

79662-9

FILED
CLERK OF COURT
APPELLATE DIVISION
JAN 11 2011
11:52
BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MARIUSZ K. KOWALEWSKI,)	
)	
Appellant,)	No. 34256-1-II
)	
and)	
)	
BARBARA KOWALEWSKA,)	RESPONDENT'S MOTION
)	ON THE MERITS TO
Respondent.)	AFFIRM
)	

I. Identity of Moving Party.

The respondent, Barbara Kowalewska, by and through her attorney of record, Jason P. Benjamin of the Law Offices of Benjamin & Healy, PLLC, respectfully requests the relief designated in part II.

II. Statement of Relief Sought.

II. Statement of Relief Sought.

The respondent, Barbara Kowalewska, respectfully requests that this Court grant a Motion on the Merits pursuant to RAP 18.14 affirming the trial court's ruling denying the appellant's Motion to Amend Decree.

III. Statement of Facts Relevant to Motion.

1. The appellant asked this court to make equitable declaratory rulings involving the real estate in his Pretrial Information Form attached hereto as Exhibit A.
2. The appellant asked this court to make equitable declaratory rulings involving the real estate in his Motion for Reconsideration &/Or For New Trial attached hereto as Exhibit B.
3. The trial Court did not purport to directly affect title to property in Poland by making equitable declaratory Decrees as to who is awarded which parcels of real property. CP 23.

IV. Grounds for Relief and Argument.

It is frustrating from the respondent's point of view that the appellant asked the trial court throughout the trial and in a motion for

reconsideration to make rulings on how it felt the real property in Poland should be divided and now is appealing on the basis of jurisdiction solely because he disagreed with the trial court's position.

It is agreed by the respondent that the Superior Court of Washington is without jurisdiction to directly affect title in another state or foreign country.

However, in the instant case, it is certainly up to Poland to decide how much weight, if any, should be given to the Pierce County Decree of Dissolution in regards to the real property situated in Poland.

The appellant does not indicate how this Decree affects him or prejudices his interests in any fashion.

More importantly, the trial court specifically clarified that ". . . the Court did not purport to directly affect title to property

in Poland by dividing the parties' rights and interest in said property by the provisions of the Decree. . . . "

This line of reasoning is supported by a California case that is directly on point. In In re the Marriage of Yehoshua, 154 Cal.Rptr.80

(1979) the Court held:

It is recognized that California cannot enter a decree directly affecting title or interest in real property outside its borders. It may, however, establish and declare the interests in such property and enter orders in aid fo such declaration requiring the parties to execute conveyances in compliance therewith. In support of the judgment we interpret the decree entered as a mere declaration of entitlement to the property which has no direct effect on the title to the property in Israel.

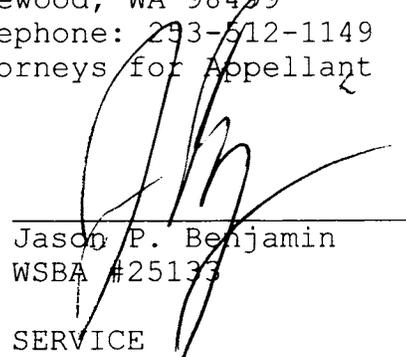
Id. (Attached as Exhibit C). The same is true for the case at bar.

V. Conclusion.

Based on the arguments, records and files contained herein, respondent respectfully requests that the trial court's decision denying the

RESPECTFULLY SUBMITTED this 22nd day of May,
2006.

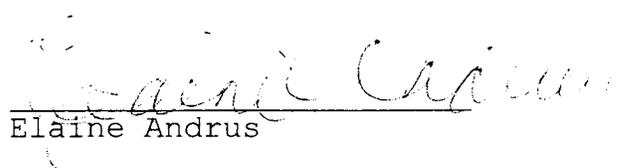
LAW OFFICES OF
BENJAMIN & HEALY, PLLC
10116 36th Ave. Ct. S.W.
Suite 310
Lakewood, WA 98499
Telephone: 206-512-1149
Attorneys for Appellant

By: 
Jason P. Benjamin
WSBA #25133

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 22, I delivered to an employee of the clerk's office of the Division II Court of Appeals in Tacoma, Washington, the original of Respondent's Motion on the Merits to Affirm, and requested that the same be filed with the court; and I further delivered an employee at the office of attorney John Stratford Mills, located at 944 Court E, Tacoma, Washington 98402, a true and correct copy of said document.

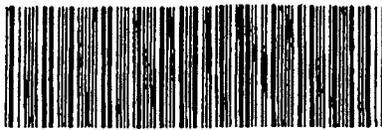
Signed at Lakewood, Washington, on May 22,
2006.


Elaine Andrus

RESPONDENT'S MOTION ON
THE MERITS TO AFFIRM
Page 5 of 5

FILED
COURT CLERK
MAY 22 2006
BY: 

EXHIBIT A



03-3-03700-1 22580871 PIF 02-18-05

12449 2/18/2005 53



PIERCE COUNTY SUPERIOR COURT
STATE OF WASHINGTON

8	In re the Marriage of:)	NO. 03-3-03700-1
)	
9	MARIUSZ KOWALEWSKI,)	PETITIONER'S
)	PRETRIAL INFORMATION FORM
10	Petitioner,)	
)	
11	and)	
)	
12	BARBARA KOWALEWSKA,)	
)	
13	Respondent.)	

