to his work until I started working in real estate. My father never urged me or pushed me to become a lawyer so that really wasn't a factor. After law school, I was fortunate to get a job at one of the finest law firms in San Diego.

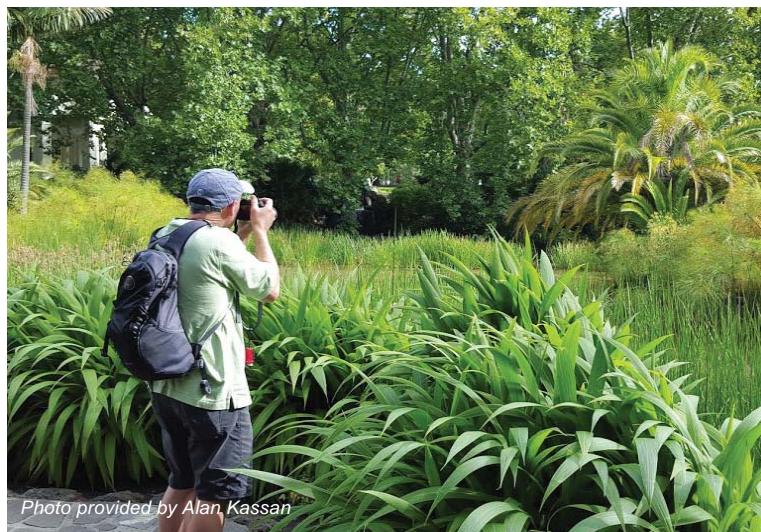


Photo provided by Alan Kassan



They paid me very well. Big firm corporate law was a grind, especially for me since I was the only one of my immediate peers who was married and had a child.

Eventually, I decided to move back to Los Angeles to be closer to family and to take advantage of the opportunity to work with my father. We practiced business, real estate, and insurance litigation as Kassan & Kassan until my father retired. My dad is brilliant. He was an excellent lawyer and a great mentor.



Photo by Alan Kassan

## **Q: Do you like being a lawyer?**

**A:** I do. I particularly like the intellectual challenges, the writing, even the research. For the last 13 years or so, the law I've been practicing is directly connected to helping people who are being bullied by insurance companies. Fighting that fight on behalf of those people is particularly gratifying. Our firm specializes in helping people obtain health insurance benefits, life insurance benefits, and long-term disability benefits, when insurance companies deny those benefits. We practice heavily in the area of ERISA, but also handle a lot of insurance bad faith matters.

In this day and age, insurance benefits are denied almost routinely. It's frustrating because these insurance companies are giant corporate monoliths that have all the power and all the money, while individuals are relatively powerless. California has a lot of consumer protection laws and regulations, but most of our cases are governed by the federal laws of ERISA where there are far fewer tools to slay the beast, so to speak. Our firm has become one of the largest, maybe even the largest, firms in the country that focuses in this practice area.

## **Q: What was it that moved you to establish the Valley Bar Network (VBN)?**

**A:** Two things, mainly. First, the importance of personal contact; and second, the seeming breakdown of community in our Twitter, Snapchat, message emoji world where we don't have that connection and genuine facetime. And, I mean real face-to-face time, not the facetime app! I don't think many people, particularly young people, appreciate the value of real facetime. We communicate differently in person. It's just more personal, and in so many ways more effective than interconnected electronic time.

The thing I've pitched at the Valley Bar Network is that it isn't just about coming to the meetings in the hope that someone is going to refer business to you; it's about coming and getting to know other lawyers and professionals and then feeling comfortable that they might be able to offer services to you, your family, friends or clients. So, when someone calls you and asks if you know, for example, a good family law or real estate lawyer, or an accountant or an insurance person, you can confidently say you do know someone who can probably help. As a result, you become a more valuable resource for all the people you associate in other networks or circles. By doing that, more people are likely to refer business to you.

Networking is a long game, but in the end it pays off. And, in the process, you also make a lot of new friends! Ultimately, expanding your networks enriches you. It's the whole karmic circle—the more people you meet, the

more people you're able to help, and you find more people who may be able to help you. Everyone is better off.

**Q - Do you see the motivation behind forming the VBN as something that could transfer to the entire Bar?**

**A** - In part, yes. The motivation is to bring people together... to create a better community. My goal as a Trustee and moving up the ladder to the presidency has been to make the SFVBA a more attractive proposition for the lawyers in our community. There are somewhere between 7,000 and 10,000 lawyers in the greater San Fernando Valley area, depending on

your geographical boundaries, and yet we only have about 2,000 of those lawyers as members. To me, that's a tragedy.

There are so many lawyers who get caught up in their day-to-day business...they are consumed by meeting with clients, telephone time, drafting documents and going to court. They bring work home, or maybe they don't, but they still tend not to look much beyond their work as they walk through life. There are so many riches to be found when you look outside your work confines, and get involved in other activities. Our Bar Association has something for everyone. Free legal research? We've got it. Continuing education? Yep. Practice sections that meet regularly to discuss current issues and events. We have many of those as well.

The Bar also has a very active Attorney Referral Service (ARS). In fact, one of the ARS attorneys just earned a fee of about \$2.8 million. And, we have the Valley Community Legal Foundation which is our charitable arm—helping our community by donating money to worthy causes, offering scholarships to students interested in studying the law, and sponsoring other community oriented activities. There is so much to gain by membership. All of this, or any of it, will offer more balance and will bring bigger successes. And, in many ways, it's all networking.

**Q - Where would you like to see the SFVBA when you leave office in October 2018?**

**A** - My vision is to continue to bring the Bar forward to build membership and to embrace new technologies. We've been at this for a while, but there's still work to do. I want to promote and expand the whole notion of our Bar Association being a community within our community, where lawyers who practice in the Valley will not only feel comfortable about becoming a member, but will perceive that there's great value to being a member. The way to do that, I think, is to continue on the path that we've worked so hard on in the Membership Committee.

The goal is to help people connect, and to create as many opportunities for making those connections. The new "Dinner at My Place" program, although it's small, is bringing people together in small, intimate groups. The VBN is connecting lawyers and other professional with diverse backgrounds, all in a social setting. We need to infuse more of that closeness and interconnectivity into our practice sections, by bringing different Sections together socially, and with other groups within the SFVBA.

I'd also like to bring the Valley Community Legal Foundation more into the mix for stronger connections between the organizations. Our organization acts as the central hub, but all the spokes need to be better connected at the outer rim. In that way, the SFVBA becomes a stronger community within our community, and in the end, that's the ultimate goal.







Photo provided by Alan Kassan

**Q** ■ In an earlier conversation, you said that you liked to take pictures of places, not people. Yet, you've maintained a lifelong fascination with psychology, the study of people and how they think. How do those two interests play off one another?

**A** ■ Interesting question. I think that comes from a little bit of reluctance to impose on people in their space. I'd much rather observe people in a neutral non-disruptive way. To me, photographing them doesn't allow that. I don't know, it's probably just a lot more about how much I love nature and being in the outdoors, than spending my free time in crowded places. Capturing landscapes is much more to my liking.

Landscape photography is a great excuse to get out of the day-to-day confines, and away from the daily noise and crowds and phones, and to travel, and hike, and enjoy the serenity that too many people, unfortunately, don't often get to enjoy. For me, travelling to far-off, little visited places for photography is meditative, and it brings calm and balance to my life. In terms of psychology, I think calm and balance are essential for mental health.

