

## Case Law Update

Mr. Gary Slossberg, El Dorado Superior Court  
Hon. Yvette Durant, Nevada/Sierra Superior Court  
Hon. Michael Bishay, San Bernardino Superior Court

19<sup>th</sup> Annual AB 1058 Child Support  
Training Conference  
October 14-16, 2015

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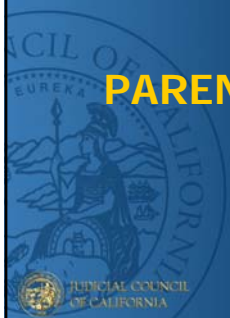
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## PARENTAGE CASES

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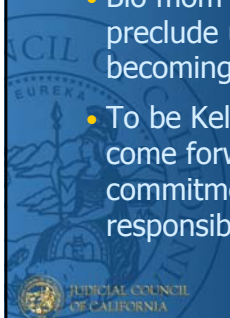
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### Adoption of Kelsey S. Revisited

- Bio mom cannot unilaterally preclude unwed bio dad from becoming presumed father.
- To be Kelsey S. dad, must promptly come forward and demonstrate full commitment to parental responsibilities.

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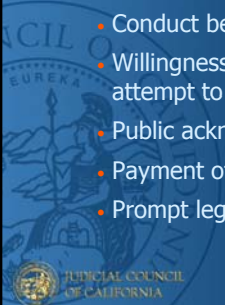
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**Adoption of Kelsey S. Revisited**

- Court should consider:
  - Conduct before and after birth
  - Willingness to assume custody (not just attempt to block adoption)
  - Public acknowledgment of paternity
  - Payment of birth/pregnancy costs
  - Prompt legal action



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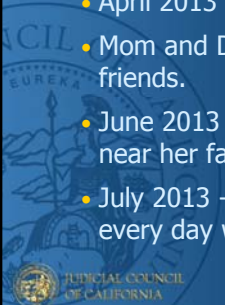
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**Adoption of Baby Boy W (2014) 232 Cal.App.4th 438**

- April 2013 - Mom learns she's pregnant.
- Mom and Dad only tell close family and friends.
- June 2013 - Mom moves to San Diego near her family.
- July 2013 - Dad visits Mom, spending every day with her.



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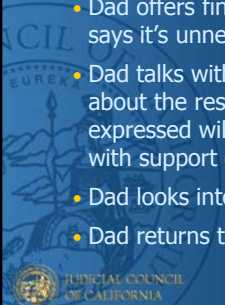
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**Adoption of Baby Boy W (2014) 232 Cal.App.4th 438**

- Dad offers financial support; Mom's family says it's unnecessary.
- Dad talks with Mom's father and family friend about the responsibilities of parenthood; expressed willingness to raise child himself with support of his family.
- Dad looks into housing and jobs in San Diego.
- Dad returns to school in Alabama.



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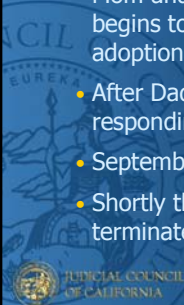
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**Adoption of Baby Boy W  
(2014) 232 Cal.App.4th 438**

- Mom and Dad talk daily, but relationship begins to deteriorate, as Mom pushes for adoption of child.
- After Dad kisses another girl, Mom stops responding to his texts.
- September 17 - Dad files paternity action.
- Shortly thereafter, Mom files petition to terminate parental rights.



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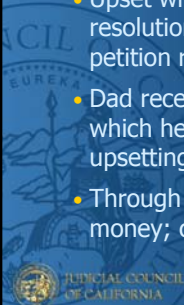
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**Adoption of Baby Boy W  
(2014) 232 Cal.App.4th 438**

- Upset with a stay of Dad's petition pending resolution of Mom's, Dad starts Change.org petition regarding rights of unwed dads.
- Dad receives e-mails of support, some of which he shares with Mom, greatly upsetting her.
- Through counsel, Dad starts sending Mom money; checks never cashed.



