S215050

IN THE
SUPREME COURT OF CALIFORNIA

In re the Marriage of:

KEITH XAVIER DAVIS,
Appellant,

v.

SHERYL JONES DAVIS,
Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION ONE
CASE NO.: A136858

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Having failed to persuade the trial court to accept his version of the facts, appellant Keith Xavier Davis ("Xavier") asks this Court to turn the factual issue resolved against him into a legal question. The Court should deny review. Xavier's petition rests on a failure to treat the facts in the light most favorable to respondent Sheryl Jones Davis ("Sheryl"), an overly-enthusiastic reading of *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, and a one-sided assessment of public policy concerning separation and divorce.

Although *Norviel* says that "spouses are not 'living separate and apart' within the meaning of [Family Code section 771] unless they reside in different places" (102 Cal.App.4th at 1163), the decision simultaneously makes clear that the determination is a question of fact, not one of law, unless the facts are undisputed.

> In any event, 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, 102 Cal.App.4th at 1164.)

The evidence demonstrates, unambiguously and objectively, that Sheryl and Xavier had been physically separated under the same roof for years before June 1, 2006, but until then they continued to

function as a family. The evidence also demonstrates, equally unambiguously and equally objectively, that on June 1, 2006, there was a "complete and final break" (*In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, 929) in the remaining connections between Xavier and Sheryl, including the important matter of their finances. June 1, 2006 was the day Sheryl told Xavier that she was "through. This is a final straw of our marriage. We are done." (RT 1/10/12 32:20-23, 34:5-13, 40:4-16; RT 5/2/12 87:21-88:4.) From this date forward Sheryl wanted minimum contact with Xavier and "would retreat to the guest room" to avoid contact unless the children "begged" her to come out. (5/2/12 RT 60:17-23, 90:13-28.) By March of 2007, Xavier acknowledged that Sheryl's announcement "that [she was] going to stop putting money into the account [they had] shared for almost fourteen years...." was a "rather significant change." (Sheryl PR 21b.)

REASONS TO DENY REVIEW

There is nothing in Family Code section 771 that requires spouses to move to separate addresses before they can be considered "living separate and apart" for purposes of distinguishing community from separate property. The Court of Appeal wisely recognized that a spouse "who continues to live in the family home

but who, in every meaningful way, has abandoned the marital relationship" (Opin. 11) lives separate and apart from the other spouse within the meaning of section 771.

I.
The Trial Court Followed the Law by Finding Both Subjective Intent to End the Marriage and Objective Evidence of Conduct Furthering that Intent

Xavier acknowledged that the facts are disputed. (Pet. 5 ["The testimony as to date of separation was disputed"].) Accordingly, the date of separation issue was "a factual issue to be determined by a preponderance of the evidence." (*Manfer, supra*, 144 Cal.App.4th at 930.) The trial court reached the correct conclusion on the record before it and the Court of Appeal viewed the evidence properly, drawing all inferences in Sheryl's favor (*In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 435).

This statement of facts comes directly from the Court of Appeal opinion. Notably, Xavier does not contest any of these facts.

> "In June 2006, when the school year had concluded, she announced to Xavier that the marriage was over. She told him she would continue to 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 by the Court of Appeal.)

"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." (Opin. 5-7.)

II.
To the Extent the *Norviel* Majority Made Living at Two Separate Addresses a Prerequisite for Finding that a Couple Has Separated, it Exaggerated California Law

Family Code section 771, subsection (a), states:

> The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.

The statute does not define "living separate and apart," but pre-*Norviel* cases had held that "the fact that 'husband and wife may live in separate residences is not determinative.'" (*Norviel, supra,* 102 Cal.App.4th at 1152, citing *In re Marriage of Baragry* (1977) 73 Cal.App 3d 444, 448; *Makeig v. United Security Bk. & T. Co.* (1931) 112 Cal.App. 138, 144; *Tobin v. Galvin* (1874) 49 Cal. 34; *In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 453; *In re Marriage of von der Nuell* (1994) 23 Cal.App.4th 730, 737; *In re Marriage of Marsden, supra,* 130 Cal. App. 3d at 434.) It is not determinative because the real question is not ***where*** the parties live, but ***how*** they live, i.e., "whether the parties' conduct evidences a complete and final break in the marital relationship." (*In re Marriage of Baragry, supra,* 73 Cal.App.3d at 448. See also, *In re Marriage of Hardin, supra,* 38 Cal.App.4th at 451 ["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" (emphasis by the court)].)