14 THE UNDERSIGNED does hereby solemnly declare the following, which is accurate as of
15 the date of trial.

16 This form submitted by: MARIUSZ KOWALEWSKI, Husband.

17 I. GENERAL INFORMATION.

18 A. Ages: Wife 52 Husband 52

19 B. Date of: Marriage July 5, 1975

20 Most Recent Separation: November 16, 2003

21
22 KEVIN G. BYRD
Attorney at Law • WSBA 12894
Suite 108 10116 36th Ave. Court SW
Lakewood, Washington 98499

Telephone 253.565.8888
Facsimile 253.566.6706

1 C. Dependent children of this marriage living with either party:

2 No minor children.

3 D. Dependent children of prior marriages:

4 Not applicable.

5 E. Support provided or received for children of prior marriage:

6 Not applicable.

7 II. MONTHLY INCOME AND MONTHLY EXPENSES OF PERSON SUBMITTING THIS
8 FORM:

9 Please see Petitioner's Financial Declaration submitted herewith.

10 III. CHILD SUPPORT I PROPOSE IS AS FOLLOWS:

11 Does not apply.

12 IV. PROPOSED ASSET AND DEBT DISTRIBUTION:

13 Please see Petitioner's Proposed Asset / Debt Division worksheet submitted herewith.

14 V. OTHER DATA WHICH WILL BE PROVIDED AT TRIAL, AND CONCERNING WHICH
15 EVIDENCE OR STIPULATIONS WILL BE AVAILABLE AT TRIAL, ARE AS
16 FOLLOWS:

17 All values and pay-off balances are as of approximately the date of separation.

18 A. Life Insurance Policies.

19 The parties have no cash value life insurance policies.

20 B. Retirement Rights.

21 Wife: Rite Aid 401(k) \$143,048.09 (as of 6/30/04)

22 Rite Aid Stock Options 70 vested

23 KEVIN C. BYRD
ATTORNEY AT LAW • WSBA 12894
Suite 108 10116 76th Ave. Court SW
Lakewood, Washington 98499

1 Husband: PERS II Retirement
 2 Originally began accumulating PERS II Retirement through employment with
 3 Evergreen State College in 1990-93. This was cashed out for \$4,000 in 1993.
 4 This money was used to pay community bills. Then began accumulating
 5 current PERS II Retirement in October, 1999, when began working for
 6 Thurston County as permanent employee in their Water & Waste Dept..

7 C. Motor Vehicles.

8	In wife's possession:	2001 Honda Accord	FMV \$15,000
9			Lien 7,000
10	In husband's possession:	1987 RV	FMV \$6,000
11		1987 Mazda 626	FMV \$ 50 (doesn't run)
12		1991 Mazda Pickup	FMV \$ 50 (doesn't run)
13		2000 Ford F150 Pickup	FMV \$11,000
14			Lien 11,000

15 D. Real Property.

- | | | | |
|----|----|---|-------------------------------|
| 16 | 1. | West Shore Property (wife's residence) fair market value: | \$ 280,000.00 |
| 17 | | Mortgage payoff: | \$ 15,000.00 (approximately) |
| 18 | | Net Community Equity: | \$ 265,000.00 (approximately) |
| 19 | 2. | North Way Property | \$ 110,000.00 |
| 20 | | Mortgage payoff: | 81,000.00 |
| 21 | | Net Community Equity: | \$ 29,000.00 |
| 22 | 3. | Apartment in Poland | \$44,000.00 |

23 E. Community vs. Separate Property Issues.

The husband claims a grand piano as his separate property, given to him as a gift from Mr.

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1 Starczewski.

2 The wife claims inheritances from her parents are her separate property. This is not disputed.

3 The wife claims some separate contribution in the North Way property from an L&I
4 settlement. Husband claims that the down payment did not come from proceeds of her L&I award,
5 which came after the North Way property had already been acquired. In any event, whatever the
6 source of the downpayment, it was commingled in an asset that was acquired in the name of the
7 community.

8 The wife claims the date of separation between the parties was in 1996. The husband denies
9 this and claims they were living together and remained intimate with one another, holding each other
10 out as husband and wife until 11/13/03.

11 Wife: Any and all property acquired after the date of separation.

12 Husband: Any and all property acquired after the date of separation

13 F. Spousal Maintenance.

14 No spousal maintenance has been requested. If the wife requests spousal maintenance at trial,
15 it will be the first such request made by wife in this case. This is not a spousal maintenance case, as
16 both parties are employed full-time and financially self-sufficient. The wife has not established a need
17 for spousal maintenance, nor does the husband have the ability to pay any.

18 G. Attorney's Fees & Costs.

19 Both parties should pay their own attorney's fees and costs.

20 H. Education & Work History of Each Party.

21 Wife: Licensed Medical Doctor in Poland. Employed as MD in Poland 1986-88,
22 School of Pharmacy. Licensed Pharmacist in U.S.
23 Employed with Group Health and Rite Aid as pharmacist since 1990.