**Q** ■ Are there aspects of photography that help you be a better lawyer?

**A** ■ Yeah, I think there are several things. One intangible is a certain level of calmness and serenity, as I just mentioned. I take a much less anxious approach to my work than so many of my peers; I think I'm able to bring a calmness to my work as a result of the time I spend doing those peaceful, calm things. It helps me unwind and that has an influence on my day-to-day. I think I've also been able to develop more creativity in both my writing and my approach to problems and problem solving.

When it comes down to it, the law is about solving problems. I think I'm a very good problem-solver, but regularly exercising my creativity muscles through my art adds a lot to that process. In dealing with clients, I think my study of psychology helps me empathize, and better understand and appreciate the issues they're facing, but the artistic expression also teaches me tolerance and patience. Art requires a lot of both of those things too. 🛠️

**Michael D. White** is editor of *Valley Lawyer* magazine. He is the author of four published books and has worked in business journalism for more than 35 years. Before joining the staff of the SFVBA, he worked as Web Content Editor for the Los Angeles County Metropolitan Transportation Authority. He can be reached at michael@sfvba.org.





By Sarah A. Scott

# Counterpoint:

## Gender Identity, Disability, and Discrimination in a Changing Workplace

By Sarah A. Scott

The following article is an opposing viewpoint to “Gender Identity, Disability and Discrimination in a Changing Workplace,” which was published in the June 2017 issue of *Valley Lawyer*.



IN HIS ARTICLE, AUTHOR PHILIP Bonoli—an employment attorney who represents employers—claims employers need not accommodate transgender employees seeking accommodation for disability based upon diagnoses of gender dysphoria (GD). His rationale is that GD is synonymous with gender identity disorder (GID), which is excluded as a disability by the Americans with Disabilities Act (ADA); and that GD is also a sexual behavior disorder, which is excluded by California’s Fair Employment and Housing Act (FEHA).

This author disagrees on both counts. GD is not synonymous with GID, and it is not a sexual behavior disorder, and, therefore, it is not excluded by either the ADA or FEHA. Recent changes in law are merely the tip of an iceberg of fundamental

change occurring in the world’s legal, medical, and societal landscapes concerning gender identity.

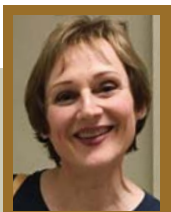
Transgender identification (identifying as a gender other than the one assigned at birth) was once considered mental illness, and GID was the diagnosis given therefor. By 2012, however, the American Psychiatric Association removed GID from its Diagnostic and Statistical Manual of Mental Disorders (DSM) when the DSM 5<sup>1</sup> replaced the DSM 4.<sup>2</sup>

Simultaneously, GD, included in the DSM 5, became the diagnosis a transgender person “might” receive “if” she experienced significant distress (dysphoria) because of the “incongruity” between the gender with which she identified (her true gender) and the gender assigned to her at birth (usually based upon biological sex).<sup>3</sup> This temporal connection between GID’s

removal, and the emergence of GD as the primary diagnosis a transperson might receive, led many to believe the diagnoses were synonymous. They were not. The change represented a substantial shift in understanding gender identity.

The problem, if any, was no longer considered to be in the transgender identification, but in the incongruity. Therefore, the solution, with which even dissenters might begrudgingly agree, moved from conversion type therapy to transition, the process through which a transperson transforms her body, and or gender role in society, to more closely match characteristics traditionally associated with her true gender, usually, but not always, opposite the gender assigned her at birth.<sup>4</sup>

GD, on the other hand, recognizes that, although many transgender



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people do not experience distress related to gender incongruity, some do. And when this distress becomes clinically significant, a GD diagnosis may follow.

**Caveat:** GD appears to be in the process of being replaced, and may now exist more to provide transgender persons access to transition related healthcare, such as cross hormone replacement therapy and gender reassignment surgery, than to indicate clinical distress. This may be inferred from the conclusions reached by mental health professionals conducting a comprehensive study for the reclassification of gender related diagnoses for the World Health Organization's International Classification of Diseases (ICD), the code book of diagnoses insurers use to pay healthcare provider claims.<sup>5 6</sup> As a result, when the ICD is updated in 2018, it is expected to eliminate GID altogether, and include "gender incongruity," which is expected to be listed as a medical rather than psychological diagnosis. This more accurate description and classification should help the transgender community because it simultaneously eviscerates the stigmatization associated with mental illness while providing access to insurance coverage for transition related healthcare.

So, if there is no disorder in the transgender identification, the transgender identification must be in order, yes? Yes. Put simply, transgender women are women and transgender men are men, despite that they may have been born with trans genitalia. If you find this incredible, consider suspending your disbelief through the end of this article. It really is the key to understanding all the change.

Let's look at *Blatt v. Cabela's Retail, Inc.*, a recent case cited by Mr. Bonoli.<sup>7</sup> Plaintiff Kate Lynn Blatt is a transgender woman who struggled her entire life trying to live as a male. Sometime after

graduating high school, she gave up, came out, and began transitioning. Immediately, she was fired from her job at a battery factory. Kate Lynn was lucky, though, as transpersons go, and she got another job. She was able to find employment at Cabela's Retail, Inc.'s 250,000-square foot outdoor megastore. Sometime prior to beginning work there, Kate Lynn was diagnosed with GD.

In her complaint, Kate Lynn alleged, *inter alia*, that while working at Cabela's her requests to use the women's employee bathroom were repeatedly denied, and that she was forced instead to use the men's room, then later a for-customers family bathroom at the front of the store; that her requests for a name tag calling her Kate Lynn were also repeatedly denied, and that she was forced to wear one calling her James, her birth name, even after she legally changed her name and gender marker. Finally, she alleges, she was fired in retaliation for these requests, which she argued constituted reasonable requests for accommodations for her GD diagnosis.

Kate Lynn sued for, *inter alia*, violation of the ADA's rule requiring an employer to reasonably accommodate an employee's disability. Cabela's filed a motion to dismiss this claim arguing GD did not constitute a disability pursuant to the ADA because GD is synonymous with GID, which is expressly excluded by the ADA. Interestingly, even Kate Lynn's own lawyers referred to GD as "aka" GID in her complaint.

U.S. District Judge Joseph F. Leeson, Jr. was not thrown far by the confusion, though, and, in what is now being called a landmark decision, made two important findings. First, Judge Leeson distinguished GD from GID, writing: "[I]t is fairly possible to interpret the term gender identity disorders narrowly to refer to the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons [who identify as transgender] ... may have—such as ... gender dysphoria, which substantially limits ... life activities ... Accordingly, Blatt's condition is not excluded by §12211 of the ADA..."

Second, Judge Leeson distinguished GID from sexual behavior disorders, writing: "The legislative history shows Congress discussed the §12211 exclusions in terms of two distinct categories. First, there was concern ... the bill would include ... [gender] identity as a disability or protected class... [citations] Second, there was separate concern that the ADA 'could protect individuals from discrimination [based on] ... socially unacceptable, often illegal, behavior ... such as compulsive gambling, pedophilia, and kleptomania.' [citations]. "[C]abela's motion to dismiss Blatt's ADA claims ... is denied."

Judge Leeson's findings—that GD and GID are not synonymous, and that being transgender is not a sexual

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behavior disorder—may not be binding authority in a California court, but his analysis is accurate, and it constitutes persuasive, sound reasoning, and, considering there is no contrary authority anywhere, should be determinative. Thusly, justly, and correctly, GD may constitute a disability pursuant to both the ADA and FEHA. Therefore, an employer may violate both the ADA and FEHA by failing to reasonably accommodate a transgender employee seeking accommodation for GD.

