

RESOLUTION 03-01-2016 (As Amended)

DIGEST

Evidence Code: Admissibility of Financial Disclosures in Family Law Matters

Amends Evidence Code section 1120 to allow mandatory financial disclosures produced in mediation in family law cases to be admissible.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 1120 to read as follows:

§1120

1 (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a
2 mediation consultation shall not be or become inadmissible or protected from disclosure solely
3 by reason of its introduction or use in a mediation or a mediation consultation.

4 **(b) In family law actions, declarations of disclosure required by sections 2104 and 2105**
5 **of the Family Code shall remain admissible even if prepared for the purpose of, in the course of,
6 **or pursuant to mediation or a mediation consultation.****

7 ~~(b)~~ This chapter does not limit any of the following:

8 (1) The admissibility of an agreement to mediate a dispute.

9 (2) The effect of an agreement not to take a default or an agreement to extend the time
10 within which to act or refrain from acting in a pending civil action.

11 (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was
12 contacted about serving as a mediator in a dispute.

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14 **AND BE IT FURTHER RESOLVED** to recommend that the Legislature adopt the following
15 Finding and Declaration of its intent:

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17 The Legislature finds and declares that the intent of this legislation is to codify the rule of *Lappe*
18 *v. Superior Court* (2014) 232 Cal.App.4th 774, review denied (Mar. 11, 2015).

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Family law litigants stand in a unique position in that they owe fiduciary duties to one another. To ensure that these duties are fulfilled and community property is equally divided, Family Code section 2100 et seq. requires the exchange of declarations of disclosures as part of a dissolution proceeding and before entry of any judgment. Frequently, parties in mediation prepare their disclosures with a mediator's help. However, because the disclosures are mandatory, they are in fact prepared to comply with the Family Code and not for mediation purposes. This point was clarified recently in the case of *Lappe v. Superior Court* (2014) 232 Cal.App.4th 774. In *Lappe*, a wife filed to set aside a mediated, stipulated judgment on the

grounds of fraud and duress (her husband had sold a company for \$75 million that he had a few months prior representing to be worth \$20 million in his declaration of disclosure). The trial court denied the motion, holding that the husband's representations of value were inadmissible under the mediation privilege.

The Solution: The appellate court reversed, finding that mediation confidentiality statutes do not apply to statutorily-mandated disclosures that must be made regardless of whether the parties participate in mediation. The appellate court held that "because exchange of the declarations is mandated by the Family Code, these documents would have existed (and would have been exchanged) even if the parties had never agreed to mediate. Their introduction at mediation does not obviate the disclosure obligation or shield the declarations from discovery."

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Evidence Code section 1120 to allow mandatory financial disclosures produced in mediation in family law cases to be admissible. This resolution should be approved in principle because these disclosures are mandatory and are required to be prepared and exchanged during the course of the dissolution.

Evidence Code section 1120 is a sweeping code section that prohibits the admissibility of anything that was produced or created for or in mediation in a civil action unless it is otherwise admissible or subject to discovery outside of mediation. Family Code section 2100 et seq. requires parties to exchange declarations of disclosure identifying the assets and liabilities known to each party. This resolution codifies the recent decision in *Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, which held that in family law cases, the financial and property disclosures which each party is required to prepare and exchange with the other party pursuant to Family Code section 2100 are admissible as evidence in any future action because these disclosures are mandatory. This clarification and expansion does not contradict the intent of section 1120 which

already allows for the admissibility of such evidence and it does not compromise the confidentiality of mediation because these disclosures are already required.

COUNTERARGUMENTS

ORANGE COUNTY BAR ASSOCIATION

This resolution is another attack on mediation confidentiality. It poses a threat to the strength, genius, and efficacy of the confidential process not only in the family law context but potentially as to all civil disputes.

Proponents say their proposal merely codifies a court decision, but never expressly state any necessity for this. Impliedly, it is necessary because, “[f]amily law litigants stand in a unique position in that they owe fiduciary duties to one another (emphasis added).” Fiduciary duties, however, flow from many relationships such as attorney/client, trustee/beneficiary, and principal/agent. Per Family Code section 721(b), in transactions between spouses, because of their confidential relationship, spouses are subject to “the general rules governing fiduciary relationships.” The phrase “general rules” makes clear there is nothing unique to family law. In truth, Section 721(b) delineates the spousal fiduciary relationship by way of sole reference to the rights and duties of business partners.

The proposal would have application only where declarations of disclosure required under Family Code sections 2104 and 2105 are completed within the mediation process. Were the proposal necessary to allow their introduction, it is clear some challenge to the declarations’ fullness and accuracy is being mounted. It is equally clear this challenge would not be confined to the four corners of any document. If created during mediation, there will naturally and necessarily be inquiries into statements and representations leading to the content of the declarations. These statements and representations are protected mediation communication. It is said the resolution merely codifies the appellate decision in *Lappe v. Superior Court*. It is stressed *Lappe* said nothing about supporting financial documents or mediation communications which led to the content of the declaration. The decision only compelled Mr. *Lappe* to produce the physical declaration document to Mrs. *Lappe* pursuant to her document production request. The confidential statements and representations in that mediation were unaddressed, hence, untouched by the decision.

Lappe made clear these declarations required pursuant to law, cannot be viewed as made pursuant to mediation, so codification of the decision is unnecessary. This is why proponents cannot and do not state any necessity for their resolution. If breach of the fiduciary duty in the family setting is of such concern and further legislation is warranted, it would be more effective to pursue measures to prohibit creation of disclosure declarations in the course of mediation, or to require completion of independent disclosures by each party, outside the process.