Rather than drawing a conclusion after weighing all the actions relevant to the finality of the marital relationship, *Norviel* concluded that "living apart physically is an indispensable threshold

requirement to separation." (102 Cal.App.4th at 1162.) It purported to find support in "several early decisions of this state." (*Id.* at 1163, citing *Makeig v. United Security Bk. & T. Co., supra,* 112 Cal.App. at 143, *Patillo v. Norris* (1976) 65 Cal.App.3d 209, 214, 218; *Romanchek v. Romanchek* (1967) 248 Cal.App.2d 337, 342; *Popescu v. Popescu* (1941) 46 Cal.App.2d 44, 52.) In fact, none of these cases says that living under the same roof is fatal to establishing separation. Further, *Popescu* upheld a finding that parties living in the same house were nevertheless separated. (46 Cal.App.2d at 52.)

In the other three cases, the record reflected other evidence that both parties intended to stay married or resume the marital relationship, in addition to evidence about where they lived. In *Makeig*, the parties "were and always had been quite friendly" and regarded living apart "as temporary and with the idea of ultimately establishing a common home." (112 Cal.App. at 144.) In *Patillo*, the Court of Appeal held that the trial court erred by failing to apply former Civil Code section 5118 (the predecessor of section 771) retroactively, but it upheld a finding that a first wife who returned to her husband after 20 years was still married to him. (65 Cal.App.3d at 216.) In *Romanchek*, the parties "lived separate and apart" for

three years, and then the wife returned to the property but in "separate quarters." (248 Cal.App.2d at 342.)

The common factor in these cases is not whether the parties did or did not live under the same roof. The outcome of each can be explained by the fact that the spouse who had left returned or intended to return and resume the marriage. In each case the trial court weighed all the evidence and concluded that the marriage had not ended, and the Court of Appeal upheld the trial court's factual findings.

Likewise in this case, the trial court weighed all the evidence and concluded that the date of separation was June 1, 2006 because:

> 4. The one remaining thing that they did together, which was share finances, changed on that date, June 2006. The management of their finances in an intentional, thoughtful way was important to the parties.
>
> 5. The decision about their finances was a significant decision to both parties. Respondent and Petitioner are highly intelligent and are financially competent. They talked about their finances and were intentional about how they handled their finances. **After June 1, 2006, the parties changed the way in which they managed their finances. This demarcation is significant conduct regarding the date of separation.**

(Sheryl PR 81, emphasis added.)

The Court of Appeal simply affirmed the trial court's factual finding that the parties' conduct viewed as a whole established separation.

Xavier worries that a standard permitting the trier of fact to draw reasonable inferences concerning date of separation from all the evidence presented is "unworkable." (Pet. 10.)

> 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.

(Pet. 10.)

There is nothing unworkable about permitting judges and juries to find facts; it happens all the time. (E.g., *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639 [constructive notice]; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal. App. 4th 272, 287 [date contract work was "substantially completed"]; *Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 432 [pesticides used in conflict with proscription in labeling]; *Muzquiz v. City of Emeryville* 79 Cal.App.4th 1106, 1118-1119 [age discrimination]; *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1218, 1314 [product defect].) Fact-finding is the essence of the California legal system.

III.
Xavier Urges a Rule that Conflicts with Public Policy

Norviel says, "[i]t seems to us that – at a minimum – the physical separation required by the statute must be qualitatively different from the parties' conduct during their ongoing marriage." (102 Cal.App.4th at 1164.) But the statute does not require "physical separation." Neither Family Code section 771 nor any other statute requires that parties live at separate addresses to be considered separated.