Husband: Masters Degree in Architecture in Poland.
Licensed Architect in Poland
Employed by Thurston County last year through current as Public Manager
for Construction Projects
1984-86 Worked as a draftsman in California.

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1	1986-90	U.S. Army
2	1990-94	Evergreen State College as draftsman and project manager
3	1994-99	Temporary employee for Thurston Co., Ft. Lewis

I. Debts.

Please see attached Proposed Asset / Debt Division Worksheet attached hereto.

J. Health Problems.

Wife: The wife has no known or objectively established health problems. She may claim some back problems which reduce her ability to continue to work in her chosen field, however, no competent medical evidence supporting this has been produced, except for some conclusory statements.

Husband: High blood pressure. Foot and ankle problems from dog bite.

K. Past Due Child Support.

Does not apply.

L. Child Support.

Does not apply.

M. Parenting Plan.

Does not apply.

N. Other.

Submitted this 7th day of February, 2005.

Kevin G. Byrd WSBA 12894
Attorney for Petitioner

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In re the Marriage of: KOWALEWSKI
Pierce County Superior Court Cause No. 03-3-03700-1

PETITIONER'S PROPOSED DISTRIBUTION OF PROPERTY & DEBTS

TO THE HUSBAND:

<u>Item</u>	<u>Community Interest</u>	<u>Husband</u>	<u>Wife</u>
West Shore Property			
FMV \$280,000			
Mtg 15,000	\$ 265,000.00		\$265,000.00
Less equalizing Lien to Husband			(139,461.00)
Equalizing Lien against West Shore Property, payable within 6 mo. of entry of Decree. If not so paid, then interest at 5% per annum back to date of entry and residence to be immediately listed for sale.		\$ 139,461	
North Way Property			
FMV 110,000			
Mtg. 81,000			
Immediately list Property for sale and each party receive 50% net proceeds	\$ 29,000.00	14,500.00	14,500.00
Apartment in Poland	\$ 44,000.00		
Immediately list Property for sale and each party receive 50% net proceeds		22,000.00	22,000.00

Wife's Rite Aid 401(k) Plan \$143,048.09 Husband's 50% share awarded to him by QDRO	71,524.00	71,524.00
Wife's Rite Aid Stock Options 70 vested	35	35
Husband's PERS II Pension Accumulated between Oct. 1999 thru DOS \$ 10,000 est. current value Wife's 50% share awarded to her by QDRO	5,000.00	5,000.00
Wife's Bank Accounts at Separation		10,722.08
1962 Motorboat w/trailer	200.00	
1987 Recreational Vehicle	4,000.00	
1987 Mazda 626	50.00	
1991 Mazda Pickup	50.00	
2001 Honda Accord FMV: 15,000 Lien 7,000		8,000.00
2000 Ford F150 Pickup FMV: 11,000 Lien: 11,000		.00
Husband's Computer	500.00	
Husband's Plotter (Inoperable)	.00	
Husband's household tools	500.00	
Wife's household tools		500.00
Contents of House in Wife's Possession		

	10,000.00	
Contents of House in Husband's Possession	5,000.00	
Items in Wife's possession		
Wanted by Husband	5,000.00	
Incl. 2d floor bathroom Furniture		
Antiques		
Paintings		
Stereo/Video Equip		
Grand Piano		
Encyclopedias		
Great books		
Fan light		
Trifold mirror		
two standing lights		
two table lights		
three pharmacy lights		
two bookcases		
two writing desk tables with chairs		
black marble round table		
leather office chair		
Ikea chair		
Steamer chair		
three garden benches		
Sink and table		
Tool Bench		
Metal shelving		
Drafting table		
Staircase		
Letters personal to husband		
Family photographs		
Plants		
Washing machine		
two radios		
Fiberglass letter		
Ceramic planters		
Victorian table		
Paintings		
Japanese china set		

NET AWARD TO EACH PARTY:

\$ 267,785

\$ 267,785

EXHIBIT B

1 apartment is \$44,000.00, it would result in an award or allocation of property other than the stated intention
2 of the Court to make a 53.2/46.8 allocation of assets.

3 CR 59(a)(7): There was no evidence or reasonable inference from the evidence to justify the verdict
4 or the decision that the properties in Poland were of comparable or equal value and, in any event, the
5 disposition of Polish real property would be governed by the laws of Poland, such that division of property
6 by a court of the State of Washington to the contrary would be contrary to law. The Petitioner's testimony
7 that the Polish apartment was valued at \$44,000.00 based upon an offer to purchase the apartment by a third
8 party was unrefuted by the Respondent. The Petitioner's testimony that the marital community did not own
9 the underlying land on which the Polish farmhouse sat, and that a third party also had an interest in the
10 farmhouse, as well as countervailing claims against the community for contribution to costs of taxes, upkeep
11 and maintenance and repair was also unrefuted by the Respondent. Further, the Petitioner's testimony that
12 he believed the market value of the marital communities share of the Polish farmhouse was about \$2,000.00
13 was unrefuted by the Respondent. Finally, there was no evidence that justifies awarding the grand piano to
14 the Respondent to hold in trust for the son, when the son is a monk in a monastery and will likely never be
15 able to enjoy it. The grand piano should be held by the Petitioner in trust for both the children an potential
16 grandchildren, who will have an opportunity to learn, play and enjoy it. The court saw videotaped testimony
17 showing this family has an interest in music.