**Caveat:** Until GID is removed from the ICD in 2018, it is possible to encounter an employee [improperly] diagnosed with GID litigating an ADA claim against an employer arguing the GID exclusion. In this case, misdiagnosis may be argued. That is, although the employee was diagnosed with GID, she should have been diagnosed with GD, additionally or alternatively, because any mental suffering based on gender incongruity is properly so diagnosed. Also, the ADA and FEHA permit claims based upon perceived disabilities. That is, an employer may violate the ADA and FEHA by acting adversely toward an employee he perceives has a disability, whether or not the employee does.

With respect to transgender workplace rights, federal protections are under fire by the Trump administration. Title VII of the Civil Rights Act of 1964 (Title VII), provides employees protection against, *inter alia*, employment discrimination based upon sex.<sup>9</sup> These protections have been held to extend to LGBTQ employees on the basis of sexual orientation and gender identity.<sup>10</sup> <sup>11</sup> Attorney General Jeff Sessions' Dept of Justice, however, has filed one of a plethora of amicus briefs in *Zarda v. Altitude Express, Inc.*, scheduled to be heard by the Second Circuit Court of Appeals on September 26, 2017.<sup>12</sup>

The sole issue to be determined therein is: "[W]hether Title VII of the Civil Rights Act of 1964 prohibits

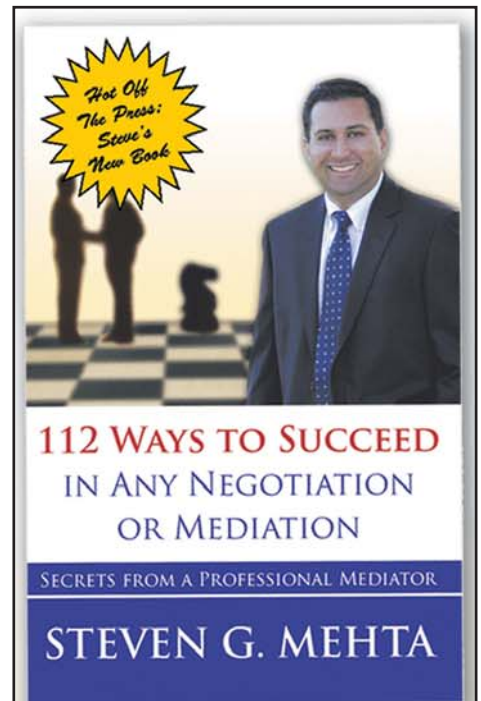
discrimination based on sexual orientation through its prohibition of discrimination "because of . . . sex."<sup>13</sup> In its amicus brief, the DOJ argues that the law does not prohibit discrimination based on sexual orientation. Although sexual orientation and gender identity are completely independent,<sup>14</sup> the court's holding will almost certainly affect Title VII's applicability to gender identity.

California law, on the other hand, is clear. FEHA provides strong protections to transgender employees. For example, trans-employees have the right to be addressed as ma'am or sir, and to be referred to with pronouns, consistent with their gender identity. They may also use the bathroom(s) any other employee of their gender identity may use, whether there is a gender-neutral, single stall bathroom available, and regardless of whether they have begun medical transition or legal name and gender marker change.<sup>15</sup>

In other words, transgender employees have all rights cisgender<sup>16</sup> employees have subject to a narrow bona fide occupational qualification (BFOQ), which, where applicable, must be raised as an affirmative defense.

"Privacy concerns will not justify discriminating against transgender employees because their sex assigned at birth differs from the sex required for the job, unless: 1) the job requires observing others nude or conducting body searches; and 2) it would be offensive to prevailing social standards to have individuals of a different sex present; and 3) it is detrimental to the mental or physical welfare of individuals being observed or searched to have someone of a different sex present."<sup>17</sup>

All three prongs must be met for a valid defense. So while it may be legal for an employer to discriminate by hiring a cisgender woman over a transgender woman to conduct body searches of women, it may be illegal to so discriminate when hiring a cisgender woman over a transgender woman to attend a women's bathroom. This is because a bathroom attendant



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is not required to observe women nude, regardless of whether it might offend prevailing social standards or be detrimental to anyone's emotional welfare. Of course, it should not so offend or be detrimental; this author merely uses these hypothetical facts to show the narrowness of the BFOQ.

**Caveat:** The BFOQ statute does not distinguish between preoperative and post-operative transgender persons. Therefore, as written, the law would apply equally to both. But should an employer hiring a female to conduct body searches of females be allowed to discriminate against a transgender woman who has undergone sex reassignment surgery to make herself anatomically female? Does public policy dictate this fact makes moot elements two and three of the defense? It appears legislative correction and or clarification is in order. For now, however, it is up to California courts to address the issue if and when faced with it.

Mr. Bonoli also writes in the original article: "So ... [if the Equality Act passes, and] an employee suffering from 'gender identity disorder' ... is discriminated against because 'her behavior failed' to conform to gender norms... [she] may have suffered sex discrimination."

When the Equality Act passes, as this author believes it will, it is virtually guaranteed that there will be

no language describing transgender persons as "suffering from gender identity disorder" or "failing to conform" to anything. These words are hallmarks of an outdated and discredited ideology.

“

Being transgender or transsexual (transsexuals are a subgroup of the transgender community) does not indicate mental illness, and is not and never was, in any way, a sexual behavior disorder.”

Employment discrimination against transgender employees can have devastating effects on transgender employees and on company bottom lines.<sup>18</sup> Encouragingly, however, when transpersons are supported, they feel better, job performance improves, and bottom lines increase.<sup>19</sup> If we simply remember that transgender women are women, and transgender men are men, despite that they were born with trans genitalia, things fall simply, neatly, and properly into place. 🏴

- <sup>1</sup> American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders DSM-5*. Washington, DC: American Psychiatric Association.
- <sup>2</sup> American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders DSM-IV-TR*. Washington, DC: American Psychiatric Association.
- <sup>3</sup> Intersex babies are born with conditions causing reproductive or sexual anatomy to differ from typical definitions of female or male.
- <sup>4</sup> Alternate forms of gender are being recognized and accepted around the world. The District of Columbia and Oregon, for example, added an "X" option as an alternative to M or F for ID cards, and the California Senate recently passed SB 179, which may make California the third jurisdiction to include an alternate gender option.
- <sup>5</sup> Rebeca Robles et al., *Removing Transgender Identity from The Classification of Mental Disorders: A Mexican field Study for ICD-11*, THE LANCET PSYCHIATRY, July 26, 2016.
- <sup>6</sup> World Health Organization, *International Classification of Diseases (ICD) Revision: Gender Incongruence of Adolescence or Adulthood Clinical Descriptions and Diagnostic Guidelines*, 2017.
- <sup>7</sup> *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-04822, 2017 U.S. Dist. LEXIS 75665 (E.D. Pa.).
- <sup>8</sup> A transsexual is a transgender person who has undergone, or will undergo, hormone replacement therapy and gender reassignment surgery.
- <sup>9</sup> 42 U.S.C. §2000e (LexisNexis, Lexis Advance through PL 115-51, approved 8/18/17).
- <sup>10</sup> *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017).
- <sup>11</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).
- <sup>12</sup> *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. N.Y. Apr. 18, 2017).
- <sup>13</sup> *Zarda v. Altitude Express, Inc.* (2d Cir. May 25, 2017, No. 15-3775) 2017 U.S. App. LEXIS 13127.
- <sup>14</sup> A transgender woman may be gay or straight. Straight means she is sexually attracted to men, regardless of whether she still has male genitalia.
- <sup>15</sup> Cal. Code Regs., tit. 2, §11029 (Lexis Advance through Register 2017, No. 33, August 18, 2017).
- <sup>16</sup> Cisgender denotes an individual who identifies as the gender she was assigned at birth.
- <sup>17</sup> Cal. Code Regs., tit. 2, §11031 (Lexis Advance through Register 2017, No. 33, August 18, 2017).
- <sup>18</sup> Brynn Tannehill, *The Truth about Transgender Suicide*, THEHUFFINGTONPOST.COM, Nov. 14, 2015, [www.huffingtonpost.com/brynn-tannehill/the-truth-about-transgend\\_b\\_8564834.html](http://www.huffingtonpost.com/brynn-tannehill/the-truth-about-transgend_b_8564834.html).
- <sup>19</sup> Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.