Any such requirement would give rise to an irrational distinction. Under *Norviel*'s formulation, two people who previously slept in the same bed but decided to separate could meet the "qualitatively different" test by moving into separate bedrooms. Conversely, two people who had not shared a bedroom for years could not carry out their intent to separate even by altering "the one remaining thing that they did together" (Sheryl PR 81, ¶4). A couple living in a mansion might never even see each other, yet not be considered to be "living separate and apart" under *Norviel*. On the other hand, a couple who occupied neighboring apartments with doors 15 feet apart would be considered to be separated even if proximity resulted in their encountering each other several times a

day in the elevator or stairs, garage, laundry room, pool, and recreation room.

Xavier believes that the Court of Appeal's decision would create dangerous precedent by "paving the way for financial manipulation by the higher-earning spouse in a bad marriage" (Pet., 12) and/or allowing "a change in handling the family finances to dictate the date of separation." (Pet., 13.) To the contrary, it is the *Norviel* "same roof" rule that threatens public policy.

The trial court found that "the management of their finances in an intentional, thoughtful way was important to the parties." (Sheryl PR 81, ¶4.) However, Xavier implies that the trial court should have ignored this significant decision in favor of an arbitrary address-based rule.

If either spouse could control the separation decision either by moving out or – under Xavier's theory – by failing to move out, the spouse who is more stubborn and/or has greater financial resources would have the power to control the date of separation even after every other indicator of a viable marriage has vanished. Moreover, in some cases family law attorneys advise their clients not to be the one to move out of the family home for fear that doing so could affect the determination of child custody. (CEB, California Child Custody

Litigation and Practice (Cal CEB 2006, updated through 2012), §1.31.)

Every divorcing couple's situation differs. The ways in which different couples show their subjective intent to separate by objective evidence of conduct furthering that intent will necessarily be different from couple to couple. It does not make sense to insist on a "one size fits all" rule in place of continuing to respect the ability of family law judges to make factual determinations based on all the evidence presented.

IV.
There Is Nothing to Clarify Concerning the Trial Court's Selection of Separation Dates

Xavier thinks footnote 12 of the Court of Appeal opinion "conveys that a trial court need not exercises 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.'" (Pet., 14.) But the opinion got the issue right: If a party does not point out to the trial court what evidence supports a date of separation other than the ones either party suggested, and there is evidence in the record supporting the date the court found was the actual separation date, why should the court be expected, let alone required, to reach a different conclusion?

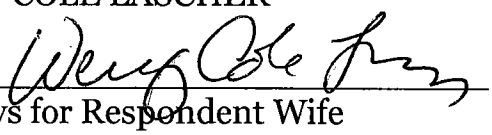
CONCLUSION

Xavier does not establish any meaningful basis for reviewing the Court of Appeal's decision. The Court should deny the petition so that these parties can conclude their divorce and get on with their lives.

Dated: December 26, 2013

Respectfully submitted,

FERGUSON CASE ORR PATERSON LLP
WENDY COLE LASCHER

By 
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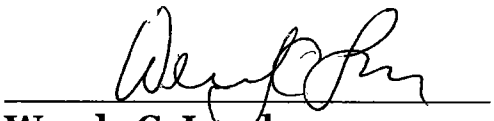
Dated: December 26, 2013



Wendy C. Lascher

PROOF OF SERVICE

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action; my business address is 1050 South Kimball Road, Ventura, California 93004.

On December 26, 2013, I served the foregoing document described as **"RESPONDENT'S ANSWER TO PETITION FOR REVIEW"** on the interested parties in the action entitled *Keith Xavier Davis vs. Sheryl Jones Davis*; Court of Appeal, First Appellate District, Division One Case No.: A136858.

[**X**] by placing [ ] the original [**X**] a true copy thereof enclosed in sealed envelopes addressed as follows:

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Executed on December 26, 2013, at Ventura, California.

Alice Duran