18 CR 59(a)(9): The court's finding and conclusion that the community interest in the Polish farmhouse
19 and apartment were of comparative value was not just and equitable. Also, the award of the grand piano to
20 the Respondent in trust for the son will result in substantial justice not being done.

21
22
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VIA FACSIMILE
572-3052

March 21, 2005

Gordon Hauschild
Davies Pearson, PC
920 Fawcett
Tacoma, WA 98401

RE: Kowalewski vs. Kowalewska

Dear Mr. Hauschild:

I think it is safe to say, this weekend went fairly well. The only items that were in dispute were two prints and one painting; a winter painting, a western calvary print, and a religious Maria print. The other item in dispute is the maple flooring from IKEA that is in the house to the left of the residence where Mr. Kowalewski was residing. Mr. Kowalewski should be allowed to take them as he has received none of the paintings in the family residence and these are the only ones that he wants and has been at his residence for the past five years. Mr. Kowalewski should also be allowed to take the flooring as it is part of the building materials and does not belong in Mrs. Kowalewska's residence. Microwave from residence of husband off of the wall. This is the only working microwave.

The following are items that Mr. Kowalewski could not get to his storage within the designated time, as time ran out:

- Antique bath tub - outside
- Potter's wheel - outside
- Small blue boat - outside
- Fencing wood - outside under the small blue boat
- 2 - Plotters in the house to the left of the residence
- 1 - large black top table in the residence
- 1 - large drafting table in the residence
- 1 - large lamp in the residence above drafting table
- 4 - computers left in the residence
- 1 - black computer table in the residence
- 2 - ceiling lamps in the residence

- 1 - pair of boot waders
- 3- Large white book shelves in the house to the left of the residence
- 3 - white metal grate storage containers with drafts inside in house to the left of residence
- 1 - cooking stove with glass plates in house to the left of residence
- 1 - bathroom sink - traingural top
- 2 - plotters
- All computer stuff left in the house to the left of the residence
- Counter top
- Top piece to tool chest in the storage to the right of residence (could not find, George is looking)
- Drafting table in storage to right of residence.
- IKEA wooden storage box in storage to right of residence.
- Metal Costco Shelving
- 2 - Mahogany bookshelves from family residence (were still at the family residence)

All parties that attended are aware of these items and in agreement, a time needs to be set to retrieve the remainder of these items.

We had four major items that were missing and were Mr. Kowalewski's:

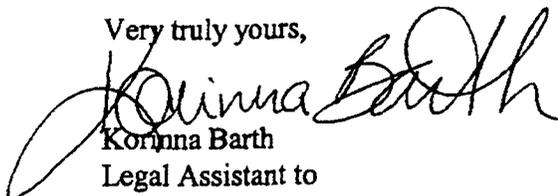
- 36 ft aluminum ladder and aluminum plank (we know for a fact that this is at Mrs. Kowalewska's)
- 1 - garden bench from Pier One Imports approximately 40 inches long
- 1 - brass landscape light
- 1- sink (building supply)
- Possibly Mr. Kowalewski's top portion of his tool chest. (May be at Mrs. Kowalewska's residence)

Please ask Mrs. Kowalewska to return these items to the property prior to Mr. Kowalewski returning to pick up the remainder of his properties.

We will instruct Mr. Kowalewski to return the boat and trailer at the time that the remainder of his properties are picked up. Please advise of a good time for this to transpire.

Thank you for your prompt attention to this matter. We look forward to hearing from you.

Very truly yours,


 Korinna Barth
 Legal Assistant to
 Kevin G. Byrd

;kbb

cc: Mariusz Kowalewski

EXHIBIT C

Westlaw.

91 Cal.App.3d 259

Page 1

91 Cal.App.3d 259, 154 Cal.Rptr. 80
(Cite as: 91 Cal.App.3d 259)**C**

Court of Appeal, Fifth District, California.
In re the MARRIAGE OF Leslie and Shimshon
BEN-YEHOSHUA.
Leslie BEN-YEHOSHUA, Respondent,
v.
Shimshon BEN-YEHOSHUA, Appellant.
Civ. 3360.

March 29, 1979.
As modified April 13, 1979.

Proceeding was brought by wife for dissolution of marriage. The Superior Court, Kings County, Charles W. Jennings, J., awarded custody of children, child support, and attorney fees to wife, as well as an undivided one-half interest in certain real and personal property situated in Israel, and husband appealed. The Court of Appeal, Geo. A. Brown, P. J., held that: (1) children, who had lived in Israel their entire lives except for a total of approximately one month in California, did not have requisite significant relationship to California to give Superior Court jurisdiction to pass on custody issue, and (2) decree concerning property located in Israel constituted mere declaration of entitlement which had no direct effect on title to property.

Reversed in part and affirmed in part.

