COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of: LUCRETIA PARGA, Respondent, and WILLIAM PARGA, Appellant.	COURT OF APPEAL NO. D055296 SAN DIEGO COUNTY SUPERIOR COURT Case No. ED51164

APPELLANT'S OPENING BRIEF

APPEAL FROM JUDGMENT
FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
HONORABLE EDLENE McKENZIE

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In re the Marriage of:	)	
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LUCRETIA PARGA,	)	COURT OF APPEAL
	)	NO. D055296
	)	
Respondent,	)	
	)	
and	)	SAN DIEGO COUNTY
	)	SUPERIOR COURT
	)	Case No. ED51164
WILLIAM PARGA,	)	
	)	
	)	
Appellant.	)	
	)	

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	)	
	)	
Appellant.	)	
	)	

APPELLANTS' OPENING BRIEF

Appellant William Parga respectfully submits his Appellant's Opening Brief.

STATEMENT OF APPEALABILITY

This appeal is from a post-judgment denial for a modification of spousal support, which is an appealable order. Code of Civil Procedure §904.1(a)(2) and (a)(10).

RELIEF SOUGHT

Appellant William Parga seeks a reversal of the spousal support order and attorneys fees award to Respondent's counsel. Appellant also seeks the termination of spousal support.

2001, a marriage of 37 years, 7 months. [CT:1] There were no minor children at the time the Petition for Dissolution was filed on April 3, 2001. [CT:1]

At the time the Petition for Dissolution was filed the parties owned two pieces of real property, one of which was the marital residence. [CT:3] They also owned two vehicles and had various bank accounts. [CT:4] The parties also owned a number of IRA's, a money market account, and a boat and trailer. [CT:4] They also owned a 7/11 Store in Chula Vista, California. [CT:4]. There was also approximately $12,000 in credit card debt. [CT:5]

In December, 2002, the parties entered into a Marital Settlement Agreement (MSA), which was then incorporated into Judgment. [CT23-32]. The 7/11 Store was the major asset of parties. With respect to the 7/11, the MSA stated:

> The parties are joint owners of a 7-Eleven convenience store franchise, located at 913 Otay Lakes Road, Chula Vista, California. Respondent is awarded the 7-Eleven convenience store as his sole and separate property subject to the

[1] The parties are referred to by their first names for the sake of clarity, and not out of any disrespect. Rubenstein v. Rubenstein, 81 Cal.App.4th 1131, 1136, fn.1 (2000).

> conditions herein. The parties have agreed that each of the parties will receive one half of the franchise fee in the event it is paid to respondent on or before his 66th birthday. If the franchise fee has not been paid to the respondent by that date, then respondent shall pay to petitioner, as a division of their community property, the sum of $15,000.00. Upon payment of $15,000.00 to petitioner, petitioner relinquishes any claim or right to receive any part of any future franchise fee. [CT27:18-26].

Lucretia received more than one-half the proceeds from the marital residence (an additional $10,000 that William did not get), the 1990 Lexus, the unimproved lot in Lake Havasu, Arizona, all the Oppenheimer money market accounts and retirement funds. In addition, Lucretia received one half the 7-Eleven franchise fee, ($46,525.00) and one half of a credit card obligation. [CT28:10-27 – 29:1-21].

William received less than one-half the proceeds of the marital residence (minus the $10,000 that Lucretia got), the 7-Eleven convenience store franchise, various vehicles, a motor home and boat, monies remaining in two checking accounts from the date of separation, and one half of the credit card obligation. [CT29:22-28 – 30:1-10]

On December 30, 2002, judgment was entered, and a marital settlement agreement became part of that judgment. [CT24-52]

On January 24, 2003, the parties stipulated that the date of the entry of judgment be changed from December 30, 2002 to January 24, 2003. [CT39] A new Notice of Entry of Judgment, dated January 24, 2003 was filed and served. [CT40].

On October 1, 2007, William filed an Order to Show Cause (OSC) requesting modification of spousal support and ordering Lucretia to pay for life insurance cost. William sought to terminate the existing $2,000 per month spousal support order. [CT42].

William sought the order because he had some serious health issues, including, but not limited to high blood pressure, diabetes, arthritis, and pancreas problems. These medical problems prevented William from working at the 7-Eleven store. [CT45:19-23]

On December 13, 2007, William and Lucretia entered into a stipulation for the following:

1. Spousal support is reduced from $2,000 per month to $1,350 per month, commencing December 1, 2007;

2. William will continue to keep the life insurance policy paid and in effect pursuant to ¶8 of the Judgment of Dissolution of Marriage; and

3. Should William sell the 7-Eleven business, either party may request the court to review spousal support; [CT49-50].

On July 31, 2008, William filed a second OSC again seeking the termination of spousal support and requiring Lucretia to pay for life insurance. [CT53-56].

In William's supporting declaration, he stated that he was 65 years old, and intended to retire, as his previously referred to health problems had not improved. [CT57:18-24]. In fact, William's health degraded further.

William found a buyer for the 7-Eleven store. William will be receiving approximately $86,000.00 for the long-tenure payment from 7-Eleven Corporation, and that Lucretia is entitled to one-half of the long-tenure payment, as set forth in the December, 2002 judgment. [CT57:26-28 to 58:1-2].

In Lucretia's opposition, she filed an Income and Expense Declaration (I&E), stating she was retired. [CT61] The Income and Expense declaration further stated that she earned $266/month in an annuity principal, $643/month in Social Security, and $157/ month in dividends and interest. Lucretia also claimed that she had $10,000 in the bank, and $180,000 in stocks and bonds. [CT62].

