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# IN THE SUPREME COURT OF CALIFORNIA

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| In re the Marriage of Sheryl Jones Davis and Keith Xavier Davis | **Supreme Court case no.:** |
| SHERYL JONES DAVIS, *Respondent,* vs. KEITH XAVIER DAVIS, *Appellant* | First District Court of Appeal Case No. A136858<br>Superior Court No. RF 08 428441 Alameda County |

# PETITION FOR REVIEW

**After a Decision by the Court of Appeal,**
**First Appellate District, Division One**
**Case no. A136858**

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**IN THE**
**SUPREME COURT OF CALIFORNIA**

In re the Marriage of Sheryl Jones Davis and Keith Xavier Davis

SHERYL JONES DAVIS,
*Respondent,*
vs.

KEITH XAVIER DAVIS,
*Appellant*

# PETITION FOR REVIEW

## I. ISSUES PRESENTED

1. Prior to any court filing, may a couple be "living separate and apart" within the meaning of Family Code section 771 despite continuing to live together in the same house in the same physical arrangement?

2. Does a family court have the discretion to confine itself to one of two dates of separation proposed by the parties rather than considering a date that is dictated by the evidence?

3. Is it legally permissible for a trial court to find a date of separation that post-dates the parties' commencement of litigation of their dissolution action?

## II. WHY REVIEW SHOULD BE GRANTED

This case creates a substantial split of authority between published appellate opinions in the First and Sixth District Courts of Appeal regarding the meaning of "living separate and apart" under Family Code section 771. In its published opinion, the First District explicitly rejected the majority ruling in *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152 in favor of the dissent. It thus

created a split of authority between itself and the Sixth District on the issue of when a party may be deemed to be legally separated.

In *Norviel, supra*, the Sixth District reversed a trial court's determination that a married couple was separated under Family Code section 771(a) prior to either spouse moving from the family residence, stating that under that section, "[s]eparation does not occur unless the parties are 'living separate and apart.'" (*Id.* at p. 1161.) That court decided that a married couple could not be "living separate and apart" under that statute "when they continue to reside together in the same house." (*Ibid.*) It stated, "Decisional law thus clearly establishes that parties may live apart and yet not be separated. The question here is whether the reverse is also true. We conclude it is not." (*Id.* at p. 1162, emphasis added.) The Sixth District thus created a bright-line rule that as long as a married couple continued to reside together, they could not be deemed to be living separate and apart for purposes of Family Code section 771.

Here, the First District held exactly the opposite. It disagreed with the majority ruling in *Norviel* and agreed with the dissent, finding the bright-line rule set forth in *Norviel* "unduly rigid...." (Slip Op. at pp. 11-12 ["we disagree with the bright line drawn by the majority in *Norviel*, and find the dissenting opinion by Justice Bamattre-Manoukian to be compelling."])

Thus a substantial split of authority exists between the First and Sixth District Courts of Appeal on the fundamental issue of date of separation. Given the importance of this factor in almost every marital dissolution action, review is essential.

Moreover, the precedent created by the First District is dangerous and could potentially erode community-property laws. It certainly undermines Family Code Section 771(a), pursuant to which community earnings cease upon date of separation. Allowing one spouse to successfully argue that the couple began "living separate and apart"—despite continuing to live together—years before a dissolution is filed opens the door to significant manipulation of the date of

separation by the higher-earning spouse, with potentially devastating consequences to the lower-earning spouse.

Additionally, the ruling permits—and perhaps inadvertently condones—a trial court abdicating its authority to select a date of separation that may be appropriate under the facts of the case in favor of selecting whichever of the parties' proffered dates it finds "less wrong." Petitioner had argued that the trial court erroneously believed it was required to select one of two separation dates argued by each of the parties. (See Slip Op. at p. 12, fn. 4.) The First District held that Petitioner had waived this argument by not offering a third date. (Ibid.) And yet that was the point: the trial court refused to consider any date other than the two proffered by the parties. This opinion thus creates law allowing a trial court to refuse to exercise its discretion to select a date of separation other than one of two asserted by the parties. Review would give this Court to opportunity to determine if this should in fact be the law in California.

Finally, the trial court refused to find that the parties had separated when Respondent moved from the family home because that move was after she had filed the dissolution action and the parties were actively litigating the case. It held that no case law supports a date of separation that post-dated litigation of a dissolution action. (Slip Op. at p. 8.) And yet no case law appears to support the opposite. Review would give this Court the opportunity to decide this issue.

## III. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner herein seeks review of the First District Court of Appeal opinion, dated October 25, 2013, a copy of which is attached hereto. This published Opinion arises from an appeal of the bifurcated issue of date of separation in a dissolution action.

Petitioner Xavier Davis ("Xavier")[1] is the appellant below and the respondent in the Alameda County family-law action. (AA.)[2] Respondent herein, Sheryl Davis ("Sheryl") is Xavier's ex-wife and the petitioner therein. The parties were married on June 12, 1993. (PR 1.) They have two children: Sheyenne, born August 15, 1995, and Xo, born November 19, 1999. (PR 1.)

The marriage was turbulent and dysfunctional almost from the beginning. The parties stopped being sexually intimate in 1999 and did not share a bedroom after January 2004. (RT 1/10/12 at p. 31; PR 26.) They did not even go on a "date" after Xo was born. (RT 1/10/12 at p. 34.)

But they had money. In 2001, Xavier was earning approximately $180,000.00 per year and Sheryl was earning about $115,000.00. (Slip Op. at p. 2.) In January 2006, Xavier had an annual salary of $240,000, during which time he retained all of his earnings except $3,200 per month, which he deposited into the parties' joint account. He left that job in September 2006, after which he was self-employed and worked from home and continued to deposit $3,200 into the joint account. (RT 1/10/12 at p. 11; PR 26-27; Slip Op. at p. 2.) As of June 2006, Sheryl was working as an independent contractor, earning about $3000 to $4000 per month. But in July 2006, she began working as a salaried employee, earning $138,000.00 per year, or $11,500.00 per month. (Slip Op. at p. 2.)