West Headnotes

[1] Courts 106 ⇌ 24

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction
in General
106k22 Consent of Parties as to Jurisdiction
106k24 k. Of Cause of Action or
Subject-Matter. Most Cited Cases

Courts 106 ⇌ 37(1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction
in General
106k37 Waiver of Objections
106k37(1) k. In General. Most Cited Cases

Courts 106 ⇌ 37(3)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction
in General
106k37 Waiver of Objections
106k37(3) k. Estoppel Arising from
Submitting to or Invoking Jurisdiction. Most Cited
Cases
Subject matter jurisdiction cannot be conferred
upon a court by consent, waiver or estoppel.

[2] Child Custody 76D ⇌ 743

76D Child Custody
76DX Interstate Issues
76DX(C) Jurisdiction of Forum Court
76Dk740 Jurisdiction of Particular Forum
Courts
76Dk743 k. Subject-Matter
Jurisdiction. Most Cited Cases
(Formerly 134k301)
Exclusive method of determining subject matter
jurisdiction in custody cases in California is the
Uniform Child Custody and Jurisdiction Act, which
supersedes any contrary decisional and statutory
laws. West's Ann.Civ.Code, §§ 5150-5174,
5152(1)(b).

[3] Child Custody 76D ⇌ 734

76D Child Custody
76DX Interstate Issues
76DX(C) Jurisdiction of Forum Court
76Dk734 k. Minimum Contacts. Most
Cited Cases
(Formerly 134k290)
Children, who were in California for two weeks

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91 Cal.App.3d 259, 154 Cal.Rptr. 80
(Cite as: 91 Cal.App.3d 259)

when separation petition was filed and were there a total of approximately one month before interlocutory custody decree was issued in amended proceeding seeking dissolution of marriage, and who except for such time had lived in Israel their entire lives, did not have requisite significant relationship to California, and thus superior court did not have jurisdiction to pass upon issue of custody concerning children, whose only contact in California was presence of mother and maternal grandmother. West's Ann.Civ.Code, § 5152(1)(b).

[4] Child Custody 76D ⇨734

76D Child Custody

76DX Interstate Issues

76DX(C) Jurisdiction of Forum Court

76Dk734 k. Minimum Contacts. Most

Cited Cases

(Formerly 134k290)

Where children had lived their entire lives in Israel except for a total of approximately one month in California, children attended school in Israel, had a number of peer acquaintances and relatives there, and their only contact in California was presence of mother and maternal grandmother, California had only minimal access to facts relevant to custody issues and thus it was in best interest of children that California not determine custody in dissolution of marriage proceeding. West's Ann.Civ.Code, § 5152(1)(b, d).

[5] Equity 150 ⇨65(2)

150 Equity

150I Jurisdiction, Principles, and Maxims

150I(C) Principles and Maxims of Equity

150k65 He Who Comes Into Equity Must
Come with Clean Hands

150k65(2) k. Nature of Unconscionable Conduct. Most Cited Cases
Husband, who without wife's consent had surreptitiously removed children and taken them to Israel after being enjoined not to remove children from jurisdiction of the court, was not barred from contesting validity of California custody decree under doctrine of unclean hands, which cannot be basis for subject matter jurisdiction, which has only been applied against wrongdoing parent who sought

to invoke jurisdiction of California court and who was in clear violation of another state's decree, and application of which is discretionary. West's Ann.Civ.Code, § 5157(1).

[6] Divorce 134 ⇨227(1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k220 Allowance for Counsel Fees and Expenses

134k227 Amount

134k227(1) k. In General. Most Cited Cases

Award of \$600 attorney fees plus costs to wife in dissolution of marriage proceeding was not abuse of discretion. West's Ann.Civ.Code, § 4370.

[7] Divorce 134 ⇨249.2

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k249.2 k. Stipulations and Agreements of Parties. Most Cited Cases

Husband's statement suggesting that under the circumstances type of award made of quasi-community property of the parties was only practical way court could act in dissolution of marriage proceeding amounted to consent to division in this manner and statement of husband, who contended that court erred in failing to ascertain value of items of property and in not making more detailed division of property, necessarily included understanding that making further evaluations would be unnecessary. West's Ann.Civ.Code, §§ 4800, 4800(a), 4803.

[8] Courts 106 ⇨29

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k29 k. Exercise of Jurisdiction Beyond Territorial Limits. Most Cited Cases

California cannot enter decree directly affecting title or interest in real property outside its borders

91 Cal.App.3d 259, 154 Cal.Rptr. 80
(Cite as: 91 Cal.App.3d 259)

but it may establish and declare interest in such property and enter orders in aid of such declaration requiring parties to execute conveyances in compliance therewith. West's Ann.Civ.Code, § 4800.5(b)(1).

[9] Divorce 134 ~~254~~254(1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k254 Judgment or Decree

134k254(1) k. In General. Most Cited

Cases

Dissolution decree which awarded undivided one-half interest in certain real and personal property situated in Israel to wife constituted mere declaration of entitlement which had no direct effect on title to property in Israel. West's Ann.Civ.Code, § 4800.5(b)(1).