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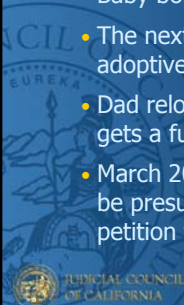
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**Adoption of Baby Boy W  
(2014) 232 Cal.App.4th 438**

- Baby born on December 23.
- The next day, Mom relinquishes child to adoptive parents.
- Dad relocates to San Diego a week later; gets a full-time job within a month.
- March 2014 - After 5 day trial, Dad found to be presumed father under Kelsey S. and petition to terminate denied.



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**Adoption of Baby Boy W  
(2014) 232 Cal.App.4th 438**

- On appeal, Mom argued that T/C misunderstood and misapplied Kelsey S. and that there was insufficient evidence to support Kelsey S. finding.
- Court finds that T/C understood Kelsey S. and conducted thorough analysis of factors.
- Substantial evidence supported finding that Dad met Kelsey S. conditions, although some he met better than others.



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**Adoption of Baby Boy W  
(2014) 232 Cal.App.4th 438**

- Undisputed that Dad took prompt legal action, publicly acknowledged paternity, and opposed adoption from the beginning
- While Dad's financial support was minimal and did not come from his own employment, he did provide support commensurate with his ability to do so as a low-income college student.
- Dad was willing to take full custody of child, despite Mom's contention that he only wanted to get legal custody to have his mother raise the child.



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**Adoption of Baby Boy W  
(2014) 232 Cal.App.4th 438**

- Dad was generally supportive up until breakdown in relationship.
- T/C noted concern with social media campaign, but stressed that this was only after Mom's filing of petition to terminate.
- T/C orders affirmed.



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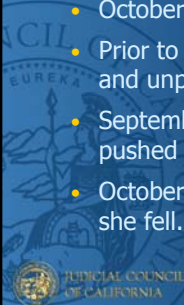
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**Adoption of Emilio G.  
(2015) 235 Cal.App.4th 1133**

- October 2012 - Mom learns she's pregnant
- Prior to pregnancy, Dad exhibited violent and unpredictable behavior.
- September 2012 - Dad yelled at and pushed Mom's mother.
- October 2012 - Dad pushed Mom so hard she fell.



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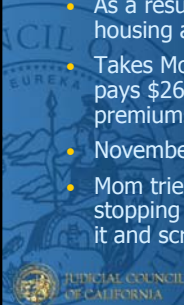
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**Adoption of Emilio G.  
(2015) 235 Cal.App.4th 1133**

- As a result of October incident, Dad loses housing and blames Mom for it.
- Takes Mom's car and lives in it, but Mom still pays \$260 car payments and insurance premiums, w/o reimbursement from Dad.
- November 29, 2012 - Argument ensued in car
- Mom tries to leave and in the process of stopping her, Dad yanks Mom's shirt and rips it and scratches her with the car key.



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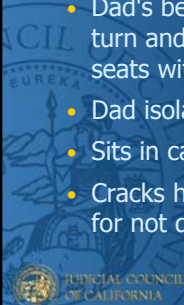
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**Adoption of Emilio G.  
(2015) 235 Cal.App.4th 1133**

- Dad's been drinking and makes an illegal turn and hits a car; forces Mom to switch seats with him as he's on probation.
- Dad isolates Mom from family and friends
- Sits in car outside her work
- Cracks her iPhone screen, saying it was for not doing what he told her to do



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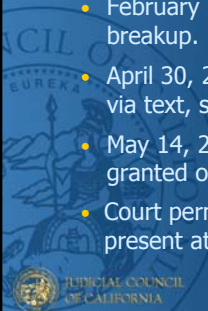
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**Adoption of Emilio G.  
(2015) 235 Cal.App.4th 1133**

- February 2013 - Mom begins to initiate breakup.
- April 30, 2013 - Dad breaks up with Mom via text, saying she's "ungrateful."
- May 14, 2013 - Mom applies for DVRO; granted on May 23.
- Court permits Dad to petition court to be present at birth; he declines to do so.



