**IN THE SUPREME COURT**

**STATE OF CALIFORNIA**

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| In re the Marriage of Sheryl Jones Davis and Keith Xavier Davis | ) | **CASE NO.: S215050** |
| SHERYL JONES DAVIS, | ) | First District Court of Appeal Case No. A136858 |
| Respondent, | ) | |
| v. | ) | |
| KEITH XAVIER DAVIS, | ) | Alameda County Superior Court Case No. RF08428441 |
| Appellant. | ) | |



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

Superior Court, Alameda County
Case No. RF 08428441
Commissioner Elizabeth Hendrickson Presiding



# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

Table of Authorities, continued

Cases, continued

Cases, continued



**CALIFORNIA STATUTES**



**OTHER AUTHORITIES**

## I. ISSUE UNDER REVIEW

Pursuant to this Court's February 11, 2014 Order granting limited review, the issue before this Court is: For the purpose of establishing the date of separation under Family Code section 771, may a couple be "living separate and apart" when they reside in the same residence?

## II. INTRODUCTION

The Court should determine that, as a matter of law, for the purpose of establishing the date of separation under California Family Code section 771, a couple may be "living separate and apart" when they reside in the same residence. Further, the Court should not permit a finding of separation under certain limited circumstances, as Xavier requests, as it is not necessary.

## III. STATEMENT OF FACTS AND CASE

Most of the facts are taken from the Slip Opinion where indicated. Additional facts and inferences are taken from the record on appeal.

### A. The Disputed Factual Determinations Made by the Court of Appeal Are Subject to the Substantial Evidence Standard of Review.

The date of separation is a factual issue. (Slip Op. at p. 4 ¶1, citing *In re Marriage of Peters* (1997) 52 Cal. App. 4th 1487, 1493-1494; see also *In re Marriage of Manfer* (2006) 144 Cal. App. 4th 925, 930; also citing *In re Marriage of Peters*, 52 Cal. App. 4th at 1493-1494.)

Here, Xavier[1] acknowledges that the parties' testimony as to the date of separation is disputed. (AOB, p. 3 ¶6.)

Appellate review of disputed facts is limited to determining whether the court's factual determinations are supported by substantial evidence. (*Manfer, supra,* 144 Cal. App. 4th at p. 930; citing *In re Marriage of De Guigne* (2002) 97 Cal. App. 4th 1353, 1360.)

Since the date of separation is a disputed fact, appellate review must defer to the trial court's determination of the date of separation if the trial court's findings are supported by substantial evidence. (*In re Marriage of Marsden* (1982) 130 Cal. App. 3d 426, 435 [trial court's finding of separation date supported by substantial evidence].)

Deferential appellate review of disputed factual matters is "particularly important in family law matters where the testimony of the parties often is . . . in conflict, and where the trial court is called upon to make credibility judgments. (*In re Marriage of Norviel* (2002) 102 Cal. App. 4th 1152, 1165 (dis. opn. of Bamattre-Manoukian, Acting P.J.).)

Substantial evidence is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. (*Roddenberry v. Roddenberry* (1996) 44 Cal. App. 4th 634, 651; citing *Kuhn v. Department of General Services* (1994) 22 Cal. App.

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[1] For ease of this Court, the parties and counsel, the parties are referred to as "Xavier" and "Sheryl" for this marital dissolution action. No disrespect is intended.

4th 1627, 1633; quoting *Estate of Reed* (1952) 111 Cal. App. 2d 638, 644.) "Substantial evidence . . . is not synonymous with any evidence. Instead, it is substantial proof of the essentials which the law requires." (*Roddenberry, supra,* 44 Cal. App. 4th at 651; citing *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 871-872; *Kruse v. Bank of America* (1988) 202 Cal. App. 3d 38, 51. (Internal quotation marks omitted.)

"Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry, supra,* 44 Cal. App. 4th at 651.)

"The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry, supra,* 44 Cal. App. 4th at 652.)

Further, the review of evidence is made in the light most favorable to the prevailing party - in this case, Sheryl - and must take into account every reasonable inference supporting the trial court's decision. (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal. App. 4th 377, 389.)

Appellate review must also resolve all conflicts in favor of the ruling under review. (*Pool v. City of Oakland* (1986) 42 Cal. 3d 1051, 1056, 1061 fn.1.)

The record for this matter reflects many disputed facts in

addition to certain stipulated facts (PR Sheryl 75-77)[2], which both give rise to reasonable inferences in favor of Sheryl and should not be subject to appellate *de novo* review.

There are significant issues arising in family law courts wherein appellate courts do not apply the *de novo* standard of review, such as matters involving child custody orders and community property characterization. In reviewing a juvenile court's jurisdictional findings in California Welfare & Institutions Code section 300 *et seq.,* dependency proceedings, for example, appellate courts apply the substantial evidence review. (*In re R.C.* (2012) 2010 Cal. App. 4th 930, 940-941; *In re Savannah M.* (2005) 131 Cal. App. 4th 1387, 1393-1395; *In re Kristin H.* (1996) 46 Cal. App. 4th 1635, 1649.)

As another example, in challenging on appeal a decision regarding reunification services offered a parent in juvenile dependency proceedings, the substantial evidence standard of review is applied. (*Constance K. v. Super.Ct. (Los Angeles County Dept. of Children & Family Services*, (R.P.I.) (1998) 61 Cal. App. 4th 689, 705.)

Appellate review of a trial court's finding in a marital status

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"PR" refers to the Partial Record on appeal filed by Xavier on October 19, 2012.

"AR" refers to the Appellant's Augmented Record on appeal.

"PR Sheryl" refers to the Partial Record on appeal filed by Sheryl on October 29, 2012.

action that a particular item is separate or community property is limited to a substantial review standard, whether any substantial evidence, contradicted or uncontradicted, supports the trial court's finding. (*Marriage of Rossin* (2009) 172 Cal. App. 4th 725, 734; *Patrick v. Alacer Corp.* (2011) 201 Cal. App. 4th 1326, 1340.)

**B. Facts Prior to June 1, 2006.**

Bearing in mind that the facts found by the trial and appellate courts are subject to the substantial evidence standards of review (see preceding section), Respondent submits the following facts from the Slip Opinion and record, as indicated. The Court of Appeal held that the date of separation was June 1, 2006. As the record indicates, there is no reversible error in that finding.

Appellant Keith Xavier Davis (hereinafter "Xavier") and Respondent Sheryl Jones Davis (hereinafter "Sheryl") were married on June 12, 1993. (Slip Op. at p. 1 ¶2; PR 1.) They have two children, a daughter born in August, 1995, and a son born in November, 1999. (Slip Op. at p. 1 ¶2; PR 1.)

The parties had a very turbulent marriage, beginning two years into the marriage. (RT 1/10/12 30:27-28, 30:1.)[3] Sheryl testified at trial that there were a number of significant events that had occurred during the marriage making it very clear to her when the date of

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[3] References to the Reporter's Transcript will be abbreviated as "RT [date][page]:[lines]." The reference in the text, for example, is to Reporter's Transcript dated 1/10/12, page 30, lines 27-28, page 31, line 1.

separation took place. (RT 1/10/12 30:25-27.) Xavier testified at trial they had a dysfunctional marriage. (RT 1/10/12 55:20.)

Xavier and Sheryl ceased being physically intimate with each other after the birth of their son in 1999. (Slip Op. at p. 1 ¶2; RT 1/10/12 31:2-4; PR Sheryl 75.)

Xavier and Sheryl did not go on any "dates' after their son was born. (Slip Op. at p. 1 ¶2 - p. 2 ¶1.)

It was a prerequisite at the beginning of their marriage that in order for their family to be financially successful, Sheryl and Xavier would have to share one bank account. (RT 5/2/12 58:4-9.) Prior to their marriage, Xavier gave Sheryl the checkbook for an account with Meriwest Credit Union which he had established and he added Sheryl to the account. (RT 5/2/12 58:11-14.) Sheryl managed the parties' money and their joint accounts. (RT 5/2/12 37:9-10.) There was only one joint account that the parties were using to maintain the household operating expenses and the expenses for the children. (Slip Op. at p. 2 ¶2.)

Before 2001, Xavier was employed at a company known as Whittman-Hart. (RT 1/10/12 31:23-24.) While employed at Whittman-Hart, Xavier was earning $180,000 per annum or $15,000 per month. (RT 5/2/12 35:24-28.) When Whittman-Hart became defunct, Xavier told Sheryl that he would be starting his own business. (RT 1/10/12 31:11-15.) Sheryl expressed concern with the financial contributions that would be required by Xavier to sustain the household. Xavier stated at that time that he would contribute $3,200

per month towards the household. (RT 1/10/12 31:20-23.)

In April of 2001, Xavier started a consulting company with business partners. (RT 1/10/12 12:24-28, 12:1.) Sheryl had no specific knowledge of Xavier's consulting business. She made several requests for documentation from Xavier regarding his business, such as 1099s, tax returns, audits, a client list - - all to no avail. (RT 1/10/12 33:14-16.) She only learned about a client of Xavier's if Xavier had to travel out of town, since they shared in the pick-up and drop-off of their children. (RT 1/10/12 33:16-19.)