***261 **81** Low, Stone & Wolfe, Linda L. Nathan, Herbert N. Wolfe and Jerome Smith, Los Angeles, for appellant.

****82** Clawson, Timm & Atkinson and Lorence L. Timm, Hanford, for respondent.

GEO. A. ***262** BROWN, Presiding Justice.

Shimshon Ben-Yehoshua, husband, appeals from an interlocutory decree of dissolution awarding custody of his three children to his wife, Leslie Ben-Yehoshua, and ordering him to pay child support, attorney's fees and costs and also dividing certain property located in Israel. We shall reverse that part of the judgment awarding custody of the children and awarding child support and affirm the balance.

Wife is a United States citizen. Husband is a citizen of Israel. They were married in Israel on April 10, 1962. Three children were born of the marriage: Eyal, born August 15, 1964, Liat, born June 20, 1967, and Amit, born August 16, 1972. Husband and wife, together with their children, were domiciled in Israel from the time of their marriage for 13 years. On June 25, 1975, wife came to Hanford, Kings County, California, with the three children to visit her mother. She testified

that when she initially came here she did not have in mind separating or divorcing her husband or remaining in California. However, 14 days after her arrival, on July 9, 1975, she filed a petition for separation in Kings County. The court issued an ex parte pendente lite order awarding custody of the children to the wife and prohibiting the husband from removing them from California. She has not returned to Israel since that time.

Husband followed the wife to California. He accepted service of process, employed counsel and appeared personally at the order to show cause hearing. At that hearing the parties stipulated that the wife have custody pendente lite with certain limited visitation rights in the husband, and the husband agreed to pay \$45.90 costs to the attorneys for the wife. The parties further agreed that the matter be submitted to the probation department for an investigation and report on the custody issue. The probation report is part of the record.

The husband was enjoined from removing the children from the jurisdiction of the court.

Near the end of July or early August 1975, without the wife's consent, the husband surreptitiously removed the children, took them to Israel, and has not returned. While the husband did not personally appear at subsequent proceedings in Kings County, he did appear through counsel at all subsequent proceedings.

***263** On January 16, 1976, the wife filed an amended petition for dissolution of the marriage and the interlocutory decree from which this appeal was taken was entered on December 17, 1976. That decree awarded custody of the children to the wife with reasonable visitation in the husband, awarded \$75 per child per month child support, no spousal support, \$600 attorney's fees to the wife's attorney and actual costs, and awarded an undivided one-half interest in certain real and personal property situated in Israel to the wife.

Upon returning to Israel with the children the husband instituted divorce proceedings in which on June 23, 1976, he was awarded temporary custody of the children and on February 23, 1977, was

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awarded a decree of divorce and custody of the children by the Israel court.^{FN1} The wife was served with process in those proceedings but did not appear in person or through counsel.

FN1. The husband has requested that the court take judicial notice of these Israel decrees, certified and exemplified copies of which have been furnished. No opposition having been received, we grant the motion.

CUSTODY ISSUE

[1][2] From the trial court's memorandum decision it is apparent that in exercising jurisdiction over the custody issue the court equated personal jurisdiction over the parties with subject matter jurisdiction over the custody of the children, predicating its decision on the fact that at the time of the order entered on the order to show cause the husband, the wife and the children were all present in California and the husband appeared generally and stipulated jurisdiction over the custody issue. The court then reasoned that "... where jurisdiction of the person or of the res has attached, it is not defeated by removal of the person or the res beyond the territorial jurisdiction of the court." The false premise upon which this conclusion is grounded is that jurisdiction over the custody issue initially attached. Determinative of this central issue is: (1) The fact that subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel. (*Sampsel v. Superior Court* (1948) 32 Cal.2d 763, 773-776, 197 P.2d 739 (disapproved on other grounds in *Robinson v. Superior Court* (1950) 35 Cal.2d 379, 386, 218 P.2d 10); *Summers v. Superior Court* (1959) 53 Cal.2d 295, 298, 1 Cal.Rptr. 324, 347 P.2d 668; see *Smith v. Superior Court* (1977) 68 Cal.App.3d 457, 464-465 fn. 3, 137 Cal.Rptr. 348; 1 *Witkin, Cal. Procedure* (2d ed. 1970) *Jurisdiction*, s 10, pp. 534-536.) In addition, the Uniform Commissioner's Note to the provision in the Uniform Child Custody and *264 *Jurisdiction Act* (the Act) which is substantially identical to Civil Code section 5152, subdivision (1) (b), states in part: "The submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient

without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction." (9 *U.Laws Ann.* (1973) p. 108). (2) The exclusive method of determining subject matter jurisdiction in custody cases in California is the Uniform Child Custody and Jurisdiction Act (Civ.Code, ^{FN2} ss 5150-5174). The provisions of the Act supersede any contrary decisional and statutory laws. (*In re Marriage of Steiner* (1979) 89 Cal.App.3d 363, 371, 152 Cal.Rptr. 612; *Smith v. Superior Court* (1977) 68 Cal.App.3d 457, 461-462, 137 Cal.Rptr. 348; *Neal v. Superior Court* (1978) 84 Cal.App.3d 847, 850, 148 Cal.Rptr. 841, 843 "(s)ection 5152 was intended to limit jurisdiction in custody disputes.") Accordingly, authorities cited by the wife predating the effective date of the Act in 1973 are inapposite.