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# Family Secrets: Filial Support and its Impact on California Law

By Diana P. Zitser and Brandon Johnson

**W**HILE “HONOR THY father and thy mother” is a central tenant in many faiths and societies, very few people know that, in California, filial piety can be enforced under the law.<sup>1</sup>

Most people in California already know that California law can require a person to pay child support for the benefit of their minor children<sup>2</sup> and spousal support, also known as alimony, to their former spouse.<sup>3</sup> But the laws that can require an adult to pay filial support to their parents are so obscure that many legal practitioners are not aware they even exist.<sup>4</sup>

## Filial Support and Adult Child Support<sup>5</sup>

While it is more widely known than the existence of filial support, many people do not know that California also has laws that can require a

parent to support a child even after they reach adulthood if the child is incapacitated from earning a living and is without sufficient means.<sup>6</sup>

Neither the laws requiring filial support nor the laws requiring adult child support existed in the common law,<sup>7</sup> but both were codified in California’s Civil Code when it was enacted in 1872.<sup>8</sup> They originally came from the same statute, former Civil Code §206.<sup>9</sup>

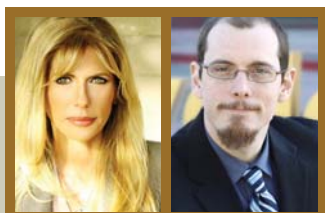
Former Civil Code §206 stated: “It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding.”<sup>10</sup>

California’s filial support and adult child support laws remained closely intertwined until 1994 when they were

separated into two different statutes (Family Code §4400 and §3910, respectively). Therefore, a discussion of California’s laws regarding filial support also involves a discussion of California’s laws regarding adult child support.<sup>11</sup>

For example, in *Paxton v. Paxton*, an adult child support case, the California Supreme Court held that, because former Civil Code §206 did not set forth specific procedures for its enforcement, suits brought under former Civil Code §206 are actions in equity.<sup>12</sup> This holding has impacted the law of filial support even though it sprang from an adult child support case.<sup>13</sup>

Contrary to what many people would assume, the primary policy behind the laws of filial support and adult child support that were created by former Civil Code §206 was not and is not for the benefit of the people



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who receive the support.<sup>14</sup> Instead, “the main purpose of the statutes seems to be to protect the public from the burden of supporting poor people who have children [or parents] able to support them.”<sup>15</sup> This policy is frequently cited in the case law for filial and adult child support, and it forms the basis for many of the aspects of the law relating to these types of support.

### ***Duffy v. Yordi***

One of the first opinions involving filial support is *Duffy v. Yordi*, which was decided in 1906.<sup>16</sup> In *Duffy*, a 77-year-old mother who was unable to support herself sued her adult daughter for filial support.<sup>17</sup> The mother had three other adult children—two other daughters who were already supporting her and a son who had not been heard from in several years.<sup>18</sup> The trial court ordered the daughter to pay one-third of the mother’s needs.<sup>19</sup>

The California Supreme Court reversed the trial court, ruling that since the mother was already receiving support from her other adult daughters, there was no indication that the mother had need for additional support from the defendant, so she could not sue under former Civil Code §206.<sup>20</sup> The court seemed less concerned with balancing the equities of having all siblings share the burden of assisting mom than only making sure that the mother would not become a burden on the public. *Duffy* was distinguished by the 1962 appellate court decision in *Britton v. Steinberg*, but is otherwise remains the law regarding filial support.<sup>21</sup>

In *Britton*, an 86-year-old mother’s adult daughter, acting as her mother’s guardian, sued the mother’s two other adult children, both sons, for filial support.<sup>22</sup> During the hearing, the daughter testified that, while she had previously been the mother’s sole source of support, their mother now required extensive care that was beyond daughter’s ability to provide and the mother needed to be placed in a “home for elderly persons.”<sup>23</sup> The evidence

confirmed that the daughter could not afford to pay for the cost of the home.<sup>24</sup>

After the trial court ordered support from at least one of the sons, that son appealed.<sup>25</sup> Relying exclusively on *Duffy*, the son argued that because their mother was already being supported by the daughter, she could not sue him for filial support.<sup>26</sup> The appellate court rejected this argument, holding that unlike in *Duffy*, there was a danger that the mother could become a public burden because she needed to be placed in a home and the daughter could not afford it.<sup>27</sup>

The son also tried to argue that there was no assurance that the mother would ever actually be placed in a home, but the appellate court also rejected that argument because requiring the mother to actually be placed in a home that the daughter could not afford before an order for filial support could be made would require the mother to become a public burden, which is exactly what the statute was enacted to prevent.<sup>28</sup>

Perhaps the most extreme example of the surprising effects that filial support can have is illustrated by a 1984 case, *Radich v. Kruly*.<sup>29</sup> In *Radich*, a father sued his adult daughter for filial support.<sup>30</sup> The daughter opposed the suit by showing, among other things, that her father had physically abused her. The trial court found that the physical abuse had occurred.<sup>31</sup>

Under California laws regarding spousal support, evidence of abuse perpetrated by a spouse must be considered by a court before support can be ordered.<sup>32</sup> And if one spouse is convicted of abusing the other, there may be either a rebuttable presumption disfavoring an award of spousal support to the abusive spouse, or, if the abusive spouse is convicted of a violent sexual felony or attempted murder, an award of spousal support to the abusive spouse may be entirely prohibited.<sup>33</sup>

In *Radich*, the trial court concluded that the father’s physical abuse of his daughter had no bearing on the father’s

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suit for filial support and ordered the daughter to pay the support.<sup>34</sup> The daughter appealed, arguing that since suits for filial support under former Civil Code §206 are actions in equity, the doctrine of unclean hands should apply and her father should be precluded from bringing the suit because of his wrongful conduct.<sup>35</sup> The appellate court agreed that the father had unclean hands, but refused to allow the doctrine to be used as a complete defense to a claim for filial support.<sup>36</sup>

In making this holding, the appellate court referenced the policy behind former Civil Code §206 and ruled that the state's interest in relieving the public from the burden of supporting a parent who can be supported by their adult children gave it the ability to do so.<sup>37</sup> The appellate court then held that, even when a parent has abused their child, the child can be obligated to pay a sum which will take care of the parent's minimum needs.<sup>38</sup> In this way, the policy behind the filial support statute and a holding from a case about adult child support combined to create a disturbing law—a victim of child abuse can be ordered to support their abuser.