On June 1, 2006, Sheryl announced her intent to end the marriage. She presented Xavier with a "financial ledger" so the parties could share community expenses equally but be solely responsible for their own respective personal expenses. (PR 27.) In July 2006, she set up a separate bank account "to segregate

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[1]/ The parties will be referred to as "Xavier" and "Sheryl" for convenience. No disrespect is intended.

[2] / "AA" refers to the Appellant's Appendix.
"PR" refers to the Partial Record on appeal Xavier filed on October 19, 2102.
"AR" refers to Appellant's Augmented Record on appeal.
"AR Sheryl" refers to Respondent's Augmented Record on Appeal.

the financial aspect of the relationship." (RT 5/2/12 at p. 83.) She deposited her half of the household bills into that account, and put the remainder into her own account, asserting that, "as far as [she] was concerned, the marriage was done." (Slip Op. at pp. 2-3.)

Thereafter, Sheryl continued to live in the marital home with Xavier; continued to keep her personal belongings in the home; continued to receive mail and telephone calls at the home; and continued to cook meals at the home. (PR 27.) She did not move out until July 2011. (RT 5/2/12 at pp. 76-77; PR 27-28.)

Sheryl filed for dissolution on December 30 2008, listing the date of separation as June 1, 2006. (PR 1, 27.) On February 2, 2009, Xavier filed a response, listing the date of separation as January 2, 2009. (PR 3.)

The issue of the date of separation was bifurcated from the other issues and tried separately. (See PR 47.) On March 8, 2012, after trial had begun, Xavier filed an Amended Response in which he listed the date of separation as July 1, 2011—when Sheryl moved from the marital residence. (PR 27.)

The testimony as to date of separation was disputed. Xavier introduced photographs of the parties dining together and going to San Francisco as a family in 2008 and 2009. (RT 5/2/12 at pp. 22-25; AR at pp. 55-60.) He testified the parties continued to celebrate Christmas together as a family and that Christmas of 2010 was the first year they did not exchange gifts. (RT 5/2/12 at pp. 30-31.) He testified that the marriage was really no different after June 2006 than it was previously; the only real difference was the ledger. (RT 5/2/12 at p. 33-34 ["everything other than the ledger was pretty much the same."])

Sheryl described the marriage as "very turbulent...probably two years after the marriage." (RT 1/10/12 at pp. 30-31.) She had determined back in March 2000 that the marriage could not be saved and that they only stayed together for the children. (RT 1/10/12 at p. 40.) She stated that the marriage was a "façade" for about 10 years—since March 2000. (RT 1/10/12 at p. 55.) She testified that there were "a lot of...significant events" that caused her to believe the marriage

was over, including her moving out of the bedroom in 2004; Xavier having quit his job with Whittman-Hart in March 2001 (see RT 1/10/12 at p. 11); Xavier having allegedly assaulted her in October 2005; and Xavier's decision to only contribute $3,250 of his monthly earnings into the joint account. (RT 1/10/12 at pp. 30-33.) She testified that the October 2005 incident was "the final straw." (RT 1/10/12 at p. 56.)

Sheryl testified that things changed in October 2005 when Xavier assaulted her, and then changed even more in January 2006 when he started earning $240,000 per year, but only put $3,200 per month in the joint account. (RT 5/2/12 at p. 87.) She testified that in June 2006, she told Xavier "this is done," she was through, and that she would only be contributing her income up to 50% of the joint household expenses into the joint account. (RT 1/10/12 at p. 32.) She developed a spreadsheet itemizing the household expenses, for which each of them was equally responsible, and the rest of their respective earnings they could spend as they pleased. (RT 1/10/12 at p. 32-33.) She provided Xavier with a ledger and told him that each of them would pay 50% of the household expenses, and that they would each pay for their own expenses from their own income. (RT 5/2/12 at p. 88.) In July 2006, Sheryl set up a separate bank account "to segregate the financial aspect of the relationship." (RT 5/2/12 at p. 83.) She stated that the "last component that anyone could call a marriage would be the finances, because there was nothing else at that point that dictated or indicated that we had a marriage." (RT 1/10/12 at p. 34.) She said the "last piece that...could bind us as a family was the finances, the credit cards, vacations and any social events. And once I had that conversation with him in June, that was it...it was clear that my intent was to separate from this marriage in the direction of a divorce and that's what I did." (RT 5/2/12 at pp. 87-88.)

Sheryl testified that her living conditions after June 2006 "were different from the perspective that we no longer consolidated our finances." (RT 1/10/12 at p. 34.) The physical living arrangements between the parties remained the same

after June 1, 2006: Sheryl continued to live in the home, keep her clothes and belongings in the home, and eat family meals in the home unless she was traveling for work. (RT 5/2/12 at pp. 20, 57-59; PR 27.) She did not move out until 2011. (RT 5/2/12 at pp. 76-77; PR 27.) Her physical living arrangements remained the same during that time. (RT 5/2/12 at p. 77.) After June 1, 2006, Sheryl continued to deposit money into the parties' joint account for household expenses. (RT 5/2/12 at pp. 71-72; see AR 66-68.)

On March 24, 2007, Xavier sent Sheryl a lengthy email. (See RT 1/10/12 at p. 9; AR Sheryl at p. 21b.) He explained that Sheryl had "basically announced [she was] going to stop putting money into the account [they] shared for almost 14 years," that there had been no discussion, and Sheryl had made this "rather significant change" when she was generating income and Xavier no longer was. (RT 1/10/12 at pp. 10-11.) Xavier stated, "...your motives are clear. But until we are engaged in dissolution we both need to be selfless to protect our children's perspective of family." (RT 1/10/12 at p. 23.) At trial, Xavier described this email as "a husband venting to his wife." (RT 1/10/12 at p. 23.)