Lucretia's expenses show that she pays $1,500.00 per month in rent in Westerville, Ohio. [CT63] What Lucretia's Income and Expense Declaration does not show is that she is living in her daughter's home, and the mortgage on the home is only $900/month. Lucretia provided no proof that she paid that amount in rent, or if she paid any rent at all to her adult daughter.

Lucretia's supporting declaration stated that she is 65 years old and has "health problems." [CT69:4] Lucretia does not state what those "health problems" might be, nor did she present any evidence of health problems.

On February 3, 2009, Lucretia filed an updated I&E. [CT76-85]. There were no significant change in her numbers, except to specify her investment accounts that total approximately $187,000. [CT81].

On February 3, 2009, Lucretia filed a supplementary declaration that contained argument rather than facts. [CT85-87]. There was also a declaration from Lucretia's counsel seeking attorneys fees of approximately $5,100. [CT87-88]

In his February 10, 2009 declaration, William stated that he had to undergo multiple brain surgeries. [CT102:12-15] and [CT103:6-7]. In that declaration, William also stated:

> I calculate that I have paid Lucretia **$123,000 in spousal support** from January 2003 through August, 2008. In addition, she was paid her equal share of the long tenure payment upon the sale of the 7-11 store, which was $46,525.00. So in addition to the 286,311 worth of community property she got in our divorce, she also received the above, making her income through this process a total of $455,836. Yet, she is not happy. I worked hard throughout our marriage, and after our divorce, I continued to work, while she did nothing to improve her status. (emphasis original) [CT154:14-19]

William filed evidentiary objections to Lucretia's February 3, 2009 declaration. [CT106-108]

On February 13, 2009, William filed a Memorandum of Points and Authorities supporting his arguments regarding the primary issues before the Court below. [CT116-123].

After the March 13, 2009 hearing, the Court below issued its Tentative Statement of Decision. [CT179-188]. Pursuant to Rule of Court 3.1590, both Lucretia and William timely filed Objections to the Tentative Statement of Decision. [Lucretia (CT189)] [William (CT191-197)].

The final Statement of Decision was rendered by the Court below on May 11, 2009 [CT198-202]. With the exception of two minor points, the Court below affirmed its Tentative Statement of Decision as the Final Statement of Decision.

William filed a timely Notice of Appeal on June 4, 2009. [CT203].

STANDARD OF REVIEW

A trial court's order modifying a spousal support award is reviewed for abuse of discretion. Marriage of Shaughnessy, 139 Cal.App.4th 1225, 1235 (2006) In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence. Marriage of Schmir, 134 Cal.App.4th 43, 47 (2005).

LEGAL ARGUMENT

A. The Trial Court's Determination of Spousal Support was an Abuse of Discretion.

Permanent spousal support "is governed by the statutory scheme set forth in Family Code §§4300 through 4360. Family Code §4330 authorizes the trial court to order a party to pay spousal support in an amount, and for a period of time, that the court determines is just and reasonable, based on

the standard of living established during the marriage, taking into consideration the circumstances set forth in section 4320." Marriage of Nelson, 139 Cal.App.4th 1546, 1559 (2006)

The statutory factors include the supporting spouse's ability to pay; the needs of each spouse based on the marital standard of living; the obligations and assets of each spouse, including separate property; and any other factors pertinent to a just and equitable award. (Family Code§ 4320, subds.(c)-(e), (n).) "The trial court has broad discretion in balancing the applicable statutory factors and determining the appropriate weight to accord to each, but it may not be arbitrary and must both recognize and apply each applicable factor." Marriage of Ackerman, 146 Cal.App.4th 191, 207 (2006).

Under the spousal support statute that governs here, the trial court is required to assess the "ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living." (Family Code §4320(c).

Family Code §4320 enumerates the mandatory factors that the Court must take into account in setting permanent spousal support:

> (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for

retraining or education to acquire other, more marketable skills or employment.

(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

(d) The needs of each party based on the standard of living established during the marriage.

(e) The obligations and assets, including the separate property, of each party.

(f) The duration of the marriage.

(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

(h) The age and health of the parties.

(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

(j) The immediate and specific tax consequences to each party.

(k) The balance of the hardships to each party.

(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.

(n) Any other factors the court determines are just and equitable.

Application of Family Code §4320 Factors

In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by Family Code §4320, with the goal of accomplishing substantial justice for the parties in the case before it." Marriage of Kerr, 77 Cal.App.4th 77, 93 (1999). In balancing the applicable statutory factors, the trial court has discretion to determine the appropriate weight to accord to each. Marriage of Baker, 3 Cal.App.4th 491, 498 (1992). But the "court may not be arbitrary; it must exercise its discretion along legal lines, taking into consideration the applicable circumstances of the parties set forth in [the statute], especially reasonable needs and their financial abilities." Marriage of Prietsch & Calhoun, 190 Cal.App.3d 645, 655 (1987). Further, the

court does not have discretion to ignore any relevant circumstance enumerated in the statute.

In Marriage of Tapia, 211 Cal.App.3d 628 (1989), when assessing what can be included in assessing a party's ability to pay, the court stated: practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties." . . . "It [includes] the needs of the parties and the ability of the parties to meet such needs;" . . .'" Such factors may include benefits in the form of gifts, receipts from parents or third parties, and income from earnings, investments, or trusts, or governmental aid. Id. at 641.

B. The Trial Court Erred in its Application of the Family Code §4320 Factors Such that The Trial Court Abused Its Discretion.