### **Balancing Equities in Filial Support**

Despite the disturbing *Radich* holding, law relating to filial support has not been completely blind to the equities between payor and payee.<sup>39</sup> In 1955, California enacted former Civil Code §206.5, which, by at least 1957, excused a child—abandoned by a parent for a period of two or more years before they turned 16—from paying filial support.<sup>40</sup> But this absolution had its own exception, so that it did not apply when a parent was unable to support his or her children during periods of abandonment.<sup>41</sup>

Both the defense of abandonment and its exception for a parent who was unable to support a minor during a period of abandonment has survived

the change in California's statutory scheme. It remains part of California's current laws regarding filial support, with the relevant minor age increased to eighteen.<sup>42</sup>

Another potential defense to a suit for filial support is discussed in *Parshall v. Parshall*, which was decided in 1922.<sup>43</sup> In *Parshall*, a man filed a suit for filial support against a woman who he claimed to be his adopted daughter.<sup>44</sup> The evidence showed that the woman had lived with, been raised by, and “been generously provided for” by the man and his wife since the woman was about four or five months old. She also shared his name and had been held out to the public as his child.<sup>45</sup> However, because she was neither the man's biological child nor had he legally adopted her, the trial court found that the man was not entitled to any filial support from the woman.<sup>46</sup>



A discussion of California's laws regarding filial support also involves a discussion of California's laws regarding adult child support.”

The man appealed and the appellate court noted that outside of California, several other states which had filial support laws had held that the class of “children” who owe an obligation of filial support are limited to biological offspring only, and do not include grandchildren, sons-in-law, stepchildren, or even adopted children.<sup>47</sup>

If the appellate court in *Parshall* had adopted this standard, it would have been a very significant departure from the primary policy behind the law of filial support that is relied on so often in other opinions. Instead, the appellate court noted that while the

man may have stood *in loco parentis* to the woman, he was not her legal father, had refused to sign adoption documents in the past, and thus had no legal basis to make a claim for support.<sup>48</sup>

While *Radich* may provide the most extreme example of the apparent unfairness that can be created by the legal history of California's filial support law, it also seems to provide the most significant attempt in the law to balance the equities between payor and payee.<sup>49</sup> In *Radich*, in addition to the father's physical abuse, the daughter alleged—and the trial court found—that her father had caused her mental distress, often forced her to work in the fields during her minority, and delayed her entry into school. He also neglected to support her during her minority while he had the ability to do so and “falsely circulated that she was unchaste at the time of her marriage.”<sup>50</sup>

While none of this was enough to convince the trial or appellate courts to completely absolve her of the duty to pay support, the appellate court did remand the case back to the trial court with instructions to reduce its award to the minimum required to prevent her father from becoming a burden on the public.<sup>51</sup>

As the appellate court stated: “Love, respect, loyalty, devotion and the natural and inevitable desire of a child to recompense a parent for the love, service, support and sacrifice usually lavished by a parent upon a child, cannot be legislated nor should the law force a child to make recompense for an assumed standard of upbringing, when a trial court finds on credible evidence that it never existed.”<sup>52</sup>

Similar issues to those discussed in *Parshall* and *Radich* were again discussed in *Gluckman v. Gaines*, which was decided in 1968, four years after *Radich*.<sup>53</sup> In *Gluckman*, an alleged father sought filial support from an alleged son. In opposition, the alleged son raised the defense questioning



whether the man was the biological father. He also raised a defense of abusive parenting, including evidence that this alleged father refused to allow him to be bar mitzvahed.<sup>54</sup> The trial court made a finding that the man was the biological father, was in need of filial support, and ordered it to be provided.<sup>55</sup> The appellate court questioned whether either of these findings was supported by substantial evidence.<sup>56</sup>

The appellate court avoided reaching a decision on either of those issues.<sup>57</sup> Instead, the appellate court held that the alleged son should not be required to pay filial support because there was substantial evidence for the trial court's finding that he was unable to afford it.<sup>58</sup> The appellate court based this holding in the policy behind the statute, stating that, in its analysis, there was a greater danger that the young man would become a public charge if he was ordered to pay support than there was a danger that the alleged father would be a public charge without it.<sup>59</sup>

While it may not have been necessary to its decision, the appellate court also discussed the "assumed standard of upbringing" from *Radich* and stated that, based on how poorly the alleged father had treated the alleged son, the older man had very little reason to expect "filial devotion."<sup>60</sup>

In 1994, the California legislature repealed former Civil Code §206 and reenacted its filial support laws as part of the Family Code under Family Code §4400 *et seq.*<sup>61</sup> Both before and after this reenactment, California's filial support laws have also allowed public and private entities to seek reimbursement from adult children for aid or services that have been provided to parents in need of support.<sup>62</sup> But it does not appear that any opinions have been published in California in which an alleged parent has sought filial support from their adult child since *Gluckman*.

This means that the scope of the standard for measuring the extent to

which a parent is entitled to filial support from their adult child that was set forth in *Radich* remains largely untested. Yet that standard seems to be supported by current filial support statutes, which give the courts discretion to order filial support after considering earning capacity and needs, obligations and assets, age and health, standard of living, and "other factors the court deems just and equitable."<sup>63</sup>

From the opinions in *Radich* and *Gluckman*, it appears that the "other factors the court deems just and equitable" can include any real or perceived grievance that the adult child may harbor against the parent seeking filial support, including such grievances as refusing to allow a son to be bar mitzvahed<sup>64</sup> or "falsely circulat[ing] that [a daughter] was unchaste at the time of her marriage."<sup>65</sup>

It is not hard to see how this could have far-ranging consequences for the future of filial support in California. If a parent does decide to file a request for support from their adult child, they should expect to be faced with a barrage of counter-arguments maligning their parenting skills and picking apart every aspect of their relationship with their child over the course of the child's entire life. Attorneys interacting with parents may want to advise their clients to keep a record of their children's childhood, not just for family memories, posterity, or custody disputes, but also as evidence to support a claim for parental support.

### Impact of Filial Support on Other Law

Since their enactment in 1872, California's filial support laws have been made with consideration as to how they will impact those who are neither parents in need of support nor their children—as has already been discussed, the primary policy behind the filial support laws is to protect everyone else from the burden of supporting parents who cannot support themselves. But they have also had



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effect on how other areas of the law have developed.

Perhaps the most significant way in which California's filial support laws have affected others is through the law relating to wrongful death actions. In *Evans v. Shanklin*, which was decided in 1936, a poor mother who was unable to support herself sought damages for the wrongful death of her adult son who had lived with her, but the then-existing law regarding standing to sue for wrongful death prohibited her from suing for wrongful death because she was not his heir.<sup>66</sup>

In its opinion, the appellate court lamented: "Though we might feel that considerations of social security and social justice should dictate that a mother situated as was the plaintiff mother here, living with and dependent upon her son for support and maintenance... coupled with his legal obligation during his lifetime under the provisions of [former] §206 of the Civil Code to maintain his mother, should have a right to bring an action for

damages occasioned by the wrongful death of her son; nevertheless, the decision of the legislature as to how far it will extend the right is conclusive... The remedy for extending the right of action to the mother under the facts and circumstances of this case must come from the legislature."<sup>67</sup>

Legislation was then enacted to include dependent parents within the class of persons who can sue for wrongful death, to remedy the type of situation the court found in *Evans*.<sup>68</sup> In *Perry v. Medina*, a mother who was being financially assisted by her son, relied on that legislation to sue the drivers of a vehicle in which her son had been a passenger when it collided with a tractor-trailer rig, which resulted in her son's death.<sup>69</sup>

On appeal, the appellate court referred to the history of the statute that allowed dependent parents to sue for the wrongful death of their adult child that is described above, quoting *Evans*.<sup>70</sup> The appellate court in *Perry* quoted the filial support statute contained in former Civil Code §206, and stated that "[i]t is public policy that family take care of family when possible."<sup>71</sup> The court reversed the judgment, holding that there was a factual question regarding whether the mother was dependent on her son.<sup>72</sup>