Xavier's consulting business subsequently dissolved and became a "legal matter." (RT 1/10/12 12:1-2.) He ultimately received a lump-sum settlement of approximately $70,000 in 2003. (RT 1/10/12 12:2-4; RT 5/2/12 16:10-14.) Also in 2003, Xavier told Sheryl that he was going to deposit these monies into a separate Wells Fargo Bank account he had opened. (RT 1/10/12 12:21-22; RT 5/2/12 17:11.) This Wells Fargo account was held in Xavier's name only. (RT 1/10/12 14:15-18.) He further told Sheryl he would withdraw $3,200 each month from his separate Wells Fargo account and deposit the same into the parties' joint checking account with Meriwest Credit Union, which is what he did. (RT 1/10/12 12:19-28, 13:1-2; RT 5/2/12 17:11-16.)

Sheryl moved out of the marital bedroom in January, 2004, because the "relationship was basically doomed" and "it was done." (RT 1/10/12 31:5-6.) Even prior to moving out of the marital bedroom, Sheryl was back and forth between both of their children's

bedrooms, sharing the bedrooms with the children on a regular basis. (RT 1/10/12 3:6-9.)

In October of 2005, Sheryl was physically assaulted by Xavier. (Slip Op. at p. 5 ¶4; RT 1/10/12 31:24-28, 32:1; RT 5/2/12 59:19-20.) Sheryl testified at trial that at this point, "[t]his is it, I am done. This is the last straw." (Slip Op. at p. 5 ¶4; RT 1/10/12 32:1-2.)

In January of 2006, Xavier became employed with Clorox, earning a full compensation package of $240,000 per annum. (Slip Op. at p. 2 ¶3; RT 1/10/12 11:10-15.) While at Clorox, Xavier typically worked 70-hour weeks. (RT 5/2/12 27:18-19.) His gross monthly earnings were $20,000. (Slip Op. at p. 2 ¶3.)

Xavier only directed some of his monthly earnings from Clorox to the joint checking account. (Slip Op. at p. 2 ¶3; RT 1/10/12 11:16-19.) Xavier determined that $3,200 was all he would be contributing to the joint household account. (Slip Op. at p. 2 ¶3; RT 1/10/12 32:22-23; PR Sheryl 75-76 ¶6.) He deposited $3,200 of his Clorox earnings into the joint account each month, depositing the remainder of his earnings into another Wells Fargo Bank account he had opened in his name only. (Slip Op. at p. 2 ¶3; RT 5/2/12 17:25-28; PR Sheryl 75 ¶6.) Xavier's decision to contribute only $3,200 to the joint account was a final straw for Sheryl. (RT 1/10/12 32:10-19.)

The bank statements to the Wells Fargo business account were sent to a mailbox under his control. (RT 1/10/12 154-11; RT 5/2/12 50:24-28, 51:1-2.) Sheryl never had access to the P.O. box. (RT 1/10/12 15:12-14; RT 5/2/12 51:4-12.) She had no knowledge of the

Wells Fargo account and only learned of it when she happened to see the mail and the pile of mail he maintained. (RT 1/10/12 33:8-11.)

The parties had a Charles Schwab account, which had been redirected to a business P.O. box address under Xavier's control. (Slip Op. at p. 2 ¶4; RT 1/10/12 33:12-14; RT 5/2/12 50:24-28, 51:1-12.)

Xavier also maintained a safe with a lock that could only be accessed by a key. (Slip Op. at p. 2 ¶4; RT 1/10/12 16:2-10.) Sheryl had no access to the safe. (Slip Op. at p. 2 ¶4; RT 1/10/12 16:8-9, 33:5-14.)

For the 2005-2006 school year, an issue involving their son and the Castro Valley Unified School District arose, requiring Sheryl's undivided attention. (Slip Op. at p. 5 ¶4; RT 1/10/12 32:3-6; RT 5/2/12 87:21-24.) Sheryl sat at their son's classroom almost daily regarding their son's education. (RT 1/10/12 56:25-28, 57:1-3; RT 5/2/12 87:21-24.)

**C. Facts Establishing Respondent's Date of Separation of June 1, 2006.**

When their son's 2005-2006 school year concluded, Sheryl stated to Xavier in June of 2006 that she was through with the marriage: "Listen, this is done, you know, I am through. This is a final straw of our marriage. We are done." (Slip Op. at p. 2 ¶5; RT 1/10/12 32:2-23.) She told Xavier that she could not continue to pretend with this charade of a marriage. (RT 1/10/12 33:24-26.) Sheryl testified at trial that they no longer had a marriage. (RT

1/10/12 33:26.) Sheryl testified at trial that, from June 1, 2006, on forward, she and Xavier were roommates. (RT 5/2/12 60:2-5.) She told Xavier she would continue to put in contributions for her one-half share of the household expenses. (Slip Op. at p. 5 ¶4; RT 1/10/12 32:23-25.) In her mind, she had no concern or interest in anything that he did. (RT 1/10/12 33:27-28.)

Sheryl developed and presented Xavier with a financial ledger or spreadsheet that itemized every household expense as well as any anticipated expenses for their children; all of these expenses were to be divided 50/50. (Slip Op. at p. 5 ¶4; RT 1/10/12 32:26-28, 37:19-22; RT 5/2/12 88:6-12; PR Sheryl 24; PR Sheryl 76, ¶10.) Sheryl and Xavier would each be responsible for making those deposits in the joint account. (RT 1/10/12 at 32:26-28, 33:1-2, 37:1-10; RT 5/2/12 88:16-19.) The household expenses and the children's expenses included the mortgage payment, home equity line of credit, car note, utilities, homeowner's insurance, health insurance premiums for the children, the children's lunch tickets, their daughter's recitals, and their son's sports activities. (RT 1/10/12 38:20-28, 39:1-5; PR Sheryl 24.) The ledger sheet would indicate which bill each party would pay. (RT 1/10/12 39:2-5; PR Sheryl 24.) Both parties would be solely responsible for their own respective personal expenses. (RT 1/10/12 33:2-4; RT 5/2/12 88:13-16; PR Sheryl 24.) Each party's personal expenses included gas, food, personal credit cards, gym memberships, cell phones, and life insurance premiums. (RT 1/10/12 37:12-22; RT 5/2/12 88:13-16; PR Sheryl 24; PR Sheryl 55-58.)

Sheryl informed Xavier that she would continue to contribute her fifty percent (50%) share of the household expenses. (RT 1/10/12 32:23-25.)

The finances for Xavier and Sheryl would be the last component for her as to what constituted a marriage because, in Sheryl's mind, "there was nothing else at this point that dictated or indicated we had a marriage." (RT 1/10/12 34:16-20.) With the financial ledger, Sheryl testified at trial that she and Xavier would manage the household expenses as roommates. (RT 5/2/12 88:6-10.)

Xavier confirmed the commencement of the financial ledger by the parties on June 1, 2006. (Slip Op. at p. 7 ¶5; RT 5/2/12 18:7-14.) The ledger was something new. (Slip Op. at p. 7, ¶4; RT 5/2/12 33:20-24.) Xavier noted in an e-mail to Sheryl that this was a significant change. (PR Sheryl 21b.)

On June 1, 2006, Sheryl worked as an independent contractor, earning a range of $3,000 to $4,000 per month. (RT 5/2/12 75:15-16.) She had been unemployed as a salaried employee prior to July 1, 2006 for six months. (RT 5/2/12 76:7-8.) On July 1, 2006, Sheryl became employed full-time as a salaried employee, earning $138,000 per annum or $11,500 per month. (Slip Op. at p. 2 ¶6; RT 5/2/12 75:22-27.)

### D. Facts After Respondent's Date of Separation of June 1, 2006.

The financial ledger would change every month and it would be based on actual bills and projected bills that had not yet come in.

(RT 5/2/12 73:3-4; PR Sheryl 24.) Xavier deposited $3,200 into the joint account and Sheryl matched the amount. (RT 5/2/12 73:10-11.)

After June 1, 2006, Sheryl did withdraw money from the joint account if she determined that she had deposited monies in excess of what was needed to be deposited as her share each month. (RT 5/2/12 72:21-28, 73:1-2.)

When Xavier subsequently failed to contribute enough to the joint household account to cover his half of their joint expenses, Sheryl decided to divide and allocate the individual community expenses. (Slip. Op. at p. 6, ¶1.)

Sheryl did attempt to close the joint account after the June 1, 2006 date of separation. (RT 05/2/12 71:25-28; 72:1-6.) However, due to Sheryl not being listed as the primary owner of the joint account, she did not have the authority to close the account. (RT 5/2/12 36:23-28, 37:1, 72:1-6.)

On or about July 5, 2006, Sheryl opened a bank account with a local bank to deposit the remainder of her income each month after she deposited funds into the joint account as her share of the household expenses. (RT 1/10/12 34:21-27; RT 5/2/12 83:2-10; PR Sheryl 43-54.)