William respectfully contends that in its tentative decision [CT179], the Court erred in its application of the Family Code §4320 factors for spousal support. For the reasons below, the spousal support order and the order for attorneys fees must be reversed.

Pursuant to Rule of Court 3.1590(c), William filed a Statement of Controverted Issues and Proposals Not Covered by the Tentative Decision. [CT191-197].

This statement outlines the precise issues on which the trial court erred. This was not an attempt to relitigate the issues, but to bring to the

attention of the Court below inconsistencies in the court's ruling. Heaps v. Heaps, 124 Cal.App.4th 286, 292 (2004).

Tentative Decision page/line 4:23-25 to 5:1:3: At the OSC hearing for modification of spousal support on March 9, 2009, the parties stipulated that the Marital Standard of Living was middle class. This court finds that the stipulation of the parties is supported by the following factors: the parties owned a home during their marriage; they owned a franchise 7-11 and made a modest income. [CT192:3-18]

Cost of Living in Ohio:

The court failed to take into consideration that the cost of living in Westerville, Ohio (where Lucretia lives), is substantially lower than the cost of living in San Diego, California. Paragraph 8 of William's February 10, 2009 declaration set forth the foundation for the statistical proof that the cost of living in Westerville, Ohio is at least 35% lower than that of San Diego, California. [See also: attachment to William's February 10, 2009 declaration. [CT109-115 to which there was no objection by opposing counsel] [CT192:10-14].

Appellant respectfully submits that the Reporter's Transcript [save for William's counsel's argument RT19:13-18], and the Tentative Statement of Decision is devoid of any reference to the difference in the cost of living between San Diego, California and Westerville, Ohio. These

differences are significant, and not to take them into consideration in the setting of support is error.

In Marriage of Cheriton, 92 Cal.App.4th 269, 297 (2001), the Court of Appeal took the cost of living in different locations into consideration when setting child support. The standard should be no different here. San Diego has one of the highest costs of living in the nation.

In its final decision, the Court below stated that the cost differential (between San Diego and Westerville, Ohio), is hearsay and lacks foundation. [CT200:18-19]. Comparison documents located at CT109-115. William respectfully submits that the comparison documents are business records of a business who provides these comparison services. Evidence Code §1271.

Additionally, information of economic conditions is so pervasive, available, and well known to the public that it has become facts of which a court may take judicial notice. City of Oceanside v. McKenna, 215 Cal.App.3d 1420, 1427 (1989)

William asserts that since this is a mobile society. Reliable information is readily available for the accurate comparison of such costs, both from government and private sources. The differences in the cost of living between diverse locations for purposes of setting spousal support is an important consideration. William submits that the Court below erred in excluding such information.

Lucretia Should be Self-Supporting in That Lucretia Worked During Most of the Marriage. Age 65 is No Longer a Death Knell for Employed Productivity:

Tentative Decision page/line 5:22-25 to 6:1-11: Notwithstanding the fact that a Gavron type warning was never administered to Petitioner at the outset of these proceedings, Respondent through is (sic) attorney, argues that there is an inclusion on the second page of the Judgment itself putting Petitioner on notice that the law anticipates that the (sic) she will, at some point in time, become self-supporting. Additionally, the Respondent argues that there were discussions and the Petitioner was aware of the expectation to become self-supporting. Respondent points out that Petitioner was ordered to undergo a vocational evaluation in 2001. There is no evidence that one was ever complete (sic). Respondent argues that it is the Petitioner's fault that she is not in a better position to support herself since, among other things, she failed to seek employment and or (sic) skills to become employed.

This court does not believe that just because the Petitioner had an 'awareness' of the expectation that she should become self-supporting as a result of a box (unchecked) on the final judgment, she knew or should have known that if she did not become self-supporting, spousal support could be terminated. [CT192:16-27 to 193:1-2].

The fact that Lucretia knew that she was required to undergo a vocational evaluation in 2001 [RT17:18-20], and that William and Lucretia

had repeated discussions about the "Gavron" warning and Lucretia's need to be self-supporting show that Lucretia had actual knowledge that she had to become self-supporting. The knowledge that a party is to become self-supporting can arise from many different sources. Marriage of Gavron, 203 Cal.App.3d 705, 711, 712 (1988).

William contends that that a Gavron warning takes many shapes and forms. Gavron itself spoke to it.

> The prerequisite awareness of the judicial expectation of future self-sufficiency can arise in numerous contexts. For example, there may be an explicit statement by the court at the time of its original support order regarding employment expectations of the supported spouse a motion and ensuing order that the supported party "submit to an examination by a vocational training consultant," a stipulated agreement which addresses the wife's ability to obtain future employment, or a justified assumption of continued future employment based on the supported spouse's employment during the parties' separation and at the time of the original support order which contained a reasonable termination date for support. Gavron, *supra* at 711 [internal citations omitted].

Lucretia contends that since there was no express Gavron warning, that she should not be so burdened. Simply stated, Lucretia did nothing to better her own position. [RT19:13-18] Lucretia states that she has no job history. [CT69:4] Lucretia's statement just is not true. Lucretia had working experience: she worked in the 7-Eleven store, she worked for a telephone company, in a flower shop, and as a secretary in a hospital. [CT58:12-22].

Although the parties had a lengthy marriage (31 years), Lucretia had

to be aware that William would retire at age 65 (especially in light of his serious physical infirmities), and would not be able to sustain the $1,350 per month level of support. Moreover, to require William to do so would be inequitable.

William also contends that there is a double-standard at work here. Lucretia expects William to continue to work past age 65, and provide $1,350 per month in spousal support. Lucretia, also age 65, voluntarily began taking Social Security at age 62, and declines to work at all.