Additionally, California's filial support laws nearly became a part of the state's criminal elder abuse laws. *People v. Heitzman* was decided in 1994, shortly after the current statutory scheme for California's filial support laws was enacted.<sup>73</sup> In *Heitzman*, the courts were asked to decide whether and to what extent the first portion of California Penal Code §368 was constitutional.<sup>74</sup> At the time, that portion of Penal Code §368 stated that it was a crime for any person to, "under circumstances or conditions likely to produce great bodily harm or death, willfully cause or permit any elder or dependent adult to suffer."<sup>75</sup>

In *Heitzman*, a partially paralyzed 67-year-old man who had depended

on his children for his daily care, died of neglect.<sup>76</sup> His sons, who had lived with him and been his caretakers at the time of his death, were prosecuted under a different part of the elder abuse statute.<sup>77</sup> But one of his daughters, who had previously been his primary caretaker but had stopped caring for him when she moved out a year before his death, was charged with permitting him to suffer under the portion of the statute described above.<sup>78</sup> She allegedly continued to regularly visit the home and, even though aware of his deplorable living conditions, did nothing except suggest to her brothers that they should take their father to a doctor.<sup>79</sup>

Before the trial, the daughter argued that the portion of Penal Code §368 under which she had been charged was unconstitutionally vague because it attempted to criminalize the actions of any person who permitted an elder to suffer without adequately defining who could be capable of permitting such abuse.<sup>80</sup> The case against her was dismissed and the prosecutor appealed.<sup>81</sup>

The appellate court first held that a person charged with violating the first portion of Penal Code §368 could only be criminally liable if they had a legal duty to act.<sup>82</sup> The appellate court then held that, due to the special relationship between a parent and their child, the defendant in this case did have a legal duty to act, and reversed the trial court's dismissal of the case.<sup>83</sup>

In making this holding, the appellate court relied on California's filial support laws, as well as Penal Code §270c,<sup>84</sup> which also makes it a misdemeanor for an adult child to fail to provide necessary food, clothing, shelter, or medical attendance for an indigent parent if they are able to do so.<sup>85</sup> If the appellate court's holding had been left to stand, California's filial support laws would have become a part of its elder abuse laws. But the California Supreme Court ultimately rejected this standard and instead

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based its holding on agency liability from California's tort law.<sup>86</sup>

## Impact of Filial Support on Divorce Law

California's filial support laws have been a part of its Family Code since 1994, shortly after the Code was first enacted in 1992, but many people are still not aware of them or the impact that they can have in a divorce.<sup>87</sup>

In a California divorce case, there are several issues that a family law court may need to address. First, if the parties have minor children, the court will have to determine the custody of the children and issue orders regarding child support.<sup>88</sup> While it is not widely known, as is described above, the court can also order the parties to pay support for an adult child who is unable to support themselves.<sup>89</sup> Unlike filial support, a court can order a parent to pay adult child support even when the adult child is already being fully supported by another parent.<sup>90</sup>

As with support for a minor child, the amount of adult child support a parent can be ordered to pay is normally determined by a guideline formula enacted by California's legislature, and a parent or their estate can be ordered to pay adult child support even after one or both of the parents die.<sup>91</sup> While an adult child's need for this support must initially be determined without considering their parents' standard of living, the amount of adult child support that a parent is ordered to pay can be based on their standard of living.<sup>92</sup>

In virtually every divorce case, the court divides, usually equally, the parties' community property and community debts.<sup>93</sup> As part of the community estate's division, the court can also order credits and reimbursements that can change the way the estate is divided. These can be ordered for things like the value of a spouse's personal effort spent during the marriage to improve a separate asset for which the community

may have been inadequately compensated,<sup>94</sup> or for a portion of the rental value of a community asset that was used by only one of the parties after their separation.<sup>95</sup>

The court can also order reimbursement for a party's separate funds that have been spent on—for example, the acquisition or improvement of either community property or the other spouse's separate property,<sup>96</sup> the payment of community or separate debts after the parties' separation,<sup>97</sup> or that one party to reimburse the other for their share of community funds that have been spent on certain things, such as to obtain an education or training.<sup>98</sup> The court can also order one party to reimburse the other for their share of community funds that have been misappropriated,<sup>99</sup> such as when one party makes an unauthorized gift of community property to someone else.<sup>100</sup>


In *In re Marriage of Leni*, a divorce case that was decided in 2006, the husband used community funds from the proceeds of the sale of a family house to support his ailing mother.<sup>101</sup> The trial court ordered the husband to reimburse the wife the sum of \$12,000 for the portion that ordinarily should have been her share.<sup>102</sup> The husband argued that he was obligated to support his ailing mother, so he should not be required to reimburse the community.<sup>103</sup>

The trial court rejected this argument, stating: "You know as well as I do that you're under no obligation to pay for your parent's expenses just as you're under no legal obligation to pay for your child's expenses once they are over the age of eighteen."<sup>104</sup> The husband appealed the trial court's order.<sup>105</sup>

In its opinion, the appellate court noted that the California laws regarding filial support is not commonly known, referencing an earlier law review article, "America's Best Kept Secret: An Adult Child's Duty to Support Aged

Parents," that had been published on the subject.<sup>106</sup> The appellate court then corrected the trial court, holding that if the circumstances were such that the husband was obligated to support his ailing mother, that duty would not have been the husband's alone and would have been considered a community obligation.<sup>107</sup>

The appellate court also held that, as a community obligation, the husband's use of community funds to support his ailing mother would not have been an unauthorized gift.<sup>108</sup> Under Family Code §915, when a spouse uses community funds to pay support for a child from another relationship or a spouse from another marriage, if separate funds that could be used instead were available, the courts will order a reimbursement.<sup>109</sup>

The appellate court in *Leni* held that because Family Code §915 does not expressly provide for such a reimbursement for payments for filial support, the husband would not owe a reimbursement under that theory, nor would any other law that was raised before the appellate court have required the husband to reimburse the wife for such a use of community funds.<sup>110</sup> The appellate court then reversed the portion of the order requiring the husband to pay \$12,000 as a reimbursement to the wife and remanded the case back to the trial court for further proceedings in accordance with its holdings.<sup>111</sup> 

<sup>1</sup> Cal. Fam. Code §4400 *et seq.*

<sup>2</sup> Cal. Fam. Code §3900 *et seq.*

<sup>3</sup> Cal. Fam. Code §4300 *et seq.*

<sup>4</sup> *IRMO Leni*, 144 Cal.App.4th 1087, 1097 (2006).

<sup>5</sup> Authors' Note: An additional source of obscurity and confusion regarding filial support may be the way in which many statutes, opinions, and other publications refer to the obligation that a parent can have to support an adult child as "parental support." To the authors of this article, "parental support" seems as though it should instead be another name for the support that can be owed to a parent, just as the support that can be owed to a minor child is called "child support" and the support that can be owed to a spouse is called "spousal support." Regardless, in an effort to achieve the greatest degree of clarity, this article will refer to the obligation that an adult child can have to support a parent as filial support, and the obligation that a parent can have to support an adult child as "adult child support."

<sup>6</sup> Cal. Fam. Code §3910.

