IN THE
SUPREME COURT OF CALIFORNIA

In re the Marriage of Sheryl Jones Davis and Keith Xavier Davis	**CASE NO.: 215050**
SHERYL JONES DAVIS, *Respondent,* vs. KEITH XAVIER DAVIS, *Appellant*	First District Court of Appeal Case No. A136858 Superior Court No. RF 08 428441 Alameda County

PETITIONER'S REPLY BRIEF ON THE MERITS

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

Appeal From Bifurcated Order of the Alameda County Superior Court
Commissioner Elizabeth Hendrickson Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases **Page**

California Statutes

I. INTRODUCTION

The majority of Respondent's Answer Brief reads as a Respondent's Brief to an intermediate appellate court, focusing on the specific situation of Xavier and Sheryl, and urging this Court to affirm the decision as to the date of their separation. But the issues in this case are far broader and further reaching than those between Sheryl and Xavier. Certainly Xavier maintains that this case was wrongly decided by the trial court and erroneously affirmed by the First District. But the reason it was wrongly decided was because those courts misinterpreted Family Code section 771 to find that the parties were separated well before they began "living separate and apart."

In his Opening Brief, Xavier urged this Court to hold that a couple may **not** be deemed living separate and apart for purposes of Family Code section 771 while they continue to reside together under the same roof. This will provide family courts, as well as litigants and their attorneys, with a bright-line rule. As such, parties need not guess as to when they are separated or seek to manipulate the date; attorneys can properly and confidently advise their clients; and judges need not preside over prolonged litigation or engage in extensive fact-finding regarding date of separation, which is one of the most basic and preliminary factors in a dissolution action.

In the alternative, if this Court is not prepared to adopt such a bright-line rule, Xavier requests this Court craft a limited exception to permit a finding of legal separation where the parties have physically separated under the same roof in a manner that is qualitatively different than a physical separation they experienced during the marriage, and which is contemporaneous with a subjective intent to end the marriage which is actually communicated to the other spouse.

II. LEGAL ARGUMENT

A. Requiring a Physical Separation Is Consistent With the Plain Language of Family Code Section 771 and Community Property Law

1. Affirming the decision would be a departure from law, which requires a physical separation in the form of separate homes

In *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 1162, the Sixth District specifically held that parties cannot live together and yet be separated. That court stated that living separate and apart under Family Code section 771 "'applies to a condition where the spouses have come to a parting of the ways and have no present intention of resuming the marital relations and taking up life together *under the same roof*.'" (*Norviel, supra* at p. 1162, citation omitted; italics in *Norviel*.)

Respondent seeks a departure from this rule, which has been the law since 2002. She argues that "no particular facts" bearing on the issue of whether parties are living separate and apart "are per se determinative." (Answer Brief at p. 25.) She later cites to a number of cases in which the courts have stated that physical separation is "but one factor" in considering date of separation and that maintaining separate residences is "not necessarily indicative of separation." (Answer Brief at pp. 45-48.) But in those cases, the parties were living in separate residences. The issue was whether such alone was sufficient to constitute "living separate and apart," and those courts held that it was not.

That something more than separate residences is required for a couple to be separated does not mean that such a physical separation is unnecessary; quite the opposite. It means separate homes are necessary, but that something more is required as well. Affirming the decision to provide that parties may be living separate and apart while they continue to reside together under the same roof would be an unwarranted, unnecessary, and unworkable departure from this well-settled law.

2. A change in the management of finances or work hours does not constitute a separation under Family Code section 771

As noted above, *Norviel* requires separate living arrangements in order for the parties to be deemed "living separate and apart." Respondent's attempts to distinguish this case from *Norviel* and her assertions that the Davises did experience a "physical separation" (Answer Brief at pp. 34-35) even further demonstrate why a bright-line rule requiring a physical separation in the form of separate residences is important.

Respondent argues that the change in how the parties managed their finances was "unambiguous, objectively ascertainable conduct amounting to a physical separation under the same residence." (Answer Brief at p. 35.) And yet it is not. Under no reasonable scenario could a change in the management of finances constitute a "physical separation." Affirming the ruling to allow conduct not amounting to a physical separation to constitute a "physical separation" for purposes of Family Code section 771 is its own form of double-speak. It creates a slippery slope indeed. The Legislature has for many years required parties to be "living separate and apart" in order to be legally separated for purposes of extinguishing community property rights. (Fam.Code §771(a).) Allowing a change in the management of finances—a change that the majority of long-term marriages likely undergo at some point as spouses gain and lose jobs and children are born, raised, and leave the home—to constitute a physical separation would be dangerous indeed.