Although Lucretia is age 65, that age is no longer the end of an individual's productive life. Vast numbers of healthy persons over the age of 65 are vigorous, work hard in jobs that are complex, and remain productive. Age alone is not and should not be a barrier to productivity and self-sufficiency. Lucretia presented no evidence of ill heath or the inability to work. The totality of the circumstances shows that Lucretia simply does not want to work. That should not inure to William's detriment.

Lucretia Worked During Most of the Marriage:

Tentative Decision page/line 6:19-24: Evidence presented at the hearing on March 13, 2009 supports a finding that there were significant periods during the marriage that the Petitioner did not work. Although there were periods during the marriage that Petitioner was employed at a phone company, a flower shop, as a secretary in a hospital, at a candy shop, with a radio station and at the 7-11, the evidence presented suggests that the

Petitioner primarily stayed home or only worked part time while the parties were raising minor children. [CT193:10-17].

Lucretia's March 2, 2009 declaration states otherwise. Lucretia's declaration 1:16-26 shows that she worked from the date of marriage September 6, 1961 to the later part of 1966, and at the 7-11 from 1979 to the date of the dissolution. Lucretia was a "stay-at home" mother for only 13 of the 37 years of the marriage. [CT18-22].

William Has One-Half of the Investment Funds stated by Lucretia:

Tentative Decision page/line 7:16-18: At the date of the deposition in December 2008, the Petitioner (sic) [should be Respondent] had had (sic) $441,000 in investment funds at four various banking institutions for which he received monthly interest in the amount of $1150. [CT194:6-11]

William's February 9, 2009 Income and Expense Declaration (Attachment One) states that William has $328,381 in investment accounts, minus the $125,000 income tax liability for the sale of the 7-11 store. The correct amount should be $203,381.00. Said Attachment One shows that he collects only approximately $455 per month in interest income. [CT129]

Lucretia asserts that William has an "investment" storage condominium. [RT29:25-29]. William has a storage unit, and uses it for the storage of his own things, and does not rent it out to others.

Once William pays the taxes owed from the sale of the 7-11 store, approximately $200,000.00 will be remaining. That is approximately the same amount of assets remaining to Lucretia. [CT81].

William respectfully submits that since the assets of the two parties are approximately equal, William should no longer be responsible for supporting Lucretia. The award of spousal support should be reversed.

Lucretia's Assets Must be Considered. The Court Below Did Not Consider Lucretia's Assets:

Tentative Decision page/line 7:20-24: The Petitioner reports that she is paying $1500 in monthly rent, approximately $400 monthly car payment, approximately $4,000 in credit card balances – total monthly expenses of $4000. [CT194:24-27] Lucretia's own I&E states that she has approximately $187,000 in investment funds. [CT81]. The Court below did not consider Lucretia's assets. The Court below erred.

Pursuant to Family Code §4320(e), the court is required to consider the obligations and assets of both parties. The Court below failed to consider Lucretia's assets, specifically those listed in Attachment 5 and 6 to her January 26, 2009 Income and Expense Declaration. [CT81]. That attachment shows that Lucretia has assets in the amount of $187,195 in various bank accounts and securities accounts. If Lucretia mishandled what she received in the judgment of dissolution, this is not her opportunity to re-equalize the judgment.

Lucretia also misrepresented her monthly expenses. Lucretia lives in the house owned by the parties' daughter, located in Westerville, Ohio. Lucretia failed to disclose that she will be living with the parties' daughter in Ohio. Lucretia states that she pays $1,500 per month in rent, but the mortgage for the property is only $900 per month. Lucretia also failed to disclose that while living with the parties' daughter, Lucretia's personal expenses will be minimal. [William's Declaration, February 10, 2009, 2:11-17 and 2:24-28.] [CT103:11-17].

William has already paid Lucretia **$123,000 in spousal support** from January 2003 through August, 2008. In addition, Lucretia was paid her equal share of the long tenure payment upon the sale of the 7-11 store, which was $46,525.00. [CT154:13-16]. Lucretia also sold the Lake Havasu, Arizona property awarded to her in the judgment for approximately $50,000 [CT154:3-7]. Lucretia also purchased and sold a condominium in La Mesa, California after the dissolution.

Lucretia's Social Security is set in the amount of $643 per month [Lucretia's Income and Expense Declaration, page 2]. The Court below does not take into consideration that Lucretia's Social Security would have been higher ($1026 per month) had she elected to wait until age 65 to receive said payments. At the time of the dissolution of the marriage Lucretia was perfectly capable of working, contributing to her Social Security earnings, and obtaining a higher payout at age 65.

William's Tax Consequences re: 7-11:

Tentative Decision page/line 8:18-21: Regarding the immediate and specific tax consequences to each party, the court makes the following findings: no evidence was offered by the parties regarding the immediate and specific tax consequences. The Court does note that spousal support is taxable to the supported party. [CT186:18-21]

William owes approximately $125,000.00 in taxes on the proceeds from the sale of the 7-11 franchise. William's February 10, 2009 Declaration, paragraph 14. [CT104:21-26] William will use $125,000.00 of the monies shown in his February 9, 2009 Income and Expenses Declaration, Attachment One.

Spousal Support Summary

William respectfully asserts that the Court below abused its discretion in retaining the $1,350.00 per month level of spousal support. Family Code §4320 enumerates the mandatory factors for consideration in setting spousal support.