The parties continued to do things together as a family after June 1, 2006. They continued to celebrate special occasions together, including the children's and each other's birthdays. (RT 5/2/12 at pp. 23-25, 65; AR 55-60.) Both before and after June 1, 2006 the parties went on vacations together and apart. (RT 5/2/12 at p. 96.) They went to Hawaii together as a family in August 2006. (PR 27.) Sheryl testified that because it was prepaid and they did not want to disappoint the children, and that thereafter, each of Sheryl and Xavier took the children on vacations separately. (RT 1/10/12 at p. 35.) But they all visited Sheryl's family in the winter of 2007-2008. (RT 1/10/12 at p. 23; PR 27.) And Sheryl admitted that Xavier typically continued to invite her on vacations, although she did not go. (RE 1/10/12 at p. 55.) In fact, the children had no knowledge of the parties' relationship until June 2011—just before Sheryl moved out of the home. (RT 5/2/12 at pp. 68-69.)

Sheryl continued to use the email address xavierwife@aol.com in 2008 and at least through February 18, 2009. (RT 5/2/12 at pp. 61-62, 64; AR 63-64.) She testified that she kept this email address because when she went to change the email address she needed the password and did not have it, and only changed the address when her friend set up a new account for her. (RT 5/2/12 at pp. 80-81.)

Ultimately, the trial court relied on Sheryl's evidence in finding the date of separation to be June 1, 2006. It held that (1) Sheryl had consistently maintained June 1, 2006 (or possibly July 1, 2006) as the date of separation, while Xavier asserted it was January 2, 2009, then later argued July 1, 2011; (2) prior to even June 1, 2006, they sometimes went to dinner together, vacationed together and separately, had not shared a bedroom for a number of years, and characterized the marriage as dysfunctional; (3) the parties had email exchanges around June 2006; (4) their one remaining thing they did together, which was share finances, changed in June 2006; (5) the decision about finances was significant and intentional; and (6) no case law supports a claimed date of separation 1½ years after dissolution was filed. (PR 49-50; see also RT 5/2/12 at pp. 95-98.)

The trial court certified the existence of probable cause for immediate appeal from this bifurcated order. (PR 53.) Thereafter the First District issued an order permitting this appeal, and on October 25, 2013 issued the instant published Opinion. Xavier hereby seeks review of that Opinion.

## IV. LEGAL ARGUMENT

### A. A Split of Authority Exists as to Whether Parties May Be Living Separate and Apart" Under Family Code Section 771 While They Continue to Live Together Under the Same Roof

#### 1. This case explicitly disagrees with *Norviel*

Prior to October 25, 2013, the law in the State of California was clear. As set forth by the Sixth District in *Norviel*, a married couple could **not** be deemed to be living separate and apart—and thus be legally separated for purposes of

accruing separate property—while they continued to live together. That changed on October 25, 2013 with the publication of the instant case. Now the law is unsettled. Now married couples living in San Francisco might be deemed "living separate and apart" even while they live together. Meanwhile, couples in neighboring San Jose will continue to need to physically separate in order to be living separate and apart. And couples in Sacramento, Los Angeles, San Diego and Fresno will be uncertain as to what is actually required for them to be living separate and apart.

The "statutory phrase 'living separate and apart' has been the subject of only a handful of published opinions in this state.'" (*Norviel, supra* at pp. 1161-1162 Citations omitted.) *Norviel* sought to provide clarity by creating a bright-line rule. (*Id.* at p. 1162 ["Decisional law thus clearly establishes that parties may live apart and yet not be separated. The question here is whether the reverse is also true. We conclude it is not."]) In making this pronouncement, the *Norviel* court was not alone; it noted that decisions from other jurisdictions "explicitly hold that parties residing in same house are not living separate and apart." (*Id.* at p. 1163.)

Here, the First District took a bright line rule—the cornerstone of our judicial system—and blurred it. In so doing it not only created a definitive split of authority between the First and Sixth Districts; it created an unworkable standard for family courts, which already have enough difficulty trying to determine date of separation in contested cases. It also creates confusion for the family-law practitioners and litigants, who are now uncertain how to navigate through the ever murkier waters of "date of separation." While the existence of separate residences is easy enough to prove, the existence of objective conduct evidencing "a final break in the marriage"—the standard created in this case—is not.

But this case went even further than allowing parties to be "living separate and apart even while living together." The *Norviel* court had not necessarily ruled out the possibility of some spouses living apart physically while still occupying the same house, but held that in such cases, "the evidence would need to

demonstrate **unambiguous, objectively ascertainable conduct amounting to a physical separation** under the same roof." (*Norviel, supra* at p. 1164, emphasis added.) Here, in agreeing with the dissent in *Norviel*, the First District apparently abandoned even the requirement of "unambiguous, objectively ascertainable conduct" in favor of a standard permitting the trier of fact to draw "reasonable inferences from *all* evidence presented." (Slip Op. at p. 11.) This is an entirely unworkable standard. Allowing each of the hundreds of family-law judges in this state to decide for themselves what is the final break in a marriage, based upon "reasonable inferences" means there is no standard. It is essentially a repealing of Family Code section 771(a).

*Norviel* was published in 2002. Therein the respondent had raised a concern that a rule requiring separate dwellings as a predicate to separation "could preclude California's less affluent couples from establishing a date of separation and ending the accumulation of community property." (*Id* at p. 1163.) *Norviel* stated that such argument "flies in the face of the strong presumption of community property that generally applies in this state." (*Id* at pp. 1163-1164 [citations omitted].) Moreover, that court stated "that unfortunate state of affairs is not a sufficient basis for courts to ignore a clear statutory mandate," and that the policy argument "is more appropriately directed to the Legislature." (*Id.* at p. 1164.) Despite this clear invitation, the Legislature did not amend Family Code section 771(a) to address this concern.

In *Norviel, supra*, the Sixth District remanded and instructed the trial court that "(1) that the parties' physical separation is a threshold prerequisite to separation; and (2) that the parties' other conduct may be considered only to the extent that it is contemporaneous with the intent to separate." (*Id.* at p. 1165.) The instant case contains no such requirement of physical separation. This is a marked departure from *Norviel* that has created an unworkable standard and an untenable conflict between the two districts.