- <sup>7</sup> *People v. Heitzman*, 9 Cal.4th 189, 212 (1994).  
<sup>8</sup> *Jones v. Jones*, 179 Cal.App.3d 1011, 1014 (1986).  
<sup>9</sup> *Duffy v. Yordi*, 149 Cal. 140, 142 (1906).  
<sup>10</sup> *Id.*  
<sup>11</sup> *Heitzman*, 9 Cal.4th 189 at 210, FN 18.  
<sup>12</sup> *Radich v. Kruly*, 226 Cal.App.2d 683, 686 (1964).  
<sup>13</sup> *Id.*  
<sup>14</sup> *Duffy*, 149 Cal. at 142.  
<sup>15</sup> *Id.*  
<sup>16</sup> *Duffy*, 149 Cal. at 140.  
<sup>17</sup> *Duffy*, 149 Cal. at 140-141.  
<sup>18</sup> *Duffy*, 149 Cal. at 141-143.  
<sup>19</sup> *Duffy*, 149 Cal. at 141.  
<sup>20</sup> *Duffy*, 149 Cal. at 142-143.  
<sup>21</sup> *Britton v. Steinberg*, 208 Cal.App.2d 358, 359-360 (1962).  
<sup>22</sup> *Britton*, 208 Cal.App.2d at 358.  
<sup>23</sup> *Britton*, 208 Cal.App.2d at 358-359.  
<sup>24</sup> *Id.*  
<sup>25</sup> *Britton*, 208 Cal.App.2d at 359.  
<sup>26</sup> *Id.*  
<sup>27</sup> *Britton*, 208 Cal.App.2d at 359-360.  
<sup>28</sup> *Britton*, 208 Cal.App.2d at 360.  
<sup>29</sup> *Radich*, 226 Cal.App.2d at 683.  
<sup>30</sup> *Radich*, 226 Cal.App.2d at 685.  
<sup>31</sup> *Id.*  
<sup>32</sup> Cal. Fam. Code §4320.  
<sup>33</sup> Cal. Fam. Code §4324, 4324.5, 4325.  
<sup>34</sup> *Radich*, 226 Cal.App.2d at 685.  
<sup>35</sup> *Radich*, 226 Cal.App.2d at 685-686.  
<sup>36</sup> *Radich*, 226 Cal.App.2d at 686-687.  
<sup>37</sup> *Id.*  
<sup>38</sup> *Radich*, 226 Cal.App.2d at 687.  
<sup>39</sup> *Radich*, 226 Cal.App.2d at 687-689.  
<sup>40</sup> *Stark v. County of Alameda*, 182 Cal.App.2d 20 (1960).  
<sup>41</sup> *Chryst v. Chryst*, 204 Cal.App.2d 620 (1962).  
<sup>42</sup> Cal. Fam. Code §4410 et seq.  
<sup>43</sup> *Parshall v. Parshall*, 56 Cal.App. 553 (1922).  
<sup>44</sup> *Parshall*, 56 Cal.App. at 553-554.  
<sup>45</sup> *Parshall*, 56 Cal.App. at 554-555.  
<sup>46</sup> *Parshall*, 56 Cal.App. at 554.  
<sup>47</sup> *Parshall*, 56 Cal.App. at 555.  
<sup>48</sup> *Parshall*, 56 Cal.App. at 555-556.  
<sup>49</sup> *Radich*, 226 Cal.App.2d at 687-689.  
<sup>50</sup> *Radich*, 226 Cal.App.2d at 685.  
<sup>51</sup> *Radich*, 226 Cal.App.2d at 687-689.  
<sup>52</sup> *Radich*, 226 Cal.App.2d at 687.  
<sup>53</sup> *Gluckman v. Gaines*, 266 Cal.App.2d 52 (1968).  
<sup>54</sup> *Gluckman*, 266 Cal.App.2d at 57-59.  
<sup>55</sup> *Gluckman*, 266 Cal.App.2d at 59.  
<sup>56</sup> *Id.*  
<sup>57</sup> *Gluckman*, 266 Cal.App.2d at 59-60.  
<sup>58</sup> *Id.*  
<sup>59</sup> *Gluckman*, 266 Cal.App.2d at 60.  
<sup>60</sup> *Id.*  
<sup>61</sup> *Heitzman*, 9 Cal.4th 189 at 210, FN 18.  
<sup>62</sup> Cal. Fam. Code §4403; See also *Huntoon v. Powell*, 88 Cal.App. 657 (1928); *County of San Mateo v. Boss*, 3 Cal.3d 962 (1971); *Swoap v. Superior Court*, 10 Cal.3d 490 (1973); and *Lara v. Board of Supervisors*, 59 Cal.App.3d 399 (1976).  
<sup>63</sup> Cal. Fam. Code §4404.  
<sup>64</sup> *Gluckman*, 266 Cal.App.2d at 58.  
<sup>65</sup> *Radich*, 226 Cal.App.2d at 685.  
<sup>66</sup> *Evans v. Shanklin*, 16 Cal.App.2d 358 (1936).  
<sup>67</sup> *Evans*, 16 Cal.App.2d at 362-363.  
<sup>68</sup> *Perry v. Medina*, 192 Cal.App.3d 603, 609-611 (1987).  
<sup>69</sup> *Id.*  
<sup>70</sup> *Perry*, 192 Cal.App.3d at 609-611.  
<sup>71</sup> *Id.*  
<sup>72</sup> *Id.*  
<sup>73</sup> *Heitzman*, 9 Cal.4th at 189.  
<sup>74</sup> *Id.*  
<sup>75</sup> *Heitzman*, 9 Cal.4th at 194.  
<sup>76</sup> *Heitzman*, 9 Cal.4th at 194-195.  
<sup>77</sup> *Id.*  
<sup>78</sup> *Id.*  
<sup>79</sup> *Id.*  
<sup>80</sup> *Heitzman*, 9 Cal.4th at 196.  
<sup>81</sup> *Id.*  
<sup>82</sup> *Id.*  
<sup>83</sup> *Id.*  
<sup>84</sup> *Heitzman*, 9 Cal.4th at 196-197.  
<sup>85</sup> Cal. Penal Code §270c.  
<sup>86</sup> *Heitzman*, 9 Cal.4th at 211-214.  
<sup>87</sup> *Heitzman*, 9 Cal.4th 189 at 210, FN 18.  
<sup>88</sup> Cal. Fam. Code §3020 et seq.; Cal. Fam. Code §3600.  
<sup>89</sup> Cal. Fam. Code §3910.  
<sup>90</sup> *Chun v. Chun*, 190 Cal.App.3d 589 (1987).  
<sup>91</sup> Cal. Fam. Code §4050 et seq.; *IRMO Drake*, 53 Cal. App.4th 1139 (1997).  
<sup>92</sup> *IRMO Cecilia & David W.*, 241 Cal.App.4th 1277 (2015).  
<sup>93</sup> Cal. Fam. Code §2550, 2622.  
<sup>94</sup> *Van Camp v. Van Camp*, 53 Cal.App. 17 (1921).  
<sup>95</sup> *IRMO Watts*, 171 Cal.App.3d 366 (1985).  
<sup>96</sup> Cal. Fam. Code §2640.  
<sup>97</sup> Cal. Fam. Code §914, 916, 2626.  
<sup>98</sup> Cal. Fam. Code §2641.  
<sup>99</sup> Cal. Fam. Code §2602.  
<sup>100</sup> Cal. Fam. Code §1100(a).  
<sup>101</sup> *Leni*, 144 Cal.App.4th at 1091-1099.  
<sup>102</sup> *Leni*, 144 Cal.App.4th at 1091.  
<sup>103</sup> *Leni*, 144 Cal.App.4th at 1091-1099.  
<sup>104</sup> *Leni*, 144 Cal.App.4th at 1097.  
<sup>105</sup> *Leni*, 144 Cal.App.4th at 1091.  
<sup>106</sup> *Leni*, 144 Cal.App.4th at 1097. See also *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 Cal. Western L.Rev. 351 (1990).  
<sup>107</sup> *Leni*, 144 Cal.App.4th at 1097-1098.  
<sup>108</sup> *Leni*, 144 Cal.App.4th at 1097-1099.  
<sup>109</sup> Cal. Fam. Code §915.  
<sup>110</sup> *Id.*  
<sup>111</sup> *Leni*, 144 Cal.App.4th at 1199.