William submits that the Court below erred in the following:

- No demand that Lucretia be self-supporting despite Lucretia's ignoring the order for a vocational evaluation;
- Consideration of the incorrect amount of William's assets. The Court below set the figure at $441,00. The correct figure

is approximately $200,000.00, which is nearly identical to Lucretia's assets.

- The Court below did not properly consider the tax consequences of the sale of the 7-11 store for William;
- The Court below did not properly consider William's retirement because of ill health;
- The Court below did not consider Lucretia's assets;
- The Court below improperly considered Lucretia's expenses;
- The Court below improperly excluded evidence of the difference in the cost of living between San Diego, California and Westerville, Ohio.

In summary, the Court below abused its discretion under Family Code §4320 in continuing spousal support at the $1,350 per month level. William respectfully submits that the decision of the trial court be reversed.

C. William's Retirement was a Material Change in Circumstances That the Court Below Refused to Consider.

The Court below refused to consider William's retirement a material change in circumstances. William, age 65, retired and sold the 7-11 store because of his ill health. [CT45:19-23] Additionally, William underwent brain surgery. [CT102:12-15].

Even though William retired from active employment, the Court below attributed sufficient income to him to continue paying the $1,350 per

month in spousal support. As noted below in Section D, William's income is comprised of his $1,850 monthly Social Security and $456.00 per month in interest income.

The Court of Appeal in Marriage of Reynolds, 63 Cal.App.4th 1373 (1998) faced a similar problem. Where, as here, there is a bona fide retirement (which Lucretia does not dispute), a supporting spouse should not be forced to continue working. Under those circumstances, the trial court may determine that there has been a material change in circumstances. Id. at 1379. Here, the Court below erred in not doing so. In what can only be characterized as contradictory, the Court below stated that there was a material change of circumstance. [RT24:4-10].

The Reynolds court was also faced with the question as to whether the retired spouse should be forced to deplete the capital of his retirement monies to pay spousal support. Where, as here, William would be forced to invade or exhaust his retirement assets in order to pay Lucretia, only investment income and not investment principal should be available to pay spousal support. Id. at1380. See also: Marriage of Olson, 14 Cal.App.4th 1, 10 (1993).

Given the spousal support order is some 72% of William's Social Security, leaving him only $956 per month in income from all sources, William would be forced to invade or exhaust his investment principal. This would be inequitable, and contrary to Reynolds, especially in light of

the fact that Lucretia has an approximately equal amount of investment principal.

If the order below is affirmed William's income would be $1,850 (Social Security) plus $450 (monthly interest). William would be required to pay $1,350 per month spousal support, leaving him just $956 per month on which to live. Lucretia's income would be $2,416 per month, comprised of $643.00 social security, $266.00 investment, $157.00 dividends and interest, and $1350 spousal support.

The spousal support order below should be reversed, as the Court abused its discretion in requiring William to invade or exhaust his investment principal.

D. The $1350 per month Spousal Support is 72% of William's Social Security Income.

The Court below erred in mandating $1,350 per month spousal support when his total income is approximately $2,300 per month, of which $1,850 is Social Security. In William's I&E, he states that his only income is $1,850 per month in Social Security, together with $456.00 per month in interest income. [CT125]. By requiring William to pay $1,350 per month in spousal support, William will be left with $956 per month to pay his expenses, and Lucretia would have $2,416 in monthly income.

William submits that his Social Security is his own separate property. Taking some 72% of William's social security to pay spousal

support, is tantamount to an improper division of his Social Security. In Marriage of Hillerman, 109 Cal.App.3d 334 (1980), the Court of Appeal plainly stated that Social Security benefits are not divisible by a state court, and any consideration of Social Security benefits is preempted by Federal law. Id. at 343-5.

Hillerman provides that the authority addressing whether trial courts lack jurisdiction to divide future Social Security benefits is irrelevant. As the Hillerman court explains, an employee-spouse contributing to Social Security has no legally recognized property interest or contract right in his or her Social Security benefits. Id. at 338. But the scheme is not one-sided in favor of the employee-spouse. "Congress had expressly provided certain benefits (under certain circumstances) for divorced spouses ...." Federal preemption principles forbid family law courts from holding a former spouse is entitled to any more. Id.

California courts, however, have refused to recognize any community interest in OASDI benefits. These decisions have been based chiefly on federal cases which, for purposes of federal law, characterized Social Security as a general public benefit, creating no legally recognized property or contract right [citations to federal cases]. Id. at 338-9.

In addition to the broad bar of the anti-attachment provision of the SSA, "[t]he enactment of a total OASDI family benefit scheme does, in fact, suggest to us the presence of a similar congressional intent to replace

state family law as it applies to Social Security benefits. The spouse, dependent children, and even a divorced spouse of the retired employee may receive OASDI benefits in addition to the primary benefits.... Payment of the derivative benefits does not reduce those paid to the primary beneficiary, nor do the divorced spouse's benefits reduce the amount payable to the present spouse. Family benefits protect the retired worker's family as a unit by increasing the level of total OASDI benefits [citations]." Id. at 343-44.

Simply stated, the Court of Appeal concluded that social security benefits were not an asset of the community, were not subject to division, and cannot be recognized by any alternative provision employing a setoff; and that, as the trial court found, to do otherwise would be contrary to current prevailing law. Marriage of Cohen, 105 Cal.App.3d 836, 846 (1980).

In the following colloquy, both the Court and Lucretia's counsel recognized that William's Social Security benefits were his, and not to be divided.