Review should be granted to clarify the law in this area. (See Cal.Rules Ct. Rule 8.500(b)(1).)

**2. This case misconstrues *Manfer***

In addition to creating a conflict between two district courts of appeal, this case also creates confusion as to the application of law set forth by the Fourth District in *In re Marriage of Manfer* (2006) 144 Cal.App.4th 925. In *Manfer*, as in each of the three cases discussed by the First District, the spouses were no longer living together as of the asserted date of separation. (See Slip Op. at pp. 10-11.) Therefore, physical separation was not an issue, as it had already occurred. Here, the First District acknowledged that the parties in those cases were no longer living together. (Slip Op. at p. 11.) But it failed to appreciate the significance of this fact. It stated that while those cases involved "spouses who had already moved out of the family home while continuing to maintain ongoing financial and social relations, thereby evidencing a lack of true marital separation, we see no reason why the inverse rationale can not be applied to a spouse who continues to live in the family home but who, in every meaningful way, has abandoned the marital relationship." (Slip Op. at p. 11.) This legal conclusion is flawed because the inverse is <u>not</u> true. In *Manfer*, the Fourth District held that a <u>physical separation</u> was a necessary prerequisite to separation. The meaningful facts therein included the husband's move from the residence, at which time the couple began '"[l]iving separate and apart'" with 'the contemporaneous conjunction of intent to separate and conduct evidencing that intent,' i.e., an 'objectively ascertainable form of physical separation' [citation]; and at least one of the parties did not 'intend to resume the marriage *and*...her actions [bespoke] the finality of the martial relationship...'" (*Manfer, supra* at p. 933.) Thus, it was the couple's <u>physical</u> separation when husband moved out, combined with the <u>contemporaneous</u> subjective intention of both parties to end the marriage that constituted date of separation. (See *ibid.*)

In holding that a physical separation is unnecessary to constitute a legal separation, the First District parts ways with not only the Sixth District in *Norviel*, but the Fourth in *Manfer*. This is another reason review is necessary to clarify the law as to date of separation.

### 3. The Published Decision Is Dangerous Precedent

By not requiring physical separation in order for a married couple to be "living separate and apart," under Family Code section 771(a), the First District paved the way for financial manipulation by the higher-earning spouse in a bad marriage. It provides a method by which such spouse may "back-date" the date of separation and thus retain a significant portion of what the other spouse believed was community earnings, thus further eroding the concept of community property.

It was undisputed that throughout most of the marriage, Sheryl and Xavier were more like roommates than a married couple. But many married couples live like "roommates" for years—especially couples like Xavier and Sheryl who have high-powered careers and young children. This does not mean they are no longer married. It does not terminate community property rights. To the contrary, such couples continue to be married, and continue to accumulate community property.

Until now. Under this case, the higher-earning spouse may continue to live in the home, eat meals, receive mail, and do laundry at the marital home, and then years later, upon filing for dissolution, look back to other, more subtle conduct that arguably evidences a "breakdown" in the marriage and claim that all earnings from that day forward are separate.

This is why physical separation must be dispositive: if one spouse wishes to separate, that spouse must do something in order to establish a physical separation that is qualitatively different from what the parties had been doing all along. And this means something more than merely dividing up the finances or sending a particularly caustic email. With marriages under difficult circumstances, husbands and wives look for whatever "sign" that their spouse is "still there," despite

confusing and contradictory actions. This is why a physical separation is so important: there is no potential for confusion or manipulation by either spouse to obscure the fact that a clear choice has been made to live their lives separately. Here, the court's factual finding was based on disputed evidence, including Sheryl's continued use of the email address "xavierwife@aol.com" until 2009. Requiring a physical separation was thus all the more necessary.

This case is also dangerous precedent because it allows a change in handling the family finances to dictate the date of separation. Yet such adjustments are common in lengthy marriages, as children are born and grow up, jobs are obtained and lost, and illnesses and other obligations arise. Here, Xavier had no more control over Sheryl's decision to institute the ledger than she did in his decision to only deposit $3,200 of his $20,000 monthly earnings into the joint account. At the end of the day, the family bills needed to be paid, and in fact were paid by each of the parties, albeit under a different system in July 2006. Allowing such a change to be the law in a published opinion is dangerous indeed.

It is true that the *Norviel* court left open the possibility that parties could continue living together and yet be physically separated in certain circumstances. It states, "our conclusion does not necessarily rule out the possibility of some spouses living apart physically while still occupying the same dwelling. In such cases, however, the evidence would need to demonstrate unambiguous, objectively ascertainable conduct amounting to a physical separation under the same roof." (*Norviel, supra* at p. 1164.) Here, however, those circumstances were far from met, where the parties did not physically separate any more after June 1, 2006 than they had prior to that date. The law must prohibit schemes in marriage where one spouse, bound by emotions, family, and religious beliefs, remains committed to their marriage even under poor circumstances, and assumes the other feels the same, while the other leverages the technical requirements of the law for economic gain.

## B. This Court Should Clarify that a Trial Court Is not Required to Select one of the Dates of Separation Proposed by the Parties

The footnote on page 12 of the Slip Opinion is dicta that should not be followed. Therein the First District held that Xavier had waived his argument that the trial court erred in not finding the parties separated in January 2009 when Sheryl filed her petition for dissolution because he had not specifically argued for that date. Such holding conveys that a trial court need not exercise its discretion to select a date of separation that is consistent with the evidence, but may bind itself to selecting whichever of the two dates proposed by the parties it finds "less wrong." This itself is wrong.

In its Statement of Decision, and on the bench, the trial court was clear that it believed it needed to select either June 1, 2006 or July 1, 2011 as the date of separation, and that it did not have the authority to pick a different date. (See RT 5/2/12 at pp. 96-98; RT 8/27/12 at p. 3.) The First District in its opinion did not determine otherwise; rather, it justified the trial court's abdication of discretion by asserting that Xavier had "waived" the argument. This erroneous, potentially dangerous ruling must be rectified by this Court.