FN2. All references to code sections are to the Civil Code unless otherwise indicated.

Section 5152 of the Act sets forth specifically the bases upon which jurisdiction over the custody issue may be exercised. First, it is noted that there is no provision in the Act for jurisdiction to be established by reason of the presence of the parties or by stipulation or consent. The Act expressly provides that the mere physical presence or the absence of the minor is neither a prerequisite to nor is it determinative of the custody issue. (s 5152, subs. (2), (3).) The affirmative provisions of the Act pertinent to this case which do govern jurisdiction are:

"(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

"(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

"(b) It is in the best interest of the child that a court

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of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the *265 child's present or future care, protection, training, and personal relationships.

“...thi

“(d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best **84 interest of the child that this court assume jurisdiction.” (Civ.Code, s 5152.)

Referring first to the home state rule (s 5152, subd. (1)(a)), home state is defined in section 5151, subdivision (5), as:

“(5) ‘Home state’ means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.”

Because the children were only in California for approximately two weeks before the filing of the separation and custody petition and spent a total of approximately one month here, it is manifest that the preferred home state jurisdictional prerequisite was not satisfied.

We pass next to subdivision (1)(b) of section 5152, containing what is often referred to as the significant relationship test. A fuller understanding of the philosophy of this section can be had by reference to the general purposes of the Act as set forth in section 5150 and the commissioner's note.

FN3

FN3. Section 5150 sets forth the purposes

of the Act. Subdivision (1)(b) and (c), containing two of those purposes, states:

“(1) The general purposes of this title are to:

“...e.g

“(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child.

“(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.”

The general purposes of the Act extend to the international area. (s 5172.)

Having a significant bearing upon this issue is the commissioner's note to section 5152, subdivision (1)(b), which states in part:

“Paragraph (2) of subsection (a) (Civ.Code, s 5152, subd. (1)(b)) is supplemented by subsection (b) (Civ.Code, s 5152, subd. (2)) which is designed to discourage unilateral removal of children to other states and to guard generally against too liberal an interpretation of paragraph (2) (Civ.Code, s 5152, subd. (1)(b)). Short-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical ‘domicile’ for divorce or other purposes.

“Paragraph (2) (here s 5152, subd. (1)(b)) perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1. The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the Child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state.” (9 U.Laws Ann. (1973) p.

108.)

*266 [3] Based upon the record herein it is readily apparent that the children in this case did not have the requisite significant relationship to this state and that Israel was the state having the maximum contacts. The children were in California for two weeks when the petition was filed and were here a total of approximately one month. The parents had established their home in Israel and lived there for 13 years. The children had lived there their entire lives.

The husband is a scientist with a Ph.D. He has permanent employment, earning approximately \$690 per month with a net take-home pay of \$290 per month. At the time of the dissolution action in California the wife was working as a full-time manager of a family-owned apartment complex. She had secretarial employment experience. The income from her full-time employment earned her a net monthly pay of \$258.75.

Except for the wife's testimony regarding her future plans for the education, care and upbringing of the children, all of the evidence concerning the children's present and future care, protection, training and **85 personal relationships was in Israel. The probation officer's report ^{FN4} contains a number of communications to him from experts who were thoroughly familiar with the husband and wife and the children in Israel, demonstrating that Israel is the location of the evidence relevant to the issue of the best interests of the children and the qualifications of the parents to take custody. There was a letter from Dr. Ruth Sharon, the children's pediatrician and pediatric neurologist; a letter of Dr. A. Raviv, clinical and educational psychologist and head of school psychological services in the central area; a letter of Mr. Zvi Salent, head welfare official, Welfare Office, Jerusalem.

FN4. The probation officer was unable to make a recommendation regarding custody.

*267 It was shown that the children attended school in Israel, have a number of peer acquaintances and relatives there and, though they miss their mother,

have adjusted well under the circumstances. Apparently the only contact in California is the presence of the mother and maternal grandmother and there is no evidence regarding the nature of the personal relationship between the children and the grandmother. The probation report summarized information that had been received from Israel to the effect that cultural differences between the two countries would cause the children distress if they were relocated in the United States.

Based on the foregoing, we hold that Kings County Superior Court did not have jurisdiction under subdivision (1)(b) of section 5152 to pass upon the custody issue.

[4] Turning next to subdivision (1)(d) of section 5152, it is noticed that one of the requirements is that "it is in the best interest of the child that this court assume jurisdiction." As has been pointed out, the code commissioner commented on what was intended by the term "best interest." (See fn. 3, Ante.) As there stated:

"(J)urisdiction exists only if it is in the Child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum . . . is not sufficient without additional factors establishing closer ties with the state." (9 U.Laws Ann. (1973) p. 108.)