> THE COURT: I will overrule the objection. Mr. Love, are you arguing the Social Security and offset for spousal support?
> MR. LOVE: I am not. Well, to be clear because I think that you --the points and authorities I never meant to trigger points and authorities. This Court had the power to award his Social Security credits to my client or anything like that, but the Court --it is income to him. The Court has to take it into

consideration. He --the Court can do anything that he wants to. The Court has to take into Social Security as income.
THE COURT: Okay. I guess my next question, then, is given that statement, there was a judgment that was entered initially when the parties dissolved their marriage. My understanding from --I don't remember which pleadings that the parties did file joint tax returns, on the joint tax returns it is my understanding both parties signed off on the joint tax returns, so that in some point in time she was put on notice that the Social Security or the money that would be going to self-employment would be basically on his.
She was on notice from every year that that had been done. So to go back now when she was on notice of this whether or not she understands the ramification, she did sign off on that.
MR. LOVE: There is no doubt that they filed joint returns. There is extreme --now that one they never thought back in those days they would get a divorce nor would she know how Social Security credits applied. This might make a difference to her in the future in the event they got a divorce --I don't disagree with what it is saying, but factually and realistically, I don't think we can expect her to actually know those things.
THE COURT: Maybe not. I think you are probably right but why this was not argued at the time of the judgment being entered.
MR. LOVE: Even if it were, he wasn't receiving it at that time so it wouldn't have effected the order at that time. We know Social Security is separate property. I don't know what would have been argued at that time because he wasn't receiving. It probably would have been improper and premature.
THE COURT: I will give you my tentative at that point. It is not to consider the monies that went to that are attributed, I guess, to Mr. Parga for purposes of offsetting any kind of support at this point, because my feeling is that I believe both parties are represented by counsel at the time that the dissolution became final.

The judgment was entered and they both had the needs to make whatever arguments they needed to make concerning spousal support. It is always anticipated people are going to grow older and be able to receive Social Security benefits and that argument should have been made at that time. [RT25:1-28 to 26:1-19]

The joint tax returns filed by William and Lucretia were joint returns signed under penalty of perjury by both William and Lucretia. The credit for the Lucretia's Social Security was through William's self-employment tax. Lucretia made no objection at the time the joint returns were filed, nor were any amended returns filed.

Despite the above-stated colloquy between the Court and Lucretia's counsel admitting that William's Social Security was Williams separate property, the order below would now divide William's separate property Social Security benefits. The Tentative Statement of Decision flies in the face of the trial Court's own comments on the record as to the lack of divisibility of Social Security benefits.

This court's affirmance of the order below would compel William to spend $1,350 of his $1,850 in monthly Social Security benefits. This would accomplish a division of William's Social Security benefits, a goal which Lucretia previously attempted, but failed because Social Security is the separate property of the recipient. Lucretia cannot go through the back door to accomplish what she could not do through the front door: divide William's Social Security benefits.

The spousal support order below should be reversed.

E. The Court Below erred in Granting $5,000 in Attorneys fees to Lucretia under Family Code §2030.

Tentative Decision page/line 10:4-9: The court orders that Petitioner (sic) contribute $5,000.00 toward the Respondent's (sic) attorneys' fees. The court authorizes the Respondent to pay $500 on the first of each month directly to counsel for petitioner beginning May 1, 2009 and continuing until the order is satisfied. There shall be a 10 day grace period and a standard acceleration clause for any one missed payment. [CT188:4-9]

In its Tentative Statement of Decision, court below did not set forth the basis of its attorneys fees ruling (whether Family Code §2030, et.seq., Family Code §271, or some other statutory authority), and the manner of its calculation.

In its final Statement of Decision, the Court below stated that the award of attorneys fees was based upon Family Code §2030, based upon need and ability to pay. [CT201:14-25].

Family Code §2030(a)(1) provides that the court may award attorneys fees, even after the entry of judgment, in order to assure that each party has access to legal representation to preserve each party's rights by ordering whatever amount is reasonably necessary for attorneys fees and for the cost of maintaining or defendant the proceeding during the pendency of the proceeding.

Family Code §2030(a)(2) provides that the criteria for determining an award of attorneys fees is based on (a) the respective income and needs of the parties, and (b) any factors affecting the parties' respective abilities to pay.

Family Code §2030(b) provides that the attorneys fees and costs may be awarded for legal services rendered or costs incurred before or after the commencement of the proceeding.

The court may award attorneys fees under Family Code §2030, where making the award and the amount of the award are just and reasonable under the relative circumstances of the parties. Marriage of Duncan, 90 Cal.App.4th 617, 629 (2001).

In determining what is just and reasonable under the relative circumstances, the court shall take into consideration for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the parties described in Family Code §4320. Id at 629. In assessing one party's relative need, and the other party's ability to pay, the court may consider all evidence concerning the parties' current incomes, assets, and abilities, including investment and income-producing properties. Marriage of Drake, 53 Cal.App.4th 1139, 1167 (1997).

In determining what is "just and reasonable" under the parties' "relative circumstances," courts must consider the need for the award to enable each party (both the applicant spouse and the other spouse), to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into account to the extent relevant the circumstances of the parties described in Family Code §4320. See: Marriage of Keech, 75 Cal.App.4th 860, 867-8 (1999).

When the assets and liabilities of the parties are compared, both William and Lucretia have approximately an equal amount of investment principal. Lucretia lives in a small town in Ohio whose cost of living is 35% less than the cost of living in San Diego, California. Lucretia has already been paid approximately $123,000 in spousal support. Lucretia is living with her adult daughter. Serious doubt is cast upon her claim of monthly expenses. Lucretia lives in a home owned by her daughter that carries a monthly mortgage of $900 per month, yet Lucretia's I&E claims that she pays $1,500 in rent. This is simply not credible.