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## Supporting Our Future! 2017 VCLF Legal Scholarship Recipient Andrea Solis

**A**S A PRE-TEEN, ANDREA SOLIS POSSESSED enough insight to grasp that “injustice is a part of life” and “its pervasiveness in low-income areas only exacerbates inequality in our society.”

While growing up, her family struggled to make ends meet and she has vivid memories of experiencing disadvantages unknown in wealthier neighborhoods—“violent crime, intimidating gangs, inadequate schools, and an overwhelming sense of despair that makes [people want to] give up.”

“

Despite growing up in difficult circumstances, Solis learned to appreciate everything and take nothing for granted.”

Working at the Eviction Defense Network (EDN), her mother introduced her to the possibilities of addressing social wrongs through legal means. Andrea recalls from her early childhood witnessing many in her neighborhood enduring unlawful evictions at the hands of landlords looking to exorbitantly raise rents. Her awareness of this injustice inspired her to work towards acquiring a career as an attorney so that one day she could assist the less fortunate in her community.

Volunteering at EDN, Solis has been able to witness firsthand the strife and tribulations of her indigent and elderly neighbors. “All my life I have seen neighbors crying and completely broken,” says Andrea. “An elderly lady named Helen lived below our apartment, and the landlord saw her as an easy target. My mother and I recommended she go to EDN, and she won her case.”

However, she says, “The landlord was relentless and harassed her until she didn’t have the resources to fight anymore and was forced to move out. People are forced to leave their apartments simply because they have the temerity to request basic repairs involving plumbing, electricity, leaky roofs, or vermin infestation.”

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While helping people as a student volunteer has been vastly rewarding for Andrea, she has been motivated to work towards “become an attorney to fight for justice through our courts.”

Despite growing up in difficult circumstances, Solis learned to appreciate everything and take nothing for granted—a positive attitude that has helped propel her to the upper echelon of her high school class and admittance to Smith College in Massachusetts. While Smith has provided her with limited financial aid, she still, “face[s] the burden of taking out loans to make up the deficit.”

Aware of the cost of attending law school and worried that her debt-load after graduation might limit her ability to perform public-interest law, she gratefully acknowledged that, “with the help of this scholarship, I hope to remain on course so that I may attain my dream of becoming an attorney who helps the underprivileged secure their rights.”

Andrea conveyed her gratitude personally to San Fernando Valley Bar Association President Kira Masteller and VCLF President Laurence N. Kaldor, stating that her scholarship “would help relieve some of the financial pressure and enable me to focus more on my academics and my goal to make a positive difference in my community.” 



### ABOUT THE VCLF OF THE SFVBA

The Valley Community Legal Foundation is the charitable arm of the San Fernando Valley Bar Association with a mission to support the legal needs of the San Fernando Valley's youth, victims of domestic violence, and veterans. The VCLF also provides educational grants to qualified students who wish to pursue legal careers. The Foundation relies on donations to fund its work. To donate to the VCLF and support its efforts on behalf of the Valley community, visit [www.thevclf.org](http://www.thevclf.org) and help us make a difference in our community.



### Managing Expectations or Cooler Heads Prevail

**I**N LIFE, ONE OF THE MOST difficult experiences to endure is the end of a relationship, whether it be a romantic, friendly or familial breakup. Such was the case for Ashley (pseudonym), who, with her partner, bought a home "to grow old in."

Sadly, unfortunate circumstances led to the end of the relationship, with Ashley's partner wanting to sell the home that she wanted to keep. Ashley was willing to buy out her partner, but she asked for more than double the amount Ashley considered fair as she had paid the down payment and for most of the renovations on the dwelling.

Ashley saw the ARS sign on display at the Van Nuys courthouse and decided to call the service. She was referred to attorney Steven Spile, who worked together with attorney Chris Delaplane on her case. From the beginning, Spile and Delaplane worked on managing the expectations of both Ashley and her former partner.

In general, Spile's strategy is "to try and figure out if there's a way to carry the transaction on to its natural conclusion, which would be in this case our client getting the property and the other party getting what they had justifiable coming to them."

**CATHERINE CARBALLO-MERINO**  
ARS Referral Consultant




catherine@sfvba.org

To achieve that goal, Delaplane explained to the client that even though the situation was an emotional one, it was still, fundamentally, a business case. "When you do it [litigate] out of principle or you do it out of spite, those are rich people's luxuries because you are never going to get a return equal to what you spend on them."

Fortunately for both attorneys, Ashley understood her options. "It's a situation where, from the beginning, they understood and before they got too invested in the process they realized that there was no intelligent basis to go for litigation," says Spile.

Since both parties understood what was at stake, the case moved forward smoothly. Both sides received their due without the need for litigation, all thanks to the expertise of the attorneys.

So, in the end, litigation was a possibility, but it was shown not to be the most effective means of achieving a mutually agreeable resolution. "Litigation is like horse racing. It's a sport of kings and wealthy people," Delaplane says.

Thanks to their professional management of their client's expectations, the case was kept from turning into an emotional quagmire, with client Ashley perfectly satisfied. 

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By Michael D. White

# Lawyers in the Library

**O**VER THE PAST SEVERAL years, hundreds of seniors, veterans, the indigent, and others have been helped by the Lawyers in the Library program, a regular event providing the public with access to free, 20-minute legal consultations with volunteer attorneys.

Organized by the San Fernando Valley Bar Association

Attorney Referral Service and the LA Law Library, the joint program held its first session in 2013 as a test and, since then, has served hundreds of individuals with legal advice on a wide range of topics, from bankruptcy and family law to immigration and probate.


"There are many people who can't afford legal counsel," says Sandi Levin, Executive Director of the LA Law Library in downtown Los Angeles. "They're forced to represent themselves and need help and direction, but it's a few minutes time with a skilled lawyer who's willing to volunteer a few hours of time to talk for 15 or 20 minutes to people that can make a tremendous difference."

Working together with the SFVBA on the program, "has been a tremendous experience," she says. "The Bar is a great partner and has been very helpful in getting the program up and running in the Valley and we're very excited about working with them again."

Encouraging attorneys to volunteer for the program, Levin says, "You can't believe how wonderful it feels to change someone's life in just 15 or 20 minutes. The difference that it makes is palpable and rewarding, and for very busy attorneys it's nice to be able to have the opportunity to make a difference and yet not have to take home any homework. It's not an ongoing commitment; it's a one afternoon commitment and it's rare to get that kind of uplifting, positive experience from such a small investment of time."

Attorneys who volunteer, she adds, don't need to be experts in every area of the law. "They just need to tell us which area of the law they're comfortable helping in and we will match them up with the patrons that come in with questions in that particular field. If your area is real estate, you'll be talking to people with real estate questions, for example. We don't want the attorneys who volunteer to think that they'll be asked to field questions in a wide range of legal areas. They'll be working only where they're comfortable."

The next Lawyers in the Library program will be held Friday, October 20, from 1:00 p.m. to 4:00 p.m. at the Los Angeles Public Library, 6250 Sylmar Avenue, Van Nuys.

SFVBA members are encouraged to volunteer. If you're interested, contact Lawyers in the Library Program Coordinator, Janine Liebert, at (213) 785-2538 or [jliefert@lalawlibrary.org](mailto:jliefert@lalawlibrary.org). 



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