Sheryl opened another checking account in her name only in October of 2006 with Meriwest Credit Union so that her share of household bills would be paid from said Meriwest account. (RT 1/10/12 36:26-28, 37:1-3; PR Sheryl 55-58; PR Sheryl 66-68.) For example, she redirected all of her insurance premiums to her personal

checking account as a personal expense. (RT 1/10/12 37:11-18; PR Sheryl 55-58.)

In October, 2006, Sheryl removed Xavier's name as an authorized user of her American Express card account. (Slip Op. at p. 6 ¶2; RT 1/10/12 36:15-19; RT 5/2/12 84:10-14; PR Sheryl 25-42.) Sheryl returned to Xavier the Chevron charge card and the Macy's charge card for which she had been an authorized, secondary user, in September of 2006. (RT 1/10/12 36:20-25.) She did not use the Chevron or the Macy's charge cards after June 1, 2006. (RT 5/2/12 50:19-21.)

There was very little communication between Xavier and Sheryl after June 1, 2006. (RT 5/2/12 59:13-26.) Sheryl testified that she tried to avoid Xavier and keep her distance from him because of the physical assault in 2005 and because he had an explosive temper. (RT 5/2/12 59:19-21.) Sheryl would only talk about what was pertaining to their children or the household. (RT 5/2/12 59:24-28, 60:1.) Sheryl and Xavier communicated with each other by e-mail following June 1, 2006. (RT 5/2/12 61:13-15; PR Sheryl 21b-23.) Sheryl did maintain an e-mail address called "xavierswife" with aol.com for three years after June 1, 2006 (RT 5/2/12 at p. 63.), which she changed to another e-mail address with aol.com when Sheryl's friend helped her establish a new AOL account and a new e-mail address. (RT 5/2/12 80:16-28, 81:1-7.) She had previously attempted to change the e-mail address and discovered that she could not do that as Xavier was the primary account holder with aol.com. (RT 5/2/12

80:22-28.)

When Xavier resigned from his employment with Clorox in 2006, Sheryl learned of his resignation from one of Xavier's friends. (RT 1/10/12 40:27-28, 41:1-5.) Xavier worked for Clorox for nine months until September, 2006. (Slip Op. at p. 2 ¶3.)

After July 1, 2006, when Sheryl became a full-time employee, her job required her to be in Los Angeles every week. (Slip Op. at p. 6 ¶3; RT 5/2/12 79:8-9.) During the children's school-year months, Sheryl traveled to Los Angeles for a period of three to four days every week. (RT 5/2/12 79:10-13.) During the summer months, she traveled to Los Angeles Monday through Friday every week. (RT 5/2/12 79:10-12.) Sheryl stayed at a hotel while in Los Angeles and often brought the children to join her during the summer months. (RT 5/2/12 79:15-16.) This was the schedule for Sheryl and the children until September of 2011 at which time a custody schedule was set by the court, alternating weeks with the children for the parties. (RT 5/2/12 79:21-24.) Sheryl subsequently traveled to Los Angeles every other week. (RT 5/2/12 79:24-27.)

Several months after Sheryl stated to Xavier that the marriage was over in 2006, Xavier wrote to Sheryl that what matters to their children ". . .is for them to see both parents being intelligent and civil, less contentious, and embracing an age old concept called family." (PR Sheryl 21b, ¶5, lines 2-3.) Xavier further wrote to Sheryl that their children "need to see their parents being nice to each other." (PR Sheryl 21b, ¶5, lines 14-15.) Xavier wrote to Sheryl that he had

". . . no 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." (Slip Op. at p. 6 ¶3; PR Sheryl 21b, ¶5, lines 17-19.) Sheryl believed, even though the marriage was over, that their family was a lifetime relationship given that Xavier was the father of her children and ". . . as long as there [are] children, there are grandchildren." (RT 5/2/12 60:9-16.)

At the time Sheryl informed Xavier the marriage was over, the parties had a pre-planned trip scheduled for Hawaii in 2006. (RT 1/10/12 35:1-2.) Their children were already aware of the trip to Hawaii and the parties did not cancel the trip as they did not want to disappoint the children - - the children were accustomed to going to Hawaii every year. (Slip Op. at p. 6 ¶4; RT 1/10/12 35:2-5.) Sheryl and Xavier did not share the same bed in the hotel room in Hawaii. (Slip Op. at p. 6 ¶4; RT 5/2/12 28:10-15.) The parties had one hotel room with two beds - - Xavier shared a bed with their son and Sheryl shared the second bed with their daughter. (Slip Op. at p. 6 ¶; RT 5/2/12 28:10-15.) The trip was paid for from the parties' joint account. (RT 5/2/12 28:1-2.)

Following the 2006 trip to Hawaii, Sheryl took the children on two vacations every year. (Slip Op. at p. 6 ¶4; RT 1/10/12 35:5-6.) In 2007, Sheryl took the children to Las Vegas, Nevada and to Hawaii, all without Xavier. (RT 1/10/12 35:6-7.) In 2008, she took the children on vacation to Las Vegas and to Hawaii, again without

Xavier. (RT 1/10/12 35:9-10.) She did not ask Xavier to join in on her vacations with the children. (RT 5/02/12 85:22-27.) Sheryl testified that she did not invite Xavier on any vacations because she did not want to send any mixed messages. (RT 5/2/12 85:22-27.) She testified that she "did everything in my power to stay away from [Xavier.] I only communicated when I had to communicate with him and that was only if it pertained to the children or anything pertaining to the household. There was no confusion with my intent or my actions." (RT 1/10/12 35:14-19.)

Xavier took the children on at least three (3) significant vacations and without Sheryl after June 1, 2006. (RT 5/2/12 28:20-25.) In January, 2007, he took the children to Lake Tahoe for the Martin Luther King holiday weekend. (RT 5/2/12 29:1-3.) Xavier invited Sheryl to go on the trip and she declined. (Slip Op. at p. 7 ¶2; RT 5/2/12 29:4-8.) Xavier took the children on a cross-country trip by train in the Summer of 2007. (RT 1/10/12 35:10-12; RT 5/2/12 29:9-21.) He invited Sheryl to come along on this trip and she declined. (Slip Op. at p. 7 ¶2; RT 5/2/12 29:22-25.) In the Summer of 2008, Xavier took the children on a road trip from the Bay Area to San Diego. (RT 5/2/12 29:26-28. 30:1-5.) He again invited Sheryl to come along on this trip and she declined. (Slip Op. at p. 7 ¶2; RT 5/2/12 30:6-12.)

There was one trip whereby Xavier, Sheryl and the children traveled to Sacramento together to visit with Sheryl's aunt, who was visiting other family members in Sacramento at that time. (RT 5/2/12

82:6-15.) It was Sheryl's aunt who invited Xavier to the family visit. (RT 5/2/12 82:13-19.) Subsequent trips to Sacramento to visit with Sheryl's aunt were done by Sheryl and the children only. (RT 5/2/12 82:23-27.)

After June 1, 2006, the parties celebrated Christmas with their children, for the children. (RT 5/2/12 31:5-10.)

Sheryl prepared meals for the children that the children liked. (RT 1/10/12 33:1-2.) Xavier would be responsible for his own meals if he wanted something different for a meal. (RT 1/10/12 34:2-3.)

After June of 2006, Sheryl and Xavier attended school-related conferences regarding their children. (RT 1/10/12 39:18-23.) For the majority of the time, both Xavier and Sheryl would travel to their children's schools in separate cars, as they would for their children's recitals or any other events. (Slip Op. at p. 7 ¶2; RT 1/10/12 39:23-26.) The only time Sheryl would ride in the same car as Xavier was if their children begged her to do so. (Slip Op. at p. 7 ¶2; RT 1/10/12 39:27-28.)

After June 1, 2006, Sheryl lived at the marital residence. (Slip Op. at p. 6 ¶3; RT 5/2/12 21:5-6, 59:9-12; PR Sheryl 76 ¶ 11.) Sheryl asked Xavier to move out of the home and he refused. (RT 5/2/12 58:26-28, 59:1-2.) Xavier told her he would not be leaving the house. (RT 5/2/12 582-28, 59:1-2.) She received mail at the marital residence. (RT 5/2/12 59:9-12; PR Sheryl 76 ¶13.) She received telephone calls at the residence. (RT 5/2/12 59:9-12; PR Sheryl 76 ¶13.) She kept her clothes at the residence. (RT 5/2/12 59:9-12; PR

Sheryl 76 ¶12.) She stayed at the residence because it was her home as well. (RT 5/2/12 59:9-12; 76:7-8.) Sheryl and Xavier lived as roommates from beginning June 1, 2006. (RT 5/2/12 60:2-5.)

When Sheryl was at home she would retreat to the guest bedroom. (RT 5/2/12 60:17-20.) Unless her children begged her, which they did often, to come out of the guest bedroom and participate in different family interactive activities, Sheryl would stay in the guest bedroom. (RT 5/2/12 60:22-25.)

After June of 2006, Sheryl signed greeting cards to her mother in her name only instead of signing greeting cards on behalf of herself and Xavier. (PR Sheryl 61-65.)