Clark v. Superior Court (1977) 73 Cal.App.3d 298, 308-309, 140 Cal.Rptr. 709, approves the comment of Bodenheimer in the Vanderbilt Law Review (Bodenheimer, Uniform Child Custody Jurisdiction Act (1969) 22 Vand.L.Rev. 1207): "As a general proposition the state in which there is the best opportunity to investigate the facts is most qualified to take jurisdiction." (Bodenheimer, Op cit., 22 Vand.L.Rev. at p. 1221.) The same thought has been expressed by another commentator as follows: 'All discussions agree that in an interstate custody dispute the interests of the children are paramount. To increase the probability that a custody decision will be in the best interests of the child, the case

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should be decided in the court with greatest access to the relevant evidence.' (Comment (1974) 62 Cal.L.Rev. 365, 371.)"

Inherent in the notion of the best interests of the child are the criteria set forth in subdivision (1)(b) of section 5152 (significant relationship), which in this instance are determinative of the "best interest" issue under *268 subdivision (1)(d) of section 5152. For the reasons we have already stated, it is apparent that California has only minimum access to the facts relevant to the custody issue and that it is in the best interests of the children that California not assume to determine custody.

[5] The wife contends that the husband should be barred from contesting the validity of the California decree under the equitable doctrine of unclean hands. The doctrine and the case law in which it finds its genesis have been codified in section 5157 FN6 **86 of the Act. The argument must be rejected. First, for the same reason that subject matter jurisdiction cannot be conferred by consent, such jurisdiction cannot be assumed by virtue of the unclean hands doctrine. Secondly, by the terms of section 5157 and the cases from which it is derived, the doctrine has only been applied against the wrongdoing parent who is a petitioner seeking to invoke the jurisdiction of the California court where the petitioning parent was in clear violation of another state's decree. It does not appear to have been applied against a parent defending against a dissolution and custody petition filed by the other spouse. Lastly, the application of the doctrine in any event is discretionary with the trial court. (*Ferreira v. Ferreira* (1973) 9 Cal.3d 824, 835, fn. 10, 109 Cal.Rptr. 80, 512 P.2d 304.) From the record below it does not appear that the trial court refused to recognize that the husband had standing to litigate or that he was precluded from relief upon this ground.

FN5. Subdivisions (1) and (2) of section 5157 provide:

"(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of

adjudication of custody if this is just and proper under the circumstances.

"(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances."

ATTORNEY'S FEES ISSUE

[6] The award of attorney's fees is governed by section 4370. The necessity and amount thereof are matters within the sound discretion of the trial court. (In re Marriage of Rosan (1972) 24 Cal.App.3d 885, 101 Cal.Rptr. 295.) Upon the evidence before the court in this case the award of \$600 attorney's fees plus costs was not an abuse of discretion.

*269 DIVISION OF PROPERTY IN ISRAEL

The decree appealed from states in part:

"5. The quasi-community property of the parties is awarded as follows: Petitioner and Respondent are each awarded an undivided one-half (1/2) interest in and to the following real and personal property:

"a. Real Property and improvements situated at No. 17 Gluskin Blvd., City of Rehovot, State of Israel.

"b. One (1) acre of property situate in Sitriya, State of Israel."

Appellant contends the award is improper and contrary to law because the California court lacks jurisdiction to award quasi-community real property located in Israel, that the decree violates California law because it does not divide the property but awards it in undivided interests and the court failed to value the assets and assign the liabilities. (s 4800.)

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Under section 4803, quasi-community property includes real property acquired by either spouse while domiciled elsewhere which would have been community property if acquired while domiciled in this state.

[7] As to appellant's contention that the court erred in failing to ascertain the value of the items of property and in not making a more detailed division of the property, appellant in his reply brief in the court below suggested that under the circumstances the type of award made would be the only practical way the court could act. The statement amounts to a consent to a division in this manner. Appellant's statement as to the manner of division necessarily includes an understanding that making further evaluations would be unnecessary. (s 4800, subd. (a); In re Marriage of Hendle (1976) 56 Cal.App.3d 814, 817, 128 Cal.Rptr. 854; In re Marriage of Carter (1971) 19 Cal.App.3d 479, 485, 97 Cal.Rptr. 274; see In re Marriage of Folb (1975) 53 Cal.App.3d 862, 875, 126 Cal.Rptr. 306 (disapproved on other grounds in In re Marriage of Fonstein (1976) 17 Cal.3d 738, 749, fn. 5, 131 Cal.Rptr. 873, 552 P.2d 1169).)

****87 [8][9]** It is recognized that California cannot enter a decree directly affecting title or interest in real property outside its borders. (Rozan v. Rozan (1957) 49 Cal.2d 322, 330, 317 P.2d 11.) It may, however, establish and declare the interests in such property and enter orders in aid of such declaration requiring the parties to execute conveyances in compliance therewith. (s 4800.5, subd. (b)(1); Rozan v. Rozan, supra, 49 Cal.2d, 322, 330, 317 P.2d 11.) ***270** In support of the judgment we interpret the decree entered as a mere declaration of entitlement to the property which has no direct effect on the title to the property in Israel.

That part of the judgment awarding custody of the minor children to the wife and ordering the husband to pay support for said children is reversed. In all other respects the judgment is affirmed. Each party to bear his or her own costs.

FRANSON and BEST,^{FN*} JJ., concur.

FN* Assigned by the Chairperson of the

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