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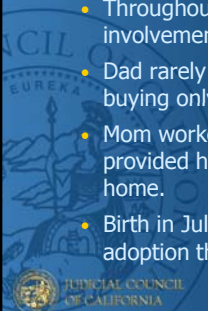
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**Adoption of Emilio G.  
(2015) 235 Cal.App.4th 1133**

- Throughout pregnancy, Dad had minimal involvement in prenatal care.
- Dad rarely worked or contributed financially, buying only a few baby items.
- Mom worked throughout pregnancy and provided him food and let him shower at her home.
- Birth in July of 2013; Baby given up for adoption three days later



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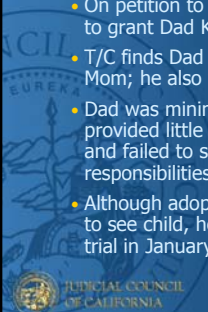
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**Adoption of Emilio G.  
(2015) 235 Cal.App.4th 1133**

- On petition to terminate parental rights, T/C declines to grant Dad Kelsey S. status.
- T/C finds Dad not only was not emotional supportive of Mom; he also was harmful to her.
- Dad was minimally supportive of prenatal care, provided little to no financial support of pregnancy, and failed to show commitment to parental responsibilities.
- Although adoptive parents never denied Dad's requests to see child, he only saw child twice between birth and trial in January.



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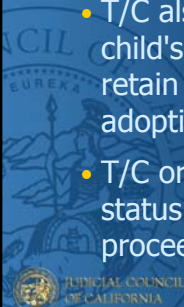
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**Adoption of Emilio G.**  
**(2015) 235 Cal.App.4th 1133**

- T/C also found that it wasn't in child's best interest for Dad to retain his rights, per FC 7664, so adoption allowed to proceed.
- T/C orders denying Kelsey S. status and allowing adoption to proceed affirmed.



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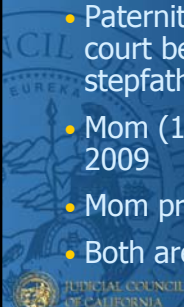
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**In re D.S.**  
**(2014) 230 Cal.App.4th 1238**

- Paternity dispute in dependency court between bio dad and stepfather
- Mom (19) and Bio dad (45) meet in 2009
- Mom prostitutes for Bio dad
- Both are arrested for shoplifting



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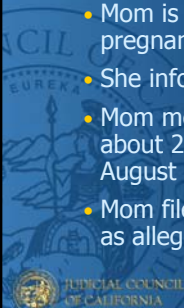
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**In re D.S.**  
**(2014) 230 Cal.App.4th 1238**

- Mom is released on bail and learns she pregnant.
- She informs Bio dad, believing child is his.
- Mom meets stepfather, and they marry about 2 months after child is born in August of 2010.
- Mom files paternity action naming Bio dad as alleged father.



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**In re D.S.**  
**(2014) 230 Cal.App.4th 1238**

- Bio dad is released in November
- He learns about paternity action when he tries to file his own; he's never served and doesn't file a response until January 2012.
- Before being incarcerated again in 2011, bio dad visits child 3 times. On last occasion, he tries to kiss Mom against her will and makes threats against stepfather.



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**In re D.S.**  
**(2014) 230 Cal.App.4th 1238**

- Mom and stepdad have child together in January of 2012.
- About a month later, he goes to jail for theft.
- While stepdad is in jail, bio dad stays with Mom for a few days.
- Around that time, kids begin living with step-grandmother, after Mom calls her while high unable to find her sons.



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**In re D.S.**  
**(2014) 230 Cal.App.4th 1238**

- Dependency petition filed in September.
- Juvenile court finds that stepdad is presumed father and child remains with step-grandmother.
- Bio dad moves to set aside; DNA test confirms that bio dad is natural father.
- 3-day trial on motion to set aside



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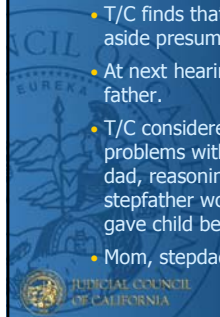
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**In re D.S.  
(2014) 230 Cal.App.4th 1238**

- T/C finds that bio dad is Kelsey S. father and sets aside presumed father determination.
- At next hearing, stepfather found to be presumed father.
- T/C considered competing presumptions, noted problems with both dads, and ruled in favor of bio dad, reasoning that having both dads in his life (since stepfather would maintain relationship through Mom) gave child best chance of success.
- Mom, stepdad, and child appeal.