Following June 1, 2006, Sheryl and Xavier ate out with their children for special occasions. (RT 5/2/12 22:5-7.) Celebrations did continue for the parties with their children. (RT 5/2/12 64:21-26.) Celebrating birthdays were a "big thing" in order to celebrate with the children. (RT 5/2/12 65:9.)

On November 19, 2008, the parties went out to Benihana with their children to celebrate their son's birthday. (RT 5/2/12 23:3-7; PR 55.)

On April 2, 2009, the parties went out to Benihana with their children to celebrate Sheryl's birthday. (RT 5/2/12 23:8-16; PR 56.)

On June 11, 2009, the parties went out to Benihana with their children to celebrate their daughter's graduation from middle school. (RT 5/2/12 23:17-20; PR 57.) Also in attendance were three other individuals - - Sheryl's mother; their daughter's best friend, and an

adult friend of the family. (RT 5/2/12 23:24-27; PR 57.)

On April 25, 2010, the parties went out to Benihana with their children to celebrate Sheryl's belated birthday. (RT 5/2/12 24:2-10; PR 58.)

On August 15, 2010, the parties went out to Benihana with their children to celebrate their daughter's birthday. (RT 5/2/12 24:11-17; PR 59.)

The parties celebrated Mother's Day at a brunch with their children only as a matter of tradition. (RT 5/2/12 25:23-27.) They celebrated Mother's Day, Father's Day and special events together with their children. (RT 5/2/12 2525-27.)

There were several occasions when Sheryl told Xavier that she did not want him to come to her birthday celebration with her and the children. (RT 5/1/12 65:26-28.)

Sheryl prepared a financial ledger each month for Xavier and herself until February of 2011, at which time Xavier informed Sheryl that he did not have any more money to pay the household expenses (Slip Op. at p. 7 ¶3.) and would not pay anything towards the household expenses unless Sheryl authorized his use of the home equity line of credit. (RT 1/10/12 39:6-17.) Sheryl paid all household expenses from February of 2011 though the end of June, 2011. (Slip Op. at p. 7 ¶3; RT 1/10/12 39:13-17.)

Sheryl moved out of the home approximately July 1, 2011 when she purchased a home. (PR 27, lines 30-31.)

Sheryl filed her petition for dissolution of marriage on

December 30, 2008. (PR 1.) She lists the date of separation in her petition for dissolution of marriage as June 1, 2006. (PR 1; RT 1/10/12 30:10-12.)

Trial commenced on the bifurcated issue of the date of separation on January 10, 2012 before Alameda County Superior Court, Family Law Division, and continued to February 29, 2012, March 13, 2013 and concluded on May 2, 2012. (PR 47.) The trial court held that the date of separation is June 1, 2006. (RT 5/12/12 98:20-27; PR 50.) The trial court applied the conclusions reached in *In re Marriage of Manfer, supra,* and *In re Marriage of Hardin* (1995) 38 Cal. App. 4th 448, based upon the following:

(1) Sheryl consistently maintained June 1, 2006 as the date of separation although she did testify that it may have been a variance of thirty days (July 1, 2006) and Xavier set forth the date of separation as January 2, 2009, which he later amended to July 1, 2011 after years of active litigation;

(2) Prior to June 1, 2006, the parties sometimes went out to dinner together, vacationed together and separately with and without the children, had not shared a bedroom for years, and acknowledged Xavier's characterization of their marriage as dysfunctional;

(3) Sheryl and Xavier had e-mail exchanges around June 1, 2006, supporting Sheryl's claimed date of separation;

(4) The one remaining thing that the parties did together,

which was share finances, changed on June 1, 2006 and the management of their finances in an intentional, thoughtful way was important to both parties;

(5) The decision about their finances was a significant decision to both parties and, after June 1, 2006, Sheryl and Xavier changed the way in which they managed their finances; and

(6) No case law supports the suggestion by Xavier that he can file a response in a divorce case and be in court, filing motions, and actively involved in getting divorced, but claim a date of separation one and one-half years later. (RT 05/2/12 94:1-28 to 98:1-27; PR 49-50.)

On October 25, 2013, the First District Court of Appeal affirmed the trial court's ruling.

On February 11, 2014, this Court granted limited review on whether, for the purpose of establishing the date of separation under Family Code section 771, may a couple be "living separate and apart" when they reside in the same residence.

## IV. THE INTERPRETATION OF CALIFORNIA FAMILY CODE SECTION 771 AND THE APPLICATION OF THAT LAW TO THE FACTS OF THIS CASE ARE SUBJECT TO *DE NOVO* REVIEW.

Questions of statutory construction are reviewed *de novo*. (*Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal.4th 1113; citing *Reid v.*

*Google, Inc.* (2010) 50 Cal.4th 512, 527.) As stated above in Part III. A., the Court is nonetheless bound by the factual findings of the appellate court if those facts are supported by substantial evidence, as well as inferences drawn in favor of Respondent as the prevailing party below. The application of the law to those facts is subject to *de novo* review. (*Ceja v. Rudolph & Sletten, Inc., supra,* 56 Cal. 4th 1113 at 1119.)

> When construing a statute, our objective "is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*Estate of Griswold* (2001) 25 Cal.4th 904, 910.) We look first to the words of the statute, " ' "because they generally provide the most reliable indicator of legislative intent." [Citation.] We give the words their usual and ordinary meaning [citation], while construing them in light of the statute as a whole and the statute's purpose [citation].' *(Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529–530.) ' "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." [Citation.] "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." ' " (*In re Ethan C.* (2012) 54 Cal.4th 610, 627; see also *Ceja v. Rudolph & Sletten, Inc., supra,* 56 Cal. 4th 1113 at 1119.)

## V. ARGUMENT

For purposes of establishing the date of separation under California Family Code section 771, the Court should decide that a couple may be "living separate and apart" when they reside in the same residence.

Family Code section 771, subdivision (a), provides that:

> The earnings and accumulations of a spouse . . ., while living separate and apart from the other spouse, are the separate property of the spouse.

The Legislature has not defined the date of separation any further, nor has it specified a standard for determining the date of separation. (*In re Marriage of Manfer* (2006) 144 Cal. App. 4th 925, 929. [Family Code section 771 "does not define 'date of separation' or specify a rule for determining it"]; *In re Marriage of Hardin* (1995) 38 Cal. App. 4th 448, 450-451.) The courts rely on case law to define the date of separation. (*In re Marriage of Manfer, supra,* at 929.)

In *Makeig v. United Security Bk. & T. Co.* (1931) 112 Cal. App. 138, 143, the court determined that "living separate and apart" refers to that "condition where the spouses have come to a parting of the ways and have no present intention of resuming marital relations." There are no particular facts that are "per se determinative" as to when this occurs. (*In re Marriage of Hardin* (1995) 38 Cal. App. 4th 448, 452.) That husband and wife may live in separate residences is not determinative. (*In re Marriage of Baragry* (1977) 73 Cal. App.

3d 444, 448; citing *Makeig, supra*, at 143.)

The definition of "living separate and apart" was developed further: "[t]he question is whether the parties' conduct evidences a complete and final break in the marital relationship." (*In re Marriage of Baragry* (1977) 73 Cal. App. 3d 444, 448; accord, *In re Marriage of Marsden* (1982) 130 Cal. App. 3d 426, 434.) The courts' conclusion is "consistent with the recognition that '[m]any marriages are 'on the rocks' for protracted periods of time and it may be many years before the spouses decide to formally dissolve their relationship." (*In re Marriage of von der Nuell* (1994) 23 Cal. App. 4th 730, 736; citing *In re Marriage of Umphrey* (1990) 218 Cal. App. 3d 647, 652, fn. 2.)

The court blended the *Makeig* and *Baragry* definitions in *In re Marriage of Von der Nuell* (1994) 23 Cal. App. 4th 730: "[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, supra*, at 736.)

As such, the two prerequisites to separation are: "[f]irst, at least one spouse must entertain the subjective intent to end the marriage; second, there must be objective evidence of conduct furthering that intent." (*In re Marriage of Norviel* (2002) 102 Cal. App. 4th 1152,

1158.)

> "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. There must be problems that have so impaired the marriage relationship that the legitimate objects of matrimony have been destroyed and there is no reasonable possibility of eliminating, correcting or resolving these problems.

(*Hardin*, supra, at p. 451, original italics.)

"All factors bearing on either party's intentions 'to return or not to return to the other spouse' are to be considered. (*Hardin*, supra at p. 452; see *Dalton v. Metropolitan Property & Liability Ins. Co.* (1982) 136 Cal. App. 3d 1037, 1041.)

Again, "[n]o particular facts are per se determinative. The ultimate test is the parties' subjective intent and all evidence relating to it is to be objectively considered by the court." (*Manfer, supra,* 144 Cal. App. 4th at p. 930; citing *Hardin, supra,* 38 Cal. App. 4th at p. 451.) The "*ultimate question to be decided in determining the date of separation is whether either or both of the parties perceived the rift in their relationship as final.* The best evidence of this is *their words and action.* The husband's and the wife's subjective intents are to be objectively determined from all of the evidence reflecting the parties' words and actions during the disputed time in order to ascertain when during that period the rift in the parties' relationship

was final." (*Manfer, supra*, 144 Cal. App. 4th at p. 930; citing *Hardin, supra,* 38 Cal. App. 4th at p. 453. (italics cited.)