## C. This Court Should Determine Whether a Date of Separation May Post-Date one Party's Filing for Dissolution

In ruling as it did, the trial court held that no case law supported finding a date of separation that was after one party had filed for dissolution and begun actively litigation the case. (RT 5/2/12 at p. 97.)

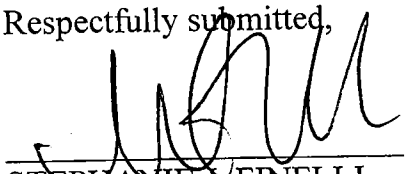
This issue has thus never been decided by any court in this state. If this Court grants review, it will have the opportunity to clarify the law on this topic.

## V. CONCLUSION

Petitioner respectfully requests this Court grant review of the First District Court of Appeal's October 25, 2013 Opinion in this case, so as to resolve the split of authority on whether a married couple may be "living separate and apart" even though they live together.

Dated: December 3, 2013

Respectfully submitted,

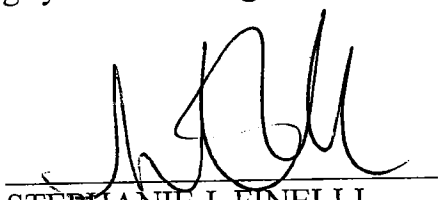


STEPHANIE J. FINELLI,
Attorney for Appellant
and Petitioner herein,
KEITH XAVIER DAVIS

## BRIEF FORMAT CERTIFICATION PURSUANT TO CRC RULE 8.504

Pursuant to California Rules of Court, Rule 8.504, I hereby certify that the text of this Petition for Review is proportionately spaced, has a typeface of 13 points or more, and contains no more than 4,807 words, including footnotes, as counted by the Microsoft Word processing system used to generate the brief.

Dated: December 3, 2013



STEPHANIE J. FINELLI
Attorney for Appellant
and Petitioner herein,
KEITH XAVIER DAVIS

Filed 10/25/13

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE



| | |
|---|---|
| In re the Marriage of SHERYL JONES DAVIS and KEITH XAVIER DAVIS. | |
| SHERYL JONES DAVIS,<br>Respondent,<br>v.<br>KEITH XAVIER DAVIS,<br>Appellant. | A136858<br><br>(Alameda County<br>Super. Ct. No. RF08428441) |

In this bifurcated marital dissolution proceeding, appellant Keith Xavier Davis (Xavier) appeals from an interlocutory order establishing the date of separation under Family Code section 771.[1] He contends the trial court erred in finding the date of separation to have occurred approximately five years before respondent Sheryl Jones Davis physically moved out of the family home. We affirm.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties[2] were married on June 12, 1993. They have two children, a daughter born in August 1995 and a son born in November 1999. The couple stopped being sexually intimate in 1999, after their son was conceived. They also did not go out on any

[1] The trial court certified the issue for appeal and we agreed to hear it. (Cal. Rules of Court, rule 5.392.) All further statutory references are to the Family Code unless otherwise stated.

[2] As is customary in marital dissolution actions, we refer to the parties hereinafter by their first names. (*In re Marriage of James and Christine C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

"dates" after their son was born. The parties disagreed as to when they stopped sharing a bedroom. Xavier testified Sheryl moved to another bedroom in 2001, while Sheryl testified this happened in 2004.

The parties maintained a joint bank account. In 2001, Xavier was earning approximately $180,000 per year and Sheryl was earning about $115,000. In 2003, Sheryl opened a separate bank account that she used to manage her business funds and allocate money for personal expenses.

In January 2006, Xavier accepted a job working for Clorox at an annual salary of $240,000, or $20,000 per month. He left this job in September 2006. During the time he worked at Clorox, he caused his earnings to be deposited into a separate Wells Fargo bank account. He continued to contribute $3,200 to the joint account, which the parties had been using to pay household bills.

By June 2006, Sheryl had been without a job for six months. During that time, she worked as an independent contractor, earning about $3,000 to $4,000 per month. She was frustrated by Xavier's decision to retain the balance of his Clorox earnings for himself, rather than to increase his contribution to the community account. She was also concerned because she did not have a key to a safe that was in the home, she was not informed about the separate bank account that Xavier had opened, and she was not given access to their Charles Schwab account.

On June 1, 2006, Sheryl announced to Xavier her intent to end the marriage.[3] She presented him with a "financial ledger" that itemized every household expense. She did this because she wanted the parties to contribute equally to running the home and funding the children's expenses, while being solely responsible for their own respective personal expenses.

In July 2006, Sheryl began working as a salaried employee at a new job, earning $138,000 per year, which equates to $11,500 per month. She made arrangements to have

[3] At trial, Sheryl testified she could not recall the exact date, but that the separation occurred between June 1, 2006 and July 1, 2006.

her share of the household expenses deposited into the couple's joint account, placing the balance of her payroll deposit into a new personal account "because, as far as I was concerned, the marriage was done." She continued to live in the marital home with Xavier. She kept her personal belongings in the home, received mail and telephone calls at the home, and cooked meals at the home.

On December 30, 2008, Sheryl filed for dissolution. In her petition, she listed the date of separation as June 1, 2006.

On February 4, 2009, Xavier filed a response, stating the date of separation was January 2, 2009.

Sheryl remained in the family home until July 2011.

At trial, the issue of the date of separation was bifurcated from the other issues and tried separately. Trial thereon was heard on four separate days, commencing on January 10, 2012.

On March 8, 2012, Xavier filed an amended response in which he listed the date of separation as July 1, 2011—the approximate date Sheryl moved out of the marital residence.

On May 2, 2012, the parties filed a stipulation in which they stipulated to certain facts pertaining to the date of separation. That same day, the trial court announced its decision from the bench, holding that the date of separation of the parties was June 1, 2006.

On May 17, 2012, the trial court filed its initial statement of decision.