So what is the impetus behind the resolution? It is believed that proponents seek to reach evidence of fiduciary duty breach/fraud in the creation of these declarations, i.e., evidence extrinsic to the declaration documents themselves. Just specifically pleading such cause would

necessarily involve delving into statements and representations made during the particular mediation. The predictable confidentiality of mediation would be shredded, the nature of the

process changed, and its ability severely hampered, if not destroyed, to bring that much-needed peace to what is perhaps the most highly-charged, personal, and impactful of disputes.

BY TEN MEMBERS AND OTHERS

Support If Amended (*Resolution was so amended*)

Oppose Unless Amended

We, the undersigned family law attorneys and mediators, are members of the State Bar in good standing and hereby submit the following statement:

We support the Resolution's codification of the Lappe decision as an important protection for families in divorce cases. The Resolution's author has agreed to accept a friendly amendment changing the phrase "declarations of disclosure prepared pursuant to Family Code section 2100 et seq." to "declarations of disclosure required under sections 2104 and 2105 of the Family Code" which is drawn from the Lappe decision.

With this change we support the resolution. Without this change, a court could interpret the new exception much more broadly than Lappe. It could make discoverable and admissible any preliminary draft, signed or unsigned, of any declaration of disclosure prepared pursuant to a divorce mediation. This would greatly inhibit the informal candor in mediation that helps avoid damaging litigation, works to preserve the parenting relationships, and serves the interests of the children in divorcing families. Without this change, we must regretfully urge the Resolutions Committee to recommend disapproval.

Fern Topas Salka	Los Angeles, CA	SB# 67392
Frederick J. Glassman	Los Angeles, CA	SB# 38570
Jeffery S. Jacobson	Los Angeles, CA	SB# 187329
Joseph P. Spirito Jr.	Redondo Beach, CA	SB# 106360
Dvorah Markman	Los Angeles, CA	SB# 55876
Katherine Shlaudeman	San Francisco, CA	SB# 192519
Suzan Barrie Aiken	Sausalito, CA	SB# 157697
Olivia Salisbury Sinaiko	Sausalito, CA	SB# 289219
Sarah Davis	San Francisco, CA	SB# 116745
Frederick C. Hertz	Oakland, CA	SB# 101757
Nancy J. Foster	San Rafael, CA	SB# 68533
Catherine Conner	Santa Rosa, CA	SB# 104324
Lynette Berg Robe	Encino, CA	SB# 123079
Hon. Susan P. Finlay (Ret)	Coronado, CA	SB# 53519
Forrest S. Mosten	Beverly Hills, CA	SB# 54189
Eileen Preville	Oakland, CA	SB# 72295
B. Elaine Thompson	Torrance, CA	SB# 75136

Shawn D. Skillin	San Diego, CA	SB# 176719
Richard G. Zimmerman	San Mateo, CA	SB# 46207
Deborah Ewing	Torrance, CA	SB# 107568
James M. Hallett	Manhattan Beach, CA	SB# 53686
Jane K. Euler	Hermosa Beach, CA	SB# 176519
Nancy L. Powers	San Ramon, CA	SB# 087603
Stanley L. Bartelmie	San Jose, CA	SB# 83225
Charles Spiegel	San Francisco, CA	SB# 142948
Jessica Metoyer	San Francisco, CA	SB# 169511
William A. Eddy	San Diego, CA	SB# 163236
Lisa Zonder	Westlake Village, CA	SB# 155165
Sharon Jill Sandler	Los Angeles, CA	SB# 151149
Lynette S. Kim	Los Angeles, CA	SB# 176757
Ronald Rosenfeld	Beverly Hills, CA	SB# 36148
Lorna Jaynes	Fremont, CA	SB# 206479
Franklin R. Garfield	Los Angeles, CA	SB# 47870
Heidi S. Tuffias	Los Angeles, CA	SB# 151133
Bonnie H. Yaeger	Los Angeles, CA	SB# 116977
Amy N. Paul	San Francisco, CA	SB# 194566
Delilah Knox Rios	Diamond Bar, CA	SB# 091754
Kenneth Cloke	Santa Monica, CA	SB# 40080
Mark B. Baer	Pasadena, CA	SB# 152512
Gayle Tamler	Beverly Hills, CA	SB# 106622
Gillian A. Brady	Davis, CA	SB# 201239
Wendy Stettenheim Jones	Torrance, CA	SB# 196892
Barbara J. Youngman	Beverly Hills, CA	SB# 183016
Jennifer Louise Stara	Los Angeles, CA	SB# 186983
Joanne D. Ratinoff	Los Angeles, CA	SB# 83124
Frisco Fayer	Santa Monica, CA	SB# 234977
Colin O'Conner	Redondo Beach, CA	SB# 155450
Linda S. Gross	Santa Monica, CA	SB# 79054
Leon F. Bennett	Woodland Hills, CA	SB# 113323
Amanda D. Singer	San Diego, CA	SB# 293606
Mary B. Culbert	Los Angeles, CA	SB# 118635
Martie H. Leys	Petaluma, CA	SB# 173057
A. Marco Turk	Santa Monica, CA	SB# 31876
Kerry L. Wallis	Hermosa Beach, CA	SB# 205650
Unmani Sarasvati	Oakland, CA	SB# 234836
Christopher Moore	Torrance, CA	SB# 36949
Edith Kelly Politis	San Rafael, CA	SB# 115150
Amy L. Neiman	Santa Monica, CA	SB# 120121
Emily F. Robinson	Westlake Village, CA	SB# 249045
Carol Dubron-Witlin	Beverly Hills, CA	SB# 183074
Michael Jonsson	Sacramento, CA	SB# 166976
Ani M. Garikian	Glendale, CA	SB# 143770
Leslie K. Hart	Torrance, CA	SB# 115460

Kimberly K. Davidson
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SB# 188558
SB# 130032
SB# 249104
SB# 123313