By her own choice, Lucretia opted to begin receiving Social Security benefit at age 62. Her Social Security benefits would have been much greater if she has waited to receive benefits until age 65. This was her choice. It was her choice to purchase a new car. It was her choice to be improvident with the spousal support already paid to her.

Family Code §2030 requires a showing of a need for payment for attorneys fees by the applicant, and an ability to pay by the intended payor. Lucretia has shown neither.

Just as the Court below erred in its financial analysis of the spousal support criteria, such a flawed analysis carries over to the attorneys fees award. For the same reasons that the spousal support award should be reversed, the order for attorneys fees should be reversed.

F. The Objections to Declarations filed by William Were Improperly Overruled.

William filed objections to Lucretia's declaration on November 12, 2008. [CT70]. William also filed objections to Lucretia's declaration on February 3, 2009. [CT106-115].

On March 13, 2009, the date of the hearing, in response to William's objections, Lucretia's counsel filed responses by way of a copy of William's objections with counsel's handwritten interlineations. [CT170-172]. William's counsel objected to this handwritten, and late-filed response. [RT1:28 to 2:1-9]. Despite this, the Court below went ahead to rule on the objections. The trial court stated that it was not aware of any rules of court that mandated the format for objections to declarations. [RT3:17-28 to 4:1-2].

San Diego Superior Court Local Rule 5.5.3 provides the standards for the timely filing of documents in an Order to Show Cause hearing such as the instant matter. The rule states, in pertinent part:

> Absent an order shortening time, all moving, opposing, and reply papers, as well as Orders to Show Cause, must be filed and served in compliance with Code of Civil Procedure section 1005, subdivision (b).
>
> Supplemental declarations to inform the court of new or different facts must be filed and personally served by either party up to five court days before the hearing. Responses to supplemental declarations must be filed and personally served before 10:00 a.m. two court days before the hearing. No reply declarations are permitted except as follows: If a party personally serves supplemental declarations at least 10 court days before the hearing, then responses to the supplemental declarations must be filed and personally served at least five court days before the hearing. Replies to responding declarations must be filed and personally served by 10:00 a.m. two court days before the hearing. The court may decline to consider any supplemental declarations which are not timely served or do not appear to be the result of newly discovered evidence or facts which were not available when the original pleadings were filed, or where the supplemental pleadings were filed late to gain a tactical advantage.
>
> If a party objects to a pleading as not being timely served, the court may, in its discretion, refuse to consider the pleading or, for good cause shown, continue the hearing.

Rule of Court 3.1354 was adopted for objections to declarations and evidence in motions for summary judgment. Although there is no rule of court mandating its use in this setting, this format is used by practitioners in other civil settings and family law matters.

A declaration is a written statement that is unsworn, but made under the penalty of perjury. Code of Civil Procedure §2015.5. Declarations are subject to most of the same objections available when a witness testified in court. See: Schraer v. Berkeley Property Owners Assn., 207 Cal.App.3d 719 (1989).

A declaration must have the facts positively set forth, and a declaration which merely states conclusions or opinions of the declarant is insufficient, and of no evidentiary value. Tri-State Mfg. Co. v. Superior Court, 224 Cal.App.2d 442 (1964).

A declaration that includes argument is not appropriate and is improper as evidence. Marriage of Heggie, 99 Cal.App.4th 28, 30 (2002). The Heggie court stated:

> We recognize that it is very common for family law practitioners to include argument in their declarations (we know it is done all the time, and we do not want to single out the trial lawyers in this regard), but it is a sloppy practice which should stop. Even at its most benign, it is a practice that forces the trial and appellate courts, and opposing counsel, to sort out the facts that are actually supported by oath from material that is nothing more than the statement of an opinion ostensibly under oath. More fundamentally, however, it makes a mockery of the requirement that declarations be supported by statements made under penalty of perjury. The proper place for argument is in points and authorities, not declarations. Id. at page 30, footnote 3

As William's objections point out, Lucretia's declarations were replete with argument, lack of foundation, and were self-serving. [CT70

and CT106-115] The Court below summarily overruled William's objections.

William contends that the Family Law trial courts have an ad-hoc, "anything goes" approach to evidence, and the requirements that declarations require facts and documents must be filed in some sort of timely matter. The instant circumstance with opposition to the objections in handwritten interlineations filed on the date of the hearing does not allow the objecting party to properly deal with or argue the objections. Additionally, the filing of the responses to the objections on the date of the hearing is in violation of the San Diego Superior Court Local Rule 5.5.3, cited above.

Local Rule 5.5.3 does grant the court below discretion to accept late filed documents. In light of the fact that Lucretia's counsel had William's written objections for weeks before the hearing, the acceptance of a filing of responses to those objections on the morning of the hearing is an abuse of that discretion. Lucretia's counsel's handwritten responses to objections filed on the morning of the hearing should have been disregarded by the Court below, and William's objections sustained.[2]

While other Courts of Appeal rule against the inclusion of argument in declarations, especially in Family Law matters, the lack of enforcement

[2] For whatever loss might have been occasioned by the sustaining of William's objections because of Lucretia's counsel's "morning of the hearing" filing, Lucretia would have remedies elsewhere.

of what rules exist flies in the face of the requirements of the Evidence Code and Code of Civil Procedure §2015.5.

The objections filed by William to Lucretia's declarations should have been sustained by the Court below.

G. The Objections At Oral Argument in the Court Below Should Have Been Ruled Differently Than They Were by the Court Below.