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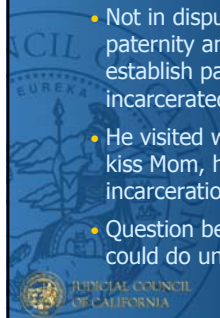
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**In re D.S.  
(2014) 230 Cal.App.4th 1238**

- Not in dispute that bio dad acknowledged paternity and took prompt legal action to establish paternity (by requesting VDP while incarcerated)
- He visited with child, but his actions (trying to kiss Mom, his drug use, his repeated incarceration, etc.) undermined his relationship.
- Question before Court: did bio dad do all he could do under the circumstances?



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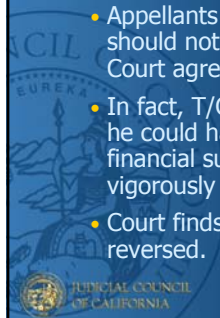
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**In re D.S.  
(2014) 230 Cal.App.4th 1238**

- Appellants argue that his bad behavior should not excuse his failures as a parent; Court agrees.
- In fact, T/C found that bio dad did not do all he could have done (e.g., providing minimal financial support, threatening stepdad, not vigorously pursuing legal rights).
- Court finds T/C in error. Judgment reversed.



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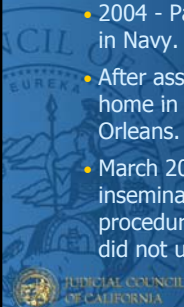
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- 2004 - Parties meet in New Orleans, while Mom in Navy.
- After assignment ended, Mom returned to her home in San Diego; Dad remained in New Orleans.
- March 2008 - Child born through artificial insemination; while Dad provided sperm for the procedure, upon pregnancy he learns that Mom did not use his sperm to get pregnant



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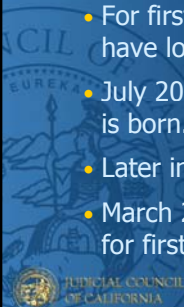
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- For first 2 years of child's life, parties have long distance relationship
- July 2010 - Mom and Dad's natural child is born.
- Later in 2010 - Mom ends relationship.
- March 2011 - Dad files paternity petition for first child.



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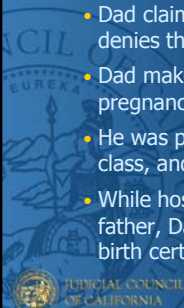
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- Dad claims Mom asked him to be the father; Mom denies this.
- Dad makes several trips to San Diego during pregnancy.
- He was present at sonogram, attended birthing class, and was present at birth.
- While hospital staff recognized him as the baby's father, Dad did not object to not being listed on birth certificate.



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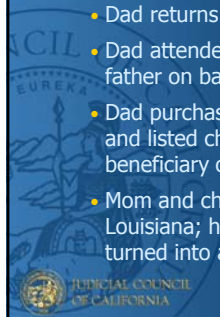
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- Dad returns to Louisiana one week after birth.
- Dad attended baptism in San Diego; not listed as father on baptismal certificate
- Dad purchased items for Mom during pregnancy and listed child as his daughter and primary beneficiary on life insurance policy.
- Mom and child visited Dad frequently in Louisiana; home was set up for child with office turned into a playroom and high chair for child.




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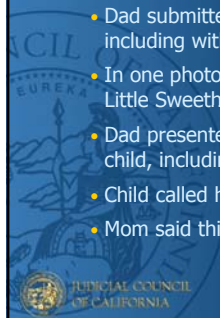
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- Dad submitted numerous photos of him with child, including with Dad's family.
- In one photo, child wore shirt that said "Daddy's Little Sweetheart."
- Dad presented cards sent from Mom on behalf of child, including one saying "You're the best, Daddy!"
- Child called him "Dad."
- Mom said this was merely a pet name.