**A. Substantial Evidence and Available Inferences in Respondent's Favor Support the Finding of June 1, 2006 as the Date of Separation.**

Here, substantial evidence and available inferences in Sheryl's favor support the finding of June 1, 2006 as the date of separation. Sheryl testified at trial as to significant events that had occurred during the marriage making it very clear to her that June 1, 2006 is the date of separation. (RT 1/10/12 30:25-27.) Sheryl testified at trial that she and Xavier had a very turbulent marriage, beginning two years into the marriage. (RT 1/10/12 30:27-28, 31:1.)

Xavier and Sheryl ceased being physically intimate after the birth of their son in 1999 (Slip Op. at p. 1 ¶2; RT 1/10/12 31:2-4; PR Sheryl 75.) and they did not go out on any dates after their son was born. (Slip Op. at p. 1 ¶2, p. 2 ¶1.)

It was a prerequisite at the beginning of their marriage that she and Xavier would share one bank account in order for their family to be financially successful. (RT 5/2/12 58:4-9.) There was only one joint account that the parties used to maintain the household operating expenses and the expenses for their children. (Slip Op. at p. 2 ¶2.)

When Xavier's employment with Whittman-Hart ceased in 2001 and he indicated to Sheryl that he would be starting his own business, she expressed concern with Xavier's financial contributions required to sustain the household - - Xavier told her he would only

contribute $3,200 per month towards the household. (RT 1/10/12 31:11-15, 31:20-23.)

Xavier started his consulting business of which Sheryl had no specific knowledge, despite her repeated requests for certain financial information. (RT 1/10/12 33:14-16.) When this business dissolved and he received a lump-sum settlement of $70,000 in 2003, Xavier told Sheryl that he would deposit his settlement money into a bank account he had opened in his own name. (RT 1/10/12 12:2-4, 12:21-22; RT 5/2/12 16:10-14.) Also in 2003, Xavier told Sheryl he would deposit $3,200 each month into the parties' joint checking account from his personal checking account. (RT 1/10/12 at p. 12; RT 5/2/12 at p. 17.)

Sheryl moved out of the marital bedroom in 2004 because the "relationship was basically doomed" and "it was done." (RT 1/10/12 31:5-6.)[4]

In October of 2005, Sheryl was physically assaulted by Xavier. (Slip Op. at p. 5 ¶4; RT 1/10/12 at 31:24-28, 32:1; RT 5/2/12 59:19-20.) In Sheryl's mind, this was the "last straw." (Slip Op. at p. 5, ¶4; RT 1/10/12 32:1-2).

In January of 2006, Xavier became employed with Clorox, earning gross monthly earnings of $20,000. (Slip Op. at p. 2 ¶3.) He determined that he would only contribute $3,200 of his gross monthly

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[4] The fact as to when the parties stopped sharing a bedroom was a disputed fact. Xavier testified that Sheryl had moved into another bedroom in 2001. (Slip Op. at p. 2 ¶1.)

earnings into the joint household bank account. (Slip Op. at p. 2 ¶3; RT 1/10/12 32:22-23; PR Sheryl 75-76 ¶6.) Xavier deposited the remaining monthly income from Clorox into another bank account he had opened in his name only. (Slip Op. at p. 2 ¶3; RT 5/2/12 17:25-28; PR Sheryl 75 ¶ 6.) Bank statements for accounts in Xavier's name were sent to a mailbox under his exclusive control. (RT 1/10/12 15:4-11; RT 5/2/12 50:24-28, 51:1-12.)

An account with Charles Schwab was redirected to a P.O. box address under Xavier's control. (RT 1/10/12 33:12-14; RT 5/2/12 50:24-28, 51:1-2.)

Xavier maintained a locked safe that could only be accessed by a key and Sheryl had no access to the safe. (Slip Op. at p. 2 ¶4; RT 1/10/12 16:2-10; 16:8-9, 33:5-14.)

For the 2005-2006 school year, Sheryl sat at their son's classroom almost daily due to an education-related issue involving their son and the local school district. (Slip Op. at p. 5, ¶3; RT 1/10/12 56:25-28, 57:1-3; RT 5/2/12 87:21-24.) When their son's stated school year concluded, Sheryl announced to Xavier that she was through with the marriage and that "we are done." (Slip Op. at p. 5, ¶3; RT 1/10/12 32:20-23.) Sheryl testified at trial that she told Xavier on June 1, 2006, "Listen, this is done, you know, I am through. This is a final straw of our marriage. We are done." (Slip Op. at p. 2 ¶5; RT 1/10/12 32:20-23.)

### B. Respondent Met Both Prerequisites as to the Date of Separation of June 1, 2006.

#### 1. Subjective Intent to End the Marriage.

Sheryl articulated to Xavier her intent to end the marriage on June 1, 2006. (Slip Op. at p. 5, ¶3; RT 1/10/12 32:20-23.) She made up her mind that she was going to end the marriage after the physical assault in October of 2005, after Xavier's commencement of his new job with Clorox in January of 2006, after Xavier pronounced that he would only put $3,200 of his $20,000 gross monthly earnings into the joint account for the household and children expenses. Sheryl stated that she "cannot continue to pretend with this charade of a marriage. Basically, we no longer had a marriage . . . I had no concern or interest in anything that he did." (RT 1/10/12 33:22-28.)

When Sheryl stated her intent to the end the marriage, there were so many problems that had so impaired the marital relationship that the legitimate objects of marriage had been destroyed. With Sheryl, there was no reasonable possibility of eliminating, correcting or resolving the problems to their marriage. Sheryl was done with the marriage and she told Xavier so.

There is no legal requirement that <u>both</u> spouses must entertain the subjective intent to end the marriage. It must be at least one spouse to express that intent and Sheryl met that prerequisite. Beginning June 1, 2006, Sheryl considered Xavier and herself as roommates.

### 2. Objective Evidence of Conduct Furthering Her Subjective Intent to End the Marriage.

Simultaneously announcing her intent to end the marriage, Sheryl engaged in conduct furthering her intent to end the marriage. Sheryl informed Xavier that she would continue to contribute her half of the household expenses each month. (Slip Op. at p. 5 ¶3; RT 1/10/12 32:23-25.) She developed a financial ledger or spreadsheet itemizing every household expense as well as the anticipated expenses for the children and all of these expenses were to be divided fifty-fifty (50/50) by and between the parties. (Slip Op. at p. 5 ¶4; RT 1/10/12 32:26-28, 37:19-22; RT 5/2/12 88:6-12; PR Sheryl 24; PR Sheryl 76 ¶10.) She stated to Xavier that they would each be responsible for making those deposits into the joint account. (Slip Op. at p. 5, ¶4; RT 1/10/12 33:26-28, 33:1-2; RT 5/2/12 88:16-19.) Both parties would solely be responsible for their own respective personal expenses, such as gas, food, personal credit cards, cell phones, gym memberships, and life insurance premiums. (Slip. Op. at p. 6, ¶1; RT 1/10/12 32:2-4; RT 5/2/12 88:13-16; PR Sheryl 24; PR Sheryl 55-58.) Sheryl testified at trial that she and Xavier would manage the household expenses as roommates. (RT 5/2/12 88:6-10.) Xavier confirmed that the commencement of the financial ledger by the parties on June 1, 2006 (Slip Op. at p. 7 ¶5; RT 5/2/12 18:7-14) and he acknowledged that the financial ledger was something new. (Slip Op. at p. 7 ¶4; RT 5/2/12 33:20-24.) He subsequently acknowledged in an e-mail to Sheryl, dated March 24, 2007, that the

financial ledger was a significant change. (PR Sheryl 21b.) Xavier confirmed Sheryl's actions in that same e-mail that she had "basically announced that you were going to stop putting money into the account we'd shared for almost fourteen years and you stated what you would be contributing to." (PR Sheryl 21b.)

The financial ledger on June 1, 2006 was not the only action Sheryl undertook to end the marriage. She engaged in the act of closing the joint bank account for the household after June 1, 2006 only to discover that she was unable to do so because she was not the primary owner. (RT 5/2/12 36:23-28, 37:1, 71:25-28, 72:1-6.) She ceased depositing all of her paychecks into the joint account the parties had used for the past fourteen years. She opened separate bank accounts in her name in order to deposit the portion of her income that would not be used for expenses related to the household or the children. (RT 1/10/12 34:21-27; RT 5/2/12 83:2-10; PR Sheryl 43-54.) She opened up another checking account in her name in October of 2006 so that her share of the household bills would be paid from said account. (RT 1/10/12 36:26-28, 37:1-3; PR Sheryl 55-58; PR Sheryl 66-68.) In June of 2006, Sheryl ceased using the Chevron and Macy's charge cards for which she had been an authorized secondary user. (RT 5/2/12 50:19-21.) She returned these same charge cards to Xavier in September, 2006. (RT 5/10/12 36:20-25.) Sheryl removed Xavier's name as an authorized user from her American Express card account in October, 2006. (Slip Op. at p. 6 ¶2; RT 1/10/12 36:15-19; RT 5/2/12 84:10-14; PR Sheryl 25-42.)