On August 27, 2012, the trial court signed and filed a revised statement of decision. This appeal followed.

## II. DISCUSSION

The sole issue before us is the date of separation. Xavier claims the trial court erred when it determined June 1, 2006 to be the date of separation. He predominately bases his argument on the fact that the parties did not physically separate until July 1, 2011. We are satisfied that substantial evidence supports the court's decision.

**A. *Standard of Review***

While the date of separation is a factual issue to be determined by the preponderance of the evidence (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1493–1494), "[o]ur review is limited to determining whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion." (*In re Marriage of De Guigne* (2002) 97 Cal.App.4th 1353, 1360.) Thus, even if we would have reached a different conclusion based upon the evidence at trial, we do not reweigh the evidence and will affirm the judgment as to the date of separation if it is supported by substantial evidence. (See *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 849, fn. 11 ["Under the substantial evidence test, courts do not reweigh the evidence. They determine whether there is any evidence (or any reasonable inferences which can be deduced from the evidence), whether contradicted or uncontradicted, which, when viewed in the light most favorable to . . . a court's judgment, will support the . . . judicial findings of fact."]; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 435 [trial court's finding of separation date supported by substantial evidence].)

**B. *Standards for Determining the Date of Separation***

Although the Legislature has declared "[t]he earnings and accumulations of a spouse . . . , while living separate and apart from the other spouse, are the separate property of the spouse" (Fam. Code, § 771, subd. (a)), it has not further defined the date of separation or specified a standard for determining that date. Accordingly, the courts rely on case law to define the date of separation.

In *Makeig v. United Security Bk. & T. Co.* (1931) 112 Cal.App. 138, 143 (*Makeig*), the appellate court determined that living separate and apart is a "condition where the spouses have come to a parting of the ways and have no present intention of resuming the marital relations and taking up life together under the same roof." This definition was amplified in *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, 448 (*Baragry*): "The question is whether the parties' conduct evidences a complete and final

break in the marital relationship." (Accord, *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 657 (*Umphrey*).)

In *In re Marriage of von der Nuell* (1994) 23 Cal.App.4th 730 (*von der Nuell*), the appellate court blended the *Makeig* and *Baragry* definitions, stating: "[B]ecause rifts between spouses may be followed by long periods of reconciliation, and the intentions of the parties may change from one day to the next, we construe *Baragry* to hold legal separation requires not only a parting of the ways with no present intention of resuming marital relations, but also, more importantly, *conduct* evidencing *a complete and final break* in the marital relationship." (*Von der Nuell*, at p. 736.) Thus, a court decides the date of separation by examining two components, one subjective and the other objective. (*In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 1158–1159 (*Norviel*).) The subjective component examines whether either of the parties harbors the subjective intent to end the marriage. The objective component examines whether there is objective conduct evidencing and in furtherance of that intent. (*Ibid.*)

**C. *Substantial Evidence Supports the June 1, 2006 Date of Separation***

**1. *Sheryl's Evidence***

Sheryl testified she believed the marriage was over in March 2000, but that she kept up appearances for the sake of the children for eight years before filing for divorce. She explained that the parties agreed to stay together because they both came from two-parent households and did not want their children to experience separation from either parent.

Xavier physically assaulted Sheryl in October 2005. In her mind, this was the "last straw." However, at that time she was dealing with some issues regarding their son and the local school district. In June 2006, when the school year had concluded, she announced to Xavier that the marriage was over. She told him she would continue contribute to her half of the household expenses. In order to segregate the parties' finances, she developed a spreadsheet that itemized every single household expense and the anticipated expenses for the children, of which they were to each pay 50 percent by

making deposits into the community account. Any other money would be kept by each as their own money to spend as they wished.

After June 1, 2006, Sheryl took Xavier off of her credit card and ceased making any charges on his credit cards. Each person became responsible for his or her personal expenses for gas, food, personal credit cards, gym memberships, and life insurance premiums. When he failed to contribute enough to the community bank account to cover his half of their joint costs, she decided to divide and allocate the individual community expenses. She created the ledger to show which bill each person was responsible for paying.

Sheryl testified that she continued to live in the home after June 2006 because it was her home just as much as Xavier's, but she made an effort to keep their interactions to a minimum. The job that she started in July 2006 was based in Los Angeles, and she would go there every week and stay at a hotel between three to five nights each time. In her mind, the parties became more like roommates, and she participated in family events solely for the sake of the children. This testimony is supported by an e-mail message Xavier sent to her in March 2007 (before he claims the separation took place) stating: "Its [*sic*] not about us desiring to have dinner together when we are all in the same house but about a need that our children have to develop a good healthy sense of family dinner. Its [*sic*] not about us desiring any particular thing but agreeing to be functional as long as we are in the same home. . . . *I don't have any reason in the world to be positive or friendly with regard to you (your motives are clear) but until we are engaged in dissolution, we both need to be selfless to protect our children's perspective of family.*" (Italics added.)

Family togetherness was minimized as much as possible. The family had a prepaid trip to Hawaii in 2006 and the parties did not want to disappoint their children because they were accustomed to going to Hawaii every year. The parties slept in the same hotel room, but they did not share a bed. Instead, they would get a room with two beds and each parent would sleep with one of the children. From that point on, Sheryl took the children on two vacations every year, one to Las Vegas and the other to Hawaii.

She also took them to a family reunion. In 2008, she took the children to Las Vegas and Hawaii again. Xavier took them on a train excursion. Sheryl did not accompany him on that trip because "as far as I was concerned we were no longer a family."

The parties also drove separate cars to back-to-school nights. Sheryl would not ride in the same car as Xavier unless the children begged her to do so. He would invite her to go on family vacations with him and the children, but she would always decline to go. She never invited him to go on her vacations with the children. The parties continued to celebrate birthdays and other special occasions by going out to restaurants together. December 2010 was the first year they did not exchange Christmas gifts.