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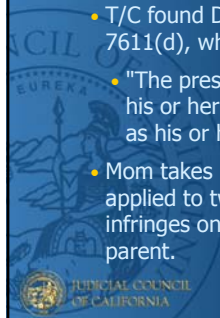
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- T/C found Dad to be presumed father per FC 7611(d), which states:
  - "The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child."
- Mom takes issue with apparent weight T/C applied to two-parent policy, which she argues infringes on her right to choose to be a single parent.




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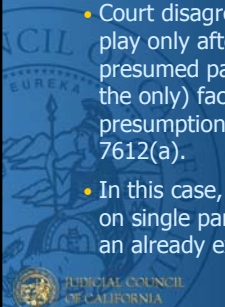
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- Court disagrees; two-parent policy comes into play only after party meets 7611(d) burden of presumed parenthood. It can be one (but not the only) factor in determining if paternity presumption should be rebutted per FC 7612(a).
- In this case, two-parent choice is not imposed on single parent; rather, the policy preserves an already existing parent-child relationship.



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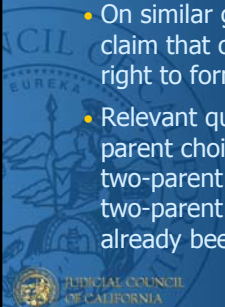
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**R.M. v. T.A.**  
**(2015) 233 Cal.App.4th 760**

- On similar grounds, Court rejects Mom's claim that order violates her constitutional right to form a single-parent family.
- Relevant question is not whether single-parent choice is afforded same respect as two-parent choice; instead it's whether a two-parent arrangement has in fact already been developed.



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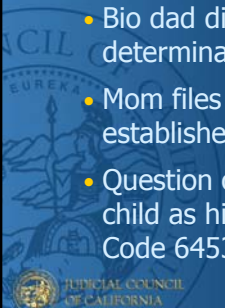
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**Estate of Britel**  
**(2015) 236 Cal.App.4th 127**

- Bio dad dies intestate, prior to any determination of paternity
- Mom files petition to have paternity established.
- Question of what "openly held out the child as his own" means per Probate Code 6453(b)(2)



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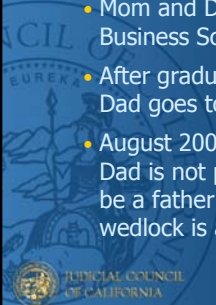
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**Estate of Britel  
(2015) 236 Cal.App.4th 127**

- Mom and Dad meet and date at Harvard Business School.
- After graduation, Mom goes to Georgia, and Dad goes to California.
- August 2000 - Mom tells Dad she's pregnant; Dad is not pleased, saying he is not ready to be a father now and having a child out of wedlock is against his Muslim religion.



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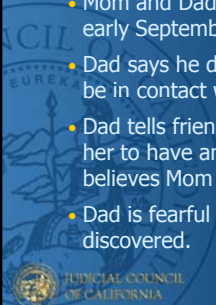
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**Estate of Britel  
(2015) 236 Cal.App.4th 127**

- Mom and Dad talk for next few weeks, but, by early September, Dad cuts off communication.
- Dad says he does not want Mom or the baby to be in contact with him or his family.
- Dad tells friend about situation and that he wants her to have an abortion; later tells friend that he believes Mom had an abortion.
- Dad is fearful of being disinherited if child is discovered.



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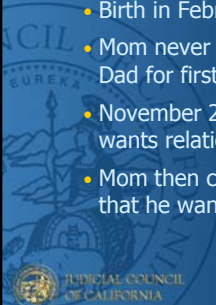
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**Estate of Britel  
(2015) 236 Cal.App.4th 127**

- Birth in February of 2001
- Mom never filed paternity petition or contacted Dad for first 5 years.
- November 2006 - Mom e-mails Dad saying child wants relationship with him; no response.
- Mom