Sheryl prepared a financial ledger every month. (RT 5/2/12 73:3-4; PR Sheryl 24.) She continued to deposit $3,200 into the joint account as did Xavier. (RT 5/2/12 73:10-11.) She was consistent in her preparation and presentation of a financial ledger every month.

Xavier and Sheryl each became responsible for their respective personal expenses for gas, food, personal credit cards, cell phones, gym memberships and life insurance premiums. (Slip Op. at p. 6 ¶1; RT 1/10/12 33:2-4; 5/2/12 88:13-16; PR Sheryl 24.)

When Xavier subsequently failed to contribute enough money to the joint account to cover his share (50%) of their joint expenses, Sheryl decided to divide and allocate the individual community expenses with respect to the financial ledger. (Slip. Op. at p. 6 ¶1.)

With respect to social interactions with others, Sheryl no longer signed greeting cards with her and Xavier's name. (PR Sheryl 61-65.) After June 1, 2006, for example, she gave greeting cards to her mother with only her signature. (PR Sheryl 61-65.)

Her actions are confirmed by Xavier's own conduct after June 1, 2006. Xavier did not, as an example, inform Sheryl that he ceased working for Clorox in September, 2006. (RT 1/10/12 40:27-28, 41:1-5.) Xavier and Sheryl communicated with each other by e-mail with respect to the household expenses and their children, as documented by Xavier's e-mail to Sheryl several months after June 1, 2006, declaring that he had ". . . reason in the world to be positive or friendly with regard to you (your motives are clear). . . ." (Slip Op. at p. 6 ¶3; PR Sheryl 21b, ¶5, lines 17-19.)

At no point after June 1, 2006 did Sheryl intend to resume the marriage. All of the actions Sheryl took to separate the financial aspect of their marital relationship were a reflection of her furthering her intent to end the marriage. Finances were an important and critical facet of this marriage and were a legitimate object of their matrimony. Sheryl's actions were deliberate and intentional and the facts support her testimony at trial that she intentionally and thoughtfully worked hard not to send mixed messages to Xavier regarding their marriage.

Interpreted in favor of Sheryl under the substantial evidence rule, the date of separation is June 1, 2006.

### C. A Couple May be "Living Separate and Apart" When They Reside in the Same Residence Under Family Code Section 771.

#### 1. Family Code section 771, subdivision (a), does not mandate that couples physically reside in separate residences in order to establish the date of separation.

Xavier relies on *Norviel, supra*, 102 Cal. App. 4th 1152 to support his claim that the date of separation was July 1, 2011, the date that Sheryl moved out of the home. He relies on several factual similarities in the 2-1 holding in *Norviel* that "living apart physically is an indispensable threshold requirement to separation, whether or not it is sufficient, by itself, to establish separation." (*Norviel, supra,* 102 Cal. App. 4th at p. 1162.) The *Norviel* 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 residence." (*Id.* at p. 1163.)

*Norviel*, however, did not hold that in every case in California, as a matter of law, spouses must reside at different and separate addresses in order to be considered "living separate and apart" within the meaning of Family Code section 771. The *Norviel* court set forth, "[a]t the threshold, the required conduct includes some objectively ascertainable form of physical separation." (*Norviel, supra*, 102 Cal. App. 4th at 1164.) The *Norviel* court noted "there may be cases in which parties could remain under the same roof and still *live apart physically* within the meaning of the statute." *(Ibid.)* The *Norviel* court expressly recognized that its conclusion "did 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." *(Ibid.)*

The facts in *Norviel* concerned the conduct of a husband and wife over a two-month period, between June and August, 2008. The Court of Appeal in *Norviel* noted that the parties had already been sleeping in different bedrooms for approximately four years prior to the Husband announcing his decision to end the marriage, and that "nothing changed as a result of Husband's decision to separate except

the parties' habit of sometimes taking Sunday dinner alone together." *(Ibid.)* This differs from the facts of this underlying case. There was a significant change in the relationship between Sheryl and Xavier in June, 2006 wherein the one remaining thing they did together, which was share in the finances, changed on June 1, 2006. (RT 1/10/12 32:26-28; RT 5/2/12 60:2-5, 88:6-12; PR Sheryl 24; PR Sheryl 81.) This change was unambiguous, objectively ascertainable conduct amounting to a physical separation under the same residence.

Additionally, there was a significant physical change on July 1, 2006. Sheryl began a new job on that date requiring her to be in Los Angeles five days each week during the summer months and three to four days each week during the school year. (RT 5/2/12 79:8-19.) While in Los Angeles she stayed in a hotel, sometimes taking both children with her. (RT 5/2/12 79:8-19.) This was another significant change for Sheryl and Xavier - - from Sheryl living in the same residence seven days a week, every week, to living at the residence two to four days a week. Even applying the extreme and limited holding under *Norviel*, this change was unambiguous, objectively ascertainable conduct.

**2. A bright-line rule should never be applied by the California family law courts in determining what is living separate and apart under Family Code section 771, subdivision (a).**

Xavier seeks the adoption of a bright-line rule under *Norviel* that parties cannot live together under the same roof and yet be

separated. (AOB at p. 3 ¶4.) He suggests that this bright-line rule has been already been adopted by the Legislature since the Legislature has failed to amend Family Code section 771, subdivision (a), in order to contravene the 2002 *Norviel* decision. (AOB at p. 8 ¶2.) Xavier contends that "permitting trial courts to find that couples are living 'separate and apart' under Family Code section 771 while they continue to live together would be an unwarranted amendment to the Family Code section 771(a)." (AOB at p. 8 ¶8.)

The dissenting opinion of Acting Presiding Justice Bamattre-Manoukian in *Norviel*, however, correctly reasons that the application of a bright-line is not a workable rule in determining the date of separation under Family Code section 771. The dissenting opinion describes the majority's conclusion that the second factor was not shown (i.e., that there must be objective conduct furthering the subjective intent of at least one of the spouses to end the marriage) as the formulation of a "new standard." (*Norviel, supra,* 102 Cal. App. at p. 1165 (dis. opn. of Bamattre-Manoukian, Acting P.J.).) The dissenting opinion further states that it is not a "workable rule in the realm of family law" for the *Norviel* court to conclude "that the intent to end the marriage and the conduct furthering that intent must be present 'simultaneously' and that [l]ater conduct that is merely consistent with an earlier decision to separate does not support an earlier separation date.'" (*Norviel, supra*, 102 Cal. App. at p. 1166, citing Maj. opn., *ante*, at p. 1160 (dis. opn. of Bamattre-Manoukian, Acting P.J.).)

The dissenting opinion states, in part:

> "I do not believe this is a workable rule in family law. Parties who have reached a decision as difficult and emotional as ending a lengthy marriage may often be unable to simultaneously engage in such clear-headed conduct as changing legal title on properties, closing bank accounts, dividing funds and establishing new bank accounts, discontinuing and applying for new credit cards, and arranging for new housing. It may be that one spouse has not worked during the marriage or that there is a great disparity in income to be taken into account. There may be efforts to maintain some continuity for the children, and to resolve issues involving shared custody. Surely the parties should be allowed a transition period to take the necessary steps to untangle the financial, legal and social ties incident to their decision to change their marital status."

(*Norviel, supra,* 102 Cal. App. 4th at p. 1166 (dis. opn. of Bamattre-Manoukian, Acting P.J.).)

The dissenting opinion stated, that under the facts in *Norviel,* "[c]onduct consistent with this expressed intent [to end the marriage], and directed to effectuate a physical separation and eventual divorce, occurred thereafter over a relatively short amount of time." Under the facts gleaned in the dissenting opinion from the spouses' testimony in *Norviel*, facts which were not expressly discussed in the

majority's opinion, the Husband could not move out immediately because escrow to the rental property that these spouses were purchasing together, and to which they agreed Husband would move, had not yet closed; because the renovations of said rental property had not yet been completed, which included substantial repairs and refurbishment to the property; and because the Husband did not purchase necessary furnishings and appliances for the rental property until after said property had been repaired and refurbished. (*Id.* at p. 1167.) The dissenting opinion further noted from the totality of facts presented that the "[w]ife went through the family home, put labels on the furniture that husband would be taking to his new residence, and helped husband pack. Husband informed colleagues at work, including his supervisor and the vice-president of human resources, that he and his wife were getting a divorce, and he shared the decision with another close friend. Husband heard from a close friend of wife's who asked if there was anything to be done to save the marriage." (*Id.* at p. 1167.) The dissenting opinion additionally noted from the totality of the facts presented to the lower court that the parties in *Norviel* sat down together several weeks after the husband's decision to end the marriage, "mak[ing] a list of their assets, work[ing] out a tentative division of their property, including real estate, and develop[ing] a visitation plan for their children." (*Ibid.*)

The First District in this underlying case appropriately found the dissenting opinion of Justice Bamattre-Manoukian to be compelling. (Slip Op. at p. 11 ¶3.) "[A] rule that would require that

conduct be absolutely 'contemporaneous' with the expression of intent unduly restricts the trial court's ability to weigh all of the evidence of the parties' conduct." (*Norviel, supra,* 102 Cal. App. 4th at p. 1167 (dis. opn. of Bamattre-Manoukian, Acting P.J.).)