Respondent claims that another physical change amounting to a physical separation was her new job that required her to travel frequently, thus causing her to be physically apart from Xavier for larger portions of time than she had previously. (Answer Brief at p. 35.) And yet allowing a spouse's new work schedule to constitute the type of physical separation required under Family Code section 771 would set a dangerous precedent and would work a severe injustice on those whose spouses travel for a living. Imagine the dismay of the wife of the

long-distance trucker, professional athlete, or regional sales manager upon discovering that her husband's new job was not actually earning money for the family, but constituted a physical separation and that his earnings are his separate property. Such would "fl[y] in the face of the strong presumption of community property that generally applies in this state." (*Norviel, supra* at pp. 1163-1164.) Moreover, the traveling spouse is also physically absent from the children and the shared household, leaving the other spouse in charge of their care. To further burden that spouse with the possibility that the other spouse's absence might constitute a "separation" is not only unfair, but does violence to the concept of community property and the fiduciary duties within a marriage.

In an effort to convince this Court that the lower ruling was correct and should constitute the law regarding date of separation in this State, Respondent argues that she engaged in objective conduct "furthering her subjective intent to end the marriage." (Answer Brief at p. 30.) That conduct, Respondent argues, was the creation of the financial ledger whereby the parties would each pay a one-half share of the joint expenses and be solely responsible for their own expenses. (Ibid.) Respondent also points to what she terms other actions in furtherance of this intent to end the marriage, but the majority of these actions were merely in furtherance of her actions in segregating the parties' finances. (Answer Brief at pp. 31-32.) And many of them did not occur in or around June 1, 2006, but were months later. (Ibid [new checking account and removal of Xavier's name from her credit cards occurred in October 2006].) The actual physical separation was years later.

Respondent's suggestion that courts look at the "totality of the circumstances" to determine date of separation is unworkable. It is a "standard" that provides no standard at all. Permitting a lower court to find that spouses are separated even while continuing to reside together based upon such amorphous and ambiguous conduct as segregating finances or failing to sign the other spouse's name to a greeting card (what spouse doesn't do that from time to time)

would be unworkable. It would allow conduct that is merely two unhappily married people trying to make the best of a bad situation to later constitute a "separation" that as yet had not occurred.

3. A bright-line rule prevents manipulation of the separation date

In response to the argument that a higher earning spouse might be able to "backdate" a date of separation, Respondent states "there is nothing subtle about" one spouse telling the other she is "done" with the marriage, presenting a ledger with which to divide household expenses, terminating the joint use of credit cards, and declining invitations to go on vacations. According to Respondent this should be enough to signify separation. (Answer Brief at pp. 42-43.) To the contrary, these are woefully insufficient. Once again, marriages are complicated. Many long-term marriages that involve minor children in which both spouses work outside the home go through numerous fluctuations, both financial and emotional. Many spouses have uttered—or heard uttered—the words "I'm done" at least once during a long-term marriage. But with no follow-through in the form of actually filing for divorce or moving out of the house, these words ring hollow, as well they should. If words said in the heat of an argument were sufficient to establish date of separation, there would be no need for Family Code section 771—or marriage. People could just "go steady" for a period of time, produce children, purchase property, and when they decide they have had enough, abandon the relationship. But that is not how family law in California works. This is a community property state. And "property acquired during a legal marriage is strongly presumed to be community property and that presumption is fundamental to the community property system." (*In re Marriage of Von der Nuell* (1994) 23 Cal.App.4th 730, 734.) To protect such property, the Legislature enacted Family Code section 771 to require that the parties be living separate and apart in order for earnings thereafter to be separate. (See *Norviel, supra* 102 Cal.App.4th at pp. 1163-1164.)

Additionally, the concept of living together as "roommates" while continuing to be married is one that is may be withstood by many couples for various time periods during a long-term marriage. Marriage is not always "happily ever after," and couples who are together for 10, 20, 30 years often experience bad patches. The Davises are a prime example. But marriage is not merely an emotional commitment. It is a financial one. It is a legal contract between two people which is governed by the laws of this State. (Fam.Code §§300, 309.) This State and this Court must respect it as such.