The first objection improperly decided by the Court below arose from the following:

> As far as the taxes, my client as I reported in his declaration has spoken to his accountant -
> MR. LOVE: Objection. Hearsay.
> THE COURT: Sustained.
> MS. WILSON: He has personal knowledge of what his tax situation is and he is on notice that he is going to have to pay taxes based upon the income that he received from the sale of the business, that only makes sense. Me client has personal knowledge that that it is going to be approximately $125,000. He will know next month when he files the taxes.
> MR. LOVE: Objection, your Honor. No foundation.
> THE COURT: Sustained. [RT32:13.24].

In his February 10, 2009 declaration, William states:

I will need approximately $125,000 of the money to pay taxes on the sale of the business (according to my accountant estimate). CT102:21-23. This is not hearsay under Evidence Code §1200, but a statement of the declarant's own personal knowledge. Even if it is hearsay, it is admissible as a declaration against his own pecuniary interest. Evidence Code §1230. While we all pay taxes, few of us line up to do so. William could have kept the money and invested it. Rather, against his own pecuniary interest, he

went to his accountant who estimated that he owed approximately $125,000 in taxes for the sale of the 7-11. Why would anyone state they owe taxes in such a substantial amount if it were not true.

The Court below improperly sustained the hearsay objection.

The Court below also sustained an objection based on lack of foundation. Most foundational facts must be proved by a preponderance of the evidence. Evidence Code §115. Here, William knew that upon the sale of his 7-11, he would be required to pay some form of income tax (whether capital gains or otherwise) on the proceeds of the sale. The requirement of payment of such a tax is a matter of common knowledge.

Simply by acknowledging the advice given to him by his accountant, William properly laid the foundation that he knew he owed the tax on the 7-11 sale proceeds, and the approximate amount thereof.

The Court below improperly sustained the objection.

The next objection arose out of the following colloquy:

> MR. LOVE: The things then --let me get --I will try to get to the basic things. The important thing is my client worked in this business for 15 years and did not get a paycheck. Therefore-
> MS. WILSON: Objection. Misstates evidence. There is no evidence that she worked for 15 years in anything.
> MR. LOVE: Her declaration, your Honor, it is not opposed.
> THE COURT: I will overrule the objection. [RT24:22-28 to RT25:1]

William respectfully contends that Mr. Love's statement did misstate the evidence. Mr. Love referred to one line in Lucretia's November 12, 2008 declaration, wherein she stated she had no job history. [CT69:4]. If Lucretia had no job history, how could her counsel argue she worked at the 7-11 for fifteen (15) years. Lucretia then further contradicts her previous declaration in the declaration of March 2, 2009, wherein she admits that she worked at the 7-11 for some fifteen (15) years. [CT131:1-9].

Additionally, William cites Lucretia's job experience in his declarations. [CT59:9-22 and CT72:17-21].

William respectfully asserts that the Mr. Love did misstate the evidence under Evidence Code §765, and the objection should have been sustained by the Court below. The Court below erred when it overruled the objection.

The next objection arose out of the following colloquy:

> MR. LOVE: He paid $37,500 for a investment storage in Yuma, a condo -
> MS. WILSON: Objection. No facts before the Court.
> MR. LOVE: They sure are. It is in his deposition. We outlined it.
> THE COURT: Overruled. [RT29:25-28 to 30:1].

Lucretia's counsel proffered to the court a summary of William's December 22, 2008 deposition. [CT96-96] Item number two of that summary states that: William Parga used part of the duplex money to purchase a storage unit for $37,000, for which he paid all cash. [CT95].

First, the deposition itself states that William paid $37,000 (not $37,500), for the storage unit. Second, there is no proof that the storage unit is a condominium. Third, William uses the storage unit for his own possessions. It is not an investment. Lucretia's counsel used the deposition in an out of context manner. William's objection should be sustained.

CONCLUSION

William respectfully submits that the order requiring him to pay $1,350 per month in spousal support to Lucretia is an onerous and inequitable burden, given the true state of both parties' financial status. If the order below is affirmed, William will be paying Lucretia some 72% of his Social Security income, and will be forced to invade and exhaust his retirement monies.

William further respectfully submits that there at the time of hearing there was an equality of financial status between the parties. Both parties had approximately the same amount of assets. Both parties are retired and draw Social Security payments. Lucretia made the decision to take her Social Security at age 62, rather than wait until age 65, when the payments would be more.

Lucretia is able to work, but affirmatively chose not to, despite knowing her affirmative obligation to do so. Even if Lucretia does not work another day, she has some $187,000.00 in investment principal, has received $123,000 in spousal support from William, has received $46,525

in the long tenure payment from the sale of the 7-11 store, purchased a new car (for which she makes car payments), and lives with her adult child in Westerville, Ohio at a greatly reduced or no cost.

William respectfully asserts that the Court below manifestly abused its discretion in setting spousal support at $1,350 per month, and for awarding $5,000 in attorneys fees for Lucretia's attorney. William respectfully submits that this Court should reverse the spousal support order and attorneys fees order below, and terminate spousal support.

Dated: November 20, 2009

Respectfully submitted,

Nancy J. Wilson

Nancy J. Wilson
Attorney for Appellant
William J. Parga

CERTIFICATION OF BRIEF LENGTH

I, Nancy J. Wilson, do here by certify, pursuant to the provisions of Rule of Court 8.204(c)(1) that the number of words in this brief is 8,865, as calculated by the word count function of my word processing program. I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this certification was executed this 20th day of November, 2009, at San Diego, California.

Nancy J. Wilson

Nancy J. Wilson

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Date: November 23, 2009

Philip W. Steinberg
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

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