This Court should reject under *Norviel* the "imposition of a standard by which the trial court must find the parties' conduct to be 'unambiguous, objectively ascertainable conduct amounting to a physical separation. . . . The court must be allowed to consider all conduct and other factors bearing on either party's intentions to return or not to return to the marital relationship." (*Id.* at p. 1167-1168.)

The fact finder should be entitled to draw reasonable inferences from all of the evidence presented and not just from the application of a bright-line rule. "Where the evidence is subject to different inferences, we must accept the inferences reasonably drawn by the trial court in support of the judgment." (*Id.* at p. 1168; citing *Hotaling v. Hotaling* (1924) 193 Cal. 368, 379.)

### 3. The appropriate approach for determining what is "living separate and apart" is to examine a totality of the circumstances.

Xavier's assertion that it would be difficult enough for family courts to determine the date of separation in contested cases if a couple reside in the same residence underestimates the abilities these judges exercise on a daily basis. (AOB, p. 9 ¶1.)

In making findings and rendering decisions, including a bifurcated issue in determining the date of separation, family law

courts consider all the oral and documentary evidence, the testimony, the demeanor and credibility of the witnesses, the written and oral arguments of counsel, the materials submitted by the parties, and the pleadings, papers, and other documents filed with the Court. A totality of the circumstances approach allows family law courts to determine when spouses are "living separate and apart" from each other under Family Code section 771 by taking all of the facts into consideration and weighing them. Family law courts must be allowed to consider all the facts and the context in order to conclude from the whole picture a couple's the date of separation under Family Code section 771. Family law courts must be permitted to draw "reasonable inferences from *all* evidence presented" (Slip Op. at 11 ¶3.) in determining when a couple is living separate and apart from one another. To amend Family Code section 771 by mandating that a couple must live physically in separate residences as an indispensable threshold requirement to establishing their date of separation would be harsh, unduly rigid, and would unnecessarily chip away the discretion of a family law court when determining issues before it.

For family law courts to adopt a bright-line rule regarding what is "living separate and apart" under Family Code section 771 would be overly simplistic and would lead to harsh results unjustly. A typical spouse in California, for example, may face further financial difficulties simply by being required to move out of the marital residence as a prerequisite to establishing the date of separation rather than intentionally and meaningfully living as roommates at the same

residence, while taking the necessary steps to untangle any outstanding financial, legal and social ties incident to that spouse's decision to terminate the marriage.

In addition, *Norviel* was decided in 2002, at a time when many issues facing society in California then, as a whole, differed from what family law courts often find today. Family law courts may find, for example, a higher quantity of spouses living separate and apart from one another as roommates while they reside in the same residence, while at the same time losing this residence to foreclosure, due to job losses or other economic factors. Family law courts may find, as another example, a greater quantity of spouses consciously living separate and apart from one another while they share the same residence in order to co-parent their children, for their children's well-being. Further, a spouse may find from family law courts that there are no grounds available to obtain move-away orders from the Court against the other spouse prior to the filing of an action for dissolution of marriage or legal separation in order to establish a date of separation under Family Code section 771.

It is important to note that family law attorneys may advise their clients not to be the spouse / parent 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.)

Family Code section 771 does not require "physical separation" and no other statute requires that parties physically live at separate

addresses to be considered as separated.

Xavier's assertion that "[p]ermitting one spouse to 'backdate' the date of separation," thereby allowing "that spouse to erode the community without the other's knowledge" (AOB, p. 10 ¶1.) is disingenuous. Xavier claims that the "higher-earning spouse" would continue to reap the benefits of living at home and later "refer back to other, more subtle conduct as evidencing a 'breakdown' in the marriage and claim that all earnings from that day are separate." (AOB, p. 10 ¶1.) This claim is, also, disingenuous.

There is nothing subtle about one spouse telling the other spouse "Listen, this is done, you know, I am through. This is a final straw of our marriage. We are done." (Slip Op. at p. 2 ¶5; RT 1/10/12 32:2-23.) There is nothing subtle about one spouse telling the other spouse that she cannot continue to pretend with this charade of a marriage. (RT 1/10/12 33:24-26.) There is nothing subtle about one spouse telling the other spouse the she will continue contributions for her one-half share of the household expenses, commencing June 1, 2006. (Slip Op. at p.5 ¶4; RT 1/10/12 32:23-25.) There is nothing subtle about developing and presenting to the other spouse, at the time of announcing her intent to end the marriage, a financial ledger itemizing every known and anticipated household expense as well as anticipated expenses for the children, and informing the other spouse that these expenses are to be divided 50/50. (Slip Op. at p. 5¶4; 1/10/12 32:26-28, 37:19-22; RT 5/2/12 88:6-12; PR Sheryl 24; PR Sheryl 76 ¶10.) There is nothing subtle

about preparing a financial ledger for yourself and the other spouse each month, based on actual bills and projected bills that have not yet come in. (RT 5/2/12 73:3-4; PR Sheryl 24.) There is nothing subtle about a spouse terminating her usage of credit cards and charge cards for which she is a secondary, authorized user as well as removing her spouse as an authorized user for her own American Express charge card. (Slip Op. at p. 6 ¶2; RT 1/10/12 36:15-19, 36:20-25; RT 5/2/12 84:10-14; PR Sheryl 25-42.) There is nothing subtle about a spouse intentionally declining invitations by the other spouse to go on vacations, after the pre-planned Hawaiian vacation with and for their children in August, 2006 (a trip which the spouses agreed to continue for the benefit of the children). (Slip Op. at p.6 ¶4; RT 1/10/12 35:2-5; RT 5/2/12 85:22-27.) For the purpose of establishing the date of separation under Family Code 771, a couple may be "living separate and apart" when they reside in the same residence. One spouse or both spouses may engage in conduct that demonstrates as well as reasonably infers that they are no longer part of the community for purposes of maintaining community property.

Here, there was no "scheme" (AOB, p. 11 ¶3) on the part of Sheryl to confuse or manipulate Xavier into believing that the marriage continued after June 1, 2006. She did not obscure her intent to end the marriage. She did not obscure any of her conduct that the marriage was over - she was done. Sheryl asked Xavier to move out and he refused. (RT 5/2/12 58:26-28, 59:1-2.) He told her he would not be leaving the house. (RT 5/2/12 58:2-28; 59:1-2.) She continued

to reside in the same house as the residence was as much hers as it was his. (RT 5/2/12 59:9-12, 76:7-8.) Sheryl maintained little contact with Xavier while she was at the home, retreating to the guest room while she was there (RT 5/2/12 60:17-20), unless the children begged her to come out of the guest bedroom and participate in various family interactive activities, which was often. (RT 5/2/12 60:22-25.) There are neither facts nor reasonable inferences available to support Xavier's claim that he remained committed to their marriage, "bound by his emotions, family, and religious beliefs" (AOB, p. 11 ¶3) to continue the marriage and after Sheryl declared her intent to end the marriage, engaging in conduct towards ending the marriage.

Xavier asserts that Sheryl leveraged "the technical requirements of the law for economic gain." (AOB, p. 11 ¶3.) Xavier discredits the fact that, on June 1, 2006, he was earning $20,000 per month in salary while Sheryl was earning a range of $3,000 to $4,000 per month as an independent contractor. (Slip Op. at p. 2 ¶3; RT 5/2/12 75:15-16.) Sheryl was earning far less than Xavier on June 1, 2006 and thus, her intent, words, and action to end the marriage on June 1, 2006 were not done for financial gain.

**4. Family law courts should be allowed to determine that a couple may be "living separate and apart" under Family Code section 771 when they reside in the same residence and have abandoned the relationship in every**

**meaningful way.**

As discussed above in Part V. C. 2., above, application of a bright-line rule requested by Xavier, mandating that spouses must be living in separate residences in order to establish the date of marital separation, restricts family law courts from drawing reasonable inferences from and all of the evidence presented and considering all conduct and other factors bearing on a party's intentions to return or not return to the marital relationship. It should not be determinative where the parties live. The real question is how the parties live and "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.)

The First District herein, in affirming the lower court, determined in its analysis of cases *In re Marriage of Hardin* (1995) 38 Cal. App. 4th 448 and *In re Marriage of Manfer* (2006) 144 Cal. App. 4th 925 that "physical separation is but one factor to consider in determining the date of separation." (Slip. Op. at p.9 ¶4 - p. 10 ¶1.) Physical separation should not be an "essential manifestation" in determining whether a couple is living separate and apart. (AOB, p. 14 ¶2.)