Sheryl reassessed her living situation after she was forced to pay all of the community expenses beginning in February 2011, when Xavier said he did not have any money. She paid these expenses from that point on until when she moved out in July 2011.

**2. *Xavier's Evidence***

At trial, Xavier testified that the marriage did not change after June 1, 2006. The couple still had issues and arguments, but over time things would normalize and they would continue doing everything that they had previously done. The ledger system was a new circumstance, but he agreed to it as a way to enable bills to get paid even though he did not like it. He conceded that by then the parties had an "abnormal and dysfunctional marriage," but this was true for most of their marriage. He did not really notice a change in the relationship until Sheryl moved out in July 2011.

Xavier confirmed Sheryl had presented him with a ledger in June 2006. He agreed to use it because he did not want money to become another issue in their marriage. Though Sheryl did announce at the same time that she wanted a divorce, he did not perceive anything unusual because she had threatened divorce before. He was served with her divorce papers in January 2009.

**3. *The Trial Court's Ruling***

The trial court noted that Sheryl had consistently maintained the date of separation was June 1, 2006. When Xavier filed his responsive papers to her dissolution petition, he

selected January 2, 2009 as the date of separation. At trial, he advocated the much later date of July 1, 2011. The court also observed the parties are very knowledgeable about financial matters, and therefore decisions about their finances could be deemed quite significant. The court noted there were no cases holding that a party could claim the date of separation occurred *after* having filed a response in a divorce case, as Xavier had attempted to do at trial.

Relying on *In re Marriage of Hardin* (1995) 38 Cal.App.4th 448 (*Hardin*) and *In re Marriage of Manfer* (2006) 144 Cal.App.4th 925 (*Manfer*), the trial court found Sheryl's articulation of her intent to end the marriage, the contemporaneous change in how the parties handled their finances, and the fact that active divorce litigation had commenced a year and a half *prior* to Xavier's proposed date of separation, were factors that supported the existence of her date of separation over his.

**D. Norviel *is Not Dispositive***

At trial, Xavier relied on *Norviel, supra,* 102 Cal.App.4th 1152 in support of his argument that the date of separation was July 1, 2011, the date Sheryl moved out. He renews this argument on appeal. We are not persuaded.

Similar to the facts of the present case, the parties in *Norviel* had two children and both parties worked long hours and travelled frequently. They stopped sleeping in the same bedroom after the birth of their second child. They then began living as "roommates," sharing few common interests or activities. The couple occasionally had family dinners together, and would try to have Sunday night dinners together without the children. (*Norviel, supra,* 102 Cal.App.4th at p. 1155.) In June 1998, during a Sunday dinner, the husband announced his decision to end the marriage. However, nothing changed after his announcement except for the cessation of private Sunday dinners. Instead, the parties continued to live in the marital home, kept their joint bank accounts open, and even went on a vacation together, though they did not sleep together. The husband also continued to use the mailing address and telephone number of the family home, and took occasional meals and outings with the family for the sake of the children. In August 1998, the husband moved out of the marital home. (*Id.* at p. 1155.) The trial

court determined the date of separation to be the date when the husband stated his intention to end the marriage. (*Id.* at p. 1154.) The wife appealed. (*Id.* at p. 1156.)

The appellate court noted that under Family Code section 771, subdivision (a), "two factors emerge as prerequisites to separation. First, at least one spouse must entertain the subjective intent to end the marriage; second, there must be objective evidence of conduct furthering that intent." (*Norviel, supra,* 102 Cal.App.4th at pp. 1158–1159.) In a more controversial passage, the *Norviel* court said: "[L]iving apart physically is an *indispensable threshold requirement* to separation, whether or not it is sufficient, by itself, to establish separation." (*Id.* at p. 1162, italics added.) The court reasoned that "spouses are not 'living separate and apart' within the meaning of the statute unless they reside in different places. Typically, that would entail each spouse taking up residence at a different address." (*Id.* at p. 1163.) The court acknowledged that its conclusion "does not necessarily rule out the possibility of some spouses living apart physically while still occupying the same dwelling. In such cases, however, the evidence would need to demonstrate *unambiguous, objectively ascertainable conduct* amounting to a physical separation under the same roof." (*Id.* at p. 1164, italics added.)

Relying on *Norviel,* Xavier claims Sheryl could have afforded to rent a small apartment if she had wanted to physically separate from him. He also notes the household maintained "business as usual" after June 2006, with Sheryl receiving her mail at the house, keeping her belongings at the home, and cooking meals. Further, they had already been sleeping in separate bedrooms "for years" before she announced her decision to end the marriage. Thus, according to Xavier, "[t]here was no qualitative difference in the parties' conduct or **physical separation** after June 1, 2006, as specifically required in *Norviel.* As in *Norviel,* nothing changed physically between the parties after Sheryl's announcement that she wanted to end the marriage." He argues that in failing to rule consistent with the holding of *Norviel,* the trial court's decision was erroneous "as a matter of law."

We reiterate that the standard of review here is the substantial evidence standard, not the de novo standard applicable to errors of law. We also find the issue of physical

separation is more persuasively discussed in the other cases relied on by the trial court, *Hardin, supra,* 38 Cal.App.4th 448, 452 ("All factors bearing on either party's intentions 'to return or not to return to the other spouse' are to be considered. [Citation.] No particular facts are per se determinative."), and *Manfer*. These cases stand for the proposition that physical separation is but one factor to consider in determining the date of separation.