B. This Court Should not Adopt the Dissent in *Norviel*

In support of her position, Respondent cites the dissenting opinion in *Norviel, supra*, in which Justice Bamattre-Manoukian asserted that it was not a workable rule to require the subjective intent to end the marriage and the objective conduct furthering that intent to occur simultaneously. (Answer Brief at pp. 36-37, citing *Norviel, supra* 102 Cal.App.4th at p. 1166.) Respondent urges this Court adopt the dissenting opinion in *Norviel*, which maintains that requiring the physical separation be contemporaneous with the subjective intent "unduly restricts the trial court's ability to weigh all of the evidence of the parties' conduct." (Answer Brief at p. 39, citing *Norviel, supra* at p. 1167.) However, this Court should not adopt it. Allowing that level of subjectivity to permeate what should be a simple decision—and one that must be made at the outset so as to properly apportion separate and community property—would do far more certain harm than potential good.

The most glaring problem with adopting the *Norviel* dissent is that it will lead to an inconsistent application of the law. There are 58 counties in California, and over 1,500 superior court judges, each with his or her own view of the world. Allowing something as important as date of separation to be determined on a subjective case-by-case basis will undoubtedly lead to inconsistent decisions. This is only compounded by the fact that courts are overburdened; some people lie

quite well; and others are unrepresented and confused. A court can very easily come to the "wrong" decision on date of separation based upon incomplete or inaccurate information. And future litigants contemplating divorce will be able to craft their conduct to enable them to assert a prior date of separation. In other situations, one spouse may highlight certain prior conduct and claim that meant the parties were separated. Suddenly such benign actions as driving to school events alone, neglecting to sign the other spouse's name to a greeting card, increasing business travel, and opening one's own checking account will take on a whole new meaning. Add to that a few caustic arguments in which one or both threaten divorce, and now a spouse who thought she was part of a rocky but intact marriage finds she has been separated for months—if not years. This has even more important ramifications for those marriages that hover around the 10-year mark. If the higher earning spouse can convince a court that the date of separation was really only nine years into the marriage and not when he finally moved out a year and a half later, he or she may be faced with only four or five years of spousal support, rather than a lifetime. (Fam.Code §4336(b).)

Litigants should not be subjected to such variables in the imposition of the legal standard, and judges should not be required to make such decisions. Litigants and their attorneys, as well as judges, will benefit from a legal standard that is readily ascertainable and applied across the board. The date of separation should not become yet another topic of long-cause hearings in this State. Rather than create one more issue for divorcing couples and their attorneys to litigate, this Court should create a definitive standard that is easily understood by everyone. Consistent with the plain language of Family Code section 771, that standard should require a physical separation in which the parties no longer reside together under the same roof—or at the very least in which they have undergone a physical separation under the same roof that is qualitatively different from that which they had previously experienced and which is contemporaneous with the expressed intent to separate.

That the *Norviel* dissent is unworkable as a rule of law is demonstrated by Respondent's reliance upon it as a basis for affirming the instant decision. In *Norviel, supra*, the dissent noted that the husband's expression of his subjective intent to end the marriage and his move from the residence occurred within "a relatively short amount of time;" and chronicled the efforts husband made to move out sooner, which were thwarted by several factors. (Answer Brief at pp. 37-38, citing *Norviel, supra* at p. 1167.) The dissent stated, "I believe the trial court was entitled to determine whether this conduct occurred sufficiently close to the date of June 28, 1998, to demonstrate an intent to implement the decision on that date to end the marriage." (*Ibid.*)

But even under the law as urged by the dissent in *Norviel*, the instant case was not decided correctly. Unlike in *Norviel*, Respondent made no efforts to move from the house in June 2006—or at any time until after she filed for dissolution. There was no purchase of another residence, packing of boxes, or informing co-workers of the impending divorce. (Cf. *Norviel, supra* at p. 1167.) To the contrary, life continued on as before, with the exception of Sheryl's new job and the financial ledger. There was no effort to physically separate any more than the parties had before. They even went to Hawaii together.

And yet the specific facts of this case are not overly important. What is important is that the law created by this case, given its specific facts, creates a standard for "living separate and apart" that is really no standard at all and is actually a contradiction of the very terms "living separate and apart."