In its opinion, the court observed in *Hardin*: "Maintenance of separate residences is not necessarily indicative of separation." *Hardin, supra*, at p. 454, fn. 5.) Under the facts of *Hardin*, fourteen years went by between 1969, when the husband left the family residence, and 1983, the year their marriage was dissolved. Even

though the parties physically lived in separate residences during this fourteen year time period, they continued to see each other regularly, they acquired real property together, and their economic relationship remained unchanged. (*Hardin, supra*, at p. 454.) Also during this fourteen year period, the wife continued on as a corporate officer in the family business and "signed, at [husband's] request, all documents presented to her in connection with this business. Bank documents *executed* in 1982 indicated they were married and not separated and all of their property was community." (*Hardin, supra*, at p. 454.) (italics added.) Further, it was determined that the lower court failed to consider other significant events regarding the husband's intentions to end the marriage. (*Hardin, supra*, at p. 454.) The husband testified at trial, for example, that "he did not make the decision to end his marriage until between early 1982 and early 1983." (*Hardin, supra*, at p. 454.) In addition, the husband "never disclosed to any person, including [wife], that he intended to end the marriage by divorce until January of 1983 and he sent her many cards in which he wrote: 'Love,' 'All my love,' 'Your loving husband,' 'I'll straighten out some day,' and 'You deserve lots of sympathy for putting up with me.'" (*Hardin, supra*, at p. 454.) Also, it was determined that the lower court failed to make findings on significant disputed facts, such as the extent of their relationship. The wife was a hostess at various business functions for those fourteen years, including picnics and an annual Christmas party. (*Hardin, supra*, at pp. 454-455.) The wife also sent Christmas cards annually to their

family business employees on behalf of herself and the husband for those fourteen years. (*Hardin, supra*, at p. 455.) The Fourth District in *Hardin* reversed the lower court because the lower court erred in concluding the appropriate standard as " '[w]ould society at large deem the couple to be separated based upon the facts and based upon the evidence [presented]?'" (*Hardin, supra,* at p. 450.)

In *Manfer,* the husband moved out of the family home and into an apartment he had previously rented after approximately thirty-one years of marriage, and the wife, in her mind, determined "the stormy marriage was finally over." (*Manfer, supra*, at p. 928.) Both spouses decided together not to tell their children, family, and friends they were getting a divorce. (*Manfer, supra*, at p. 928.) In order to keep up appearances, they 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." (*Manfer, supra*, at p. 928.) The appellate court found the trial court to have erroneously concluded "that regardless of the parties' subjective intentions and the objective evidence relating thereto, the date of separation depends on whether society at large would consider the parties separated." (*Manfer, supra*, at p. 927.) The trial court found a later date of separation as being when the Manfers began telling other people that they were getting a divorce, The appellate court reversed the decision. It was not a question of what society at large would have perceived being the Manfers' date of separation but what the subjective intent to end the marriage was,

as "objectively determined from all of the evidence reflecting the parties' words and actions during the disputed time. . . ." (*Manfer, supra*, at p. 930.)

Contrary to Xavier's assertion, a couple residing in separate residences is not an "essential manifestation" in determining when spouses are "living separate and apart." (AOB, p. 14 ¶2.) Sheryl has demonstrated that a couple can live separate and apart from one another even when residing in the same residence, as roommates, and for Sheryl and Xavier, as co-parents of their children.

The First District herein, in affirming the lower court, correctly determined that "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." (Slip Op. at p. 11 ¶3.) (Italics added.)

Sheryl has demonstrated that a spouse can continue to live in the family home while having abandoned the marital relationship in every meaningful way. She lived with Xavier as roommates once she declared that the marriage was over on June 1, 2006. After June 1, 2006, the parties changed the way they managed their finances with

the implementation and use of the financial ledger. The change in the management of their finances was significant in the parties' conduct regarding their date of separation.

**5. This Court should not adopt the application of a bright-line rule regarding Family Code section 771, subdivision (a), merely because other states may support a bright-line rule.**

To support his position of a bright-line rule under *Norviel*, Xavier offers additional cases in other jurisdictions, such as Louisiana, Alabama, or Idaho, to demonstrate that parties must be residing in separate dwellings in order to be living separate and apart. (AOB, p. 15 ¶¶2-4.) However, there is truly nothing to be gained in these cases from approximately sixty to sixty-five years ago from other jurisdictions that would have any application in California in 2014. Application of the bright-line rule is not necessarily better and it would not approach Family Code section 771 with a modern view of society.

In addition, the court in *Norviel* noted cases from other jurisdictions whereby parties residing in the same house are deemed living separate and apart: "*Graves v. Graves* (1906) 88 Miss. 677 [41 So. 384] [divorce may be awarded on ground of wife's abandonment, even though parties lived under same roof, where wife occupied separate portion of house, refused to take meals with husband, and refused to cohabit with him]; *Gove v. Crosby* (1954) 98 N.H. 469, 473 [102 A. 2d 905, 906-907] [for purposes of succession statute,

decedent was "justifiably" living apart from abusive surviving husband, even though she did not occupy a separate dwelling]; *State v. Brecheisen* (1984) 101 N. M. 38, 42 [677 P. 2d 1074, 1078] [for purposes of criminal rape statute requiring a nonspouse victim, parties may be "living apart" despite the lack of separate abodes.]." (*Norviel, supra*, at p. 1163.)

**D. A narrow exception permitting a finding of separation in certain circumstances under *Norviel* should not be created by this Court.**

Xavier requests that this Court permit a finding of separation in "certain rare circumstances" under a bright-line rule where "a couple has quite obviously intended to separate, as communicated in by words and in deeds, but one of them has failed to move from the residence." (AOB, p. 16 ¶2.)

The *Norviel* court acknowledged that a couple can continue living together and yet be physically separated: "our conclusion does not necessarily rule out the possibility of some spouses living apart physically while still occupying the same dwelling." (*Norviel, supra*, at p. 1164.) However, the *Norviel* court pursues a bright-line rule in its holding that "the evidence would need to demonstrate unambiguous, objectively ascertainable conduct amounting to a physical separation under the same roof." (*Norviel, supra,* at p. 1164.) This same court goes further in its bright-line application that "at a minimum - the physical separation required by the statute must be qualitatively different from the parties' conduct during the

marriage." (*Norviel, supra,* at p. 1164.)

It is important to note that a narrow exception is not needed. Xavier's contention that a narrow exception may be created by this Court is an acknowledgment on his part that the application of a bright-line rule will lead to harsh results across the board. It will also prevent a court from considering "all conduct and other factors bearing on either party's intentions to return or not to return to the marital relationship." (*Norviel, supra,* at p. 1166 (dis. opn. of Bamattre-Manoukian, Acting P.J.).) Further, Xavier refers to *Popescu v. Popescu* in which the Court upheld a finding that parties living in the same household were nevertheless separated. (*Popescu v. Posescu* (1941) 46 Cal. App. 2d 44, 52.) [the wife refused to speak to the husband, locked herself in certain rooms of the house, refused to cook husband's meals, and refused to perform any duties of a wife.]

Here, even if the Court apply such a narrow exception, Sheryl meets such a restrictive standard.

Xavier likens himself to a character in a movie made in Hollywood, the 1989 film *War of the Roses.* He mischaracterizes his narrative as well as the issue before this Court. In that movie, the husband and wife acted with the full-on intent of destroying the other. In that movie's narrative, the spouses physically fight with the intent to kill the other, and that is not the situation here. Sheryl never fought with Xavier as to who will stay in the marital home until the death of one spouse. Sheryl never desperately forced Xavier to move

from the residence. Sheryl never destroyed the home in the process. Here, the date of separation is June 1, 2006.

## VI. CONCLUSION

The Court should determine that, as a matter of law, for the purpose of establishing the date of separation under California Family Code section 771, a couple may be "living separate and apart" when they reside in the same residence. Further, the Court should not permit a finding of separation under certain limited circumstances, as Xavier requests, as it is not necessary.

Dated: May 14, 2014

Respectfully submitted,
IVIE, McNEILL & WYATT

By: _____
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## CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 12,734 words as counted by Corel WordPerfect X6 word processing program used to generate this brief.

Dated: May 14, 2014

BY: Lilia E. Duchrow
LILIA E. DUCHROW

## PROOF OF SERVICE

I am employed in the County of Los Angeles at 444 South Flower Street, Suite 1800, Los Angeles, California 90071. On the date of mailing, I am over the age of eighteen, and not a party to the above-described action.

On May 14, 2014, I served the within:

**RESPONDENT'S ANSWER BRIEF ON THE MERITS**

by depositing a true copy thereof enclosed in a sealed envelope addressed as follows:

Stephanie J. Finelli, Esq.
Law Office of Stephanie J. Finelli
3110 S Street
Sacramento, California 95816
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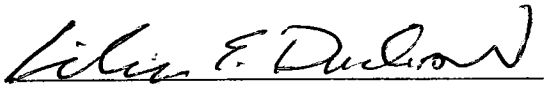
BY NORCO DELIVERY SERVICES for overnight express mail delivery. I caused such envelope to be delivered to the Law Office of Stephanie J. Finelli via Norco Delivery Services for overnight express delivery, for the morning time available.

Executed on May 14, 2014 at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



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