In *Hardin,* the husband moved out in 1969, 14 years before dissolution of the marriage. The wife contended the couple separated in 1983 when the husband went forward with the dissolution proceeding. The trial court, however, concluded the separation occurred in 1969, when the husband moved out of their residence, based on a theory that " ' "society at large" ' " would construe this as the date when separation occurred. (*Hardin, supra,* 38 Cal.App.4th at p. 450.) The appellate court reversed, synthesizing a two-part test from its review of case law: "Simply stated, the date of separation occurs when either of the parties *does not* intend to resume the marriage *and* his or her actions bespeak the finality of the marital relationship." (*Id.* at p. 451.) In its opinion, the court observed: "Maintenance of separate residences is not necessarily indicative of separation." (*Id.* at p. 454, fn. 5.) The court did not find this factor to be determinative. (*Ibid.*)

In *Manfer,* the husband moved out and rented an apartment after the couple's 31st wedding anniversary, and the wife decided "the stormy marriage was finally over." (*Manfer, supra,* 144 Cal.App.4th at p. 928.) But they decided not to tell their children, family, or friends that they were getting a divorce. They continued to keep up the façade of a marriage. Similar to the instant case, the pair continued to have sporadic social contacts and take an occasional trip together, but they did not engage in sexual relations with one another, commingle their funds, or support one another. (*Ibid.*) The trial court found that the couple merely had a private understanding that their marriage was over, finding the date of separation to be later, after the couple started telling other people they were getting a divorce. (*Id.* at pp. 930–931.) The appellate court reversed, stating the question is not what society at large would have perceived, but what the parties'

subjective intent was as " 'objectively determined *from all of the evidence* reflecting the parties' words and actions during the disputed time . . . .' " (*Id.* at p. 930, italics added.)

In another case, *von der Nuell, supra,* 23 Cal.App.4th 730, the husband moved from the family home on November 1, 1987. However, up until the spring of 1991, the parties maintained joint checking accounts, credit cards, and tax returns, and took joint title to an automobile. The husband stayed in close contact with wife, including making frequent visits to the home. He took her on vacations, and they went out socially, sent cards and gifts on special occasions and holidays, and continued having sexual relations with one another throughout the period between early 1988 and the spring of 1991. The husband also continued to contribute financially to the community. (*Id.* at p. 733.) The parties also attempted to reconcile until June 1991, when the wife decided to end the marriage after learning of the husband's intent not to pay any further support to the marital community. (*Id.* at pp. 736–737.) The appellate court concluded the trial court erred in holding the date of separation to be in November 1987. The court noted that given the "ongoing economic, emotional, sexual and social ties between the parties and their attempts at reconciliation, regardless of the parties' present intention on November 1, 1987, a complete and final break in the marriage did not occur at that time." (*Id.* at p. 737.)

While the cases summarized above involve spouses who had already moved out of the family home while continuing to maintain ongoing financial and social relations, thereby evidencing a lack of true marital separation, we see no reason why the inverse rationale can not be applied to a spouse who continues to live in the family home but who, in every meaningful way, has abandoned the marital relationship. In this respect, we disagree with the bright line drawn by the majority in *Norviel,* and find the dissenting opinion by Justice Bamattre-Manoukian to be compelling. In her dissent, she asserted that the majority had demanded too much of the evidence in calling for "unambiguous, objectively ascertainable conduct" with respect to cohabitating parties, noting that the fact finder is entitled to draw reasonable inferences from *all* the evidence presented. (*Norviel, supra*, 102 Cal.App.4th at pp. 1167–1168 (dis. opn. of Bamattre-

Manoukian, J.).) We agree with the observation that the quoted standard is unduly rigid, at least in light of the facts at issue in the present case.

Here, the parties both testified and were the only witnesses to the facts of separation. It was thus for the trial court to evaluate the evidence under the two-part test that is derived from *Baragry, supra,* 73 Cal.App.3d 444. We also note that in *Norviel,* the couple continued to engage in financial conduct together. They obtained real estate jointly. They also handled stock deals together and invested $71,000 in a joint account *after* the alleged date of separation. (*Norviel, supra,* 102 Cal.App.4th at p. 1156.) These facts present a more clouded picture of intent, and serve to distinguish *Norviel* from the present case.

Xavier also urges that the evidence presented at trial supports his claim that the date of separation occurred after 2006, either on January 2, 2009 (the date he set forth in his response to Sheryl's petition) or July 1, 2011 (when Sheryl moved out), or some other date that the court should have independently determined.[4] There is evidence, however, to support a different conclusion.

As summarized above, Sheryl's testimony tends to support the trial court's conclusion that June 1, 2006, the date she imposed strict segregation of the parties' individual finances, is the date of separation. The evidence suggests it was at this point that the parties' dysfunctional relationship devolved to where they had essentially become roommates and coparents, maintaining separate finances and cooperating only to the extent necessary to maintain the household and cover their children's expenses. In all

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[4] Posttrial, and on appeal here, Xavier has claimed that the trial court erroneously believed it had to pick one of two dates, either the June 1, 2006 date urged by Xavier or the July 1, 2011 date argued by Sheryl. He claims the court erred in refusing to consider selecting a day between these two choices. However, the court noted that during the trial Xavier was asked if he wanted to argue for any other date, and he declined to do so. Thus, the point has been waived. We also conclude his reliance on *Umphrey, supra,* 218 Cal.App.3d 647 is misplaced, as the appellate court there found the date the trial court felt bound by had merely been recited in a marital agreement, and "was never adjudicated in any meaningful sense . . . ." (*Id.* at p. 656.) In the present case, evidence was presented to support the June 1, 2006 date selected by the trial court here.

other respects, their social relationship was limited to basic interactions undertaken solely for the sake of their children. While Xavier raises his legal challenge based on the fact that Sheryl did not vacate the family residence until July 2011, he does not directly challenge the veracity of the evidence Sheryl offered at trial. Instead, he contests the inferences drawn by the trial court from the evidence presented. In particular, he argues that the introduction of the expense ledger did not represent a substantial change in the marriage, but rather was merely a symptom of a marriage that had "continued to limp along it its dysfunctional state for years." Again, it is not the task of this court to reweigh the evidence. Having concluded that *Norviel* does not control the outcome of this case, we find substantial evidence supports the trial court's ruling.

## III. DISPOSITION

The judgment is affirmed.

Dondero, J.

We concur:

Margulies, Acting P. J.

Sepulveda, J.*

A136858
*In re Marriage of Davis*

* Retired Associate Justice of the Court of Appeal, First Appellate District assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.