C. Potential Financial Difficulties Should not Undermine the Rule

Respondent argues that a spouse who is required to move from the marital residence as a prerequisite to establishing the date of separation "may face further financial difficulties" and speculates that more spouses may be living "separate and apart" and yet living together as roommates. (Answer Brief at p. 40-41.) These are not valid reasons to abandon a workable bright-line rule.

First, as to the financial difficulties: this is the same argument the respondent unsuccessfully made in *Norviel*, asserting that a rule requiring separate dwellings as a predicate to separation "could preclude California's less affluent couples from establishing a date of separation and ending the accumulation of community property." (*Id* at p. 1163.) The *Norviel* Court responded that such argument "flies in the face of the strong presumption of community property" and "that unfortunate state of affairs is not a sufficient basis for courts to ignore a clear statutory mandate. (*Id.* at pp. 1163-1164 [citations omitted].)

In the intervening 12 years, the Legislature has not amended Family Code section 771(a) to address this concern, thus indicating that *Norviel's* interpretation of section 771(a) to require separate dwellings is correct. For this Court to suddenly decide that couples need not be living separately in order to be living "separate and apart" because they might experience financial difficulties would be an unwarranted amendment to Family Code section 771(a) that the Legislature itself has decided not to make.

Moreover, divorce is expensive. Obtaining separate residences is just one of the many expenses couples face when they decide to end their marriage. Respondent's argument that potential financial difficulties should relieve spouses from complying with the statutory requirements of living separate and apart in order to be separated is thus unavailing. And is it really unfair to require the spouse who is urging an earlier date of separation to meet the statutory definition of living separate and apart? It seems far more unfair to impose an earlier date of separation on the other, unwitting spouse.

And, if one spouse is truly financially unable to move out of the residence, there are other avenues to establish a date of separation, such as filing and serving a petition for dissolution or even for legal separation. Moreover, if the parties are in such dire financial straits that establishing separate residences is truly not an option, then date of separation will likely not be a major factor in the dissolution. This argument is thus a red herring. Here, as in *Norviel*, Sheryl was not

financially unable to move from the residence; she was earning over $130,000 per year. Her excuse for not moving sooner: "because of my salary it would not make good business sense to rent." (RT 5/2/12 page 80.) She was not financially unable to move or to file for legal separation or dissolution; she simply chose not to. But her decision not to move, not to file for legal separation, and to continue in the marriage but with a "financial ledger" means that her income continued to be community property, consistent with Family Code section 771.

D. At the very Least, Separation Under the Same Roof Requires a Qualitatively Distinct Physical Separation That Is Contemporaneous With an Expressed Intent to End the Marriage

Respondent's attempt to distinguish this case from the film *War of the Roses* only further demonstrates why any exception to the bright-line rule requiring a couple be in separate residences to be living separate and apart must be narrowly tailored. It must be limited to the specific circumstance in which the parties have in fact physically separated within the house in a qualitatively distinct manner that is both contemporaneous with and demonstrative of a subjective intent to separate and which is communicated to the other spouse.

In that film, as Respondent notes, the parties were actually trying to destroy each other to force the other to move. Here, in contrast, life continued on largely as before, with each party trying to stay out of each other's way, each forging a separate peace for him or herself within the context of an unhappy but intact marriage. This case presents a perfect opportunity for this Court to set forth the law on date of separation, and to use the facts of this case to highlight what is sufficient and what is not sufficient to constitute living separate and apart.

III. CONCLUSION

This Court should determine that, as a matter of law, in order for a couple to be "living separate and apart" under Family Code section 771(a), they must be

physically separated, meaning they are no longer living under the same roof. In the alternative, if this Court deems such law unduly harsh, it may permit a finding of separation in certain rare circumstances. It must be limited to couples who physically separate within the same residence in a qualitatively different manner, which is contemporaneous with the intent to separate and communicated to the other spouse.

Dated: May 30, 2014

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION
PURSUANT TO CRC RULE 8.520

Pursuant to California Rules of Court, Rule 8.520, I hereby certify that the Petitioner's Reply Brief is proportionately spaced, has a typeface of 13 points or more, and contains no more than 3,502 words, including footnotes, as counted by the Microsoft Word processing system used to generate the brief.

Dated: May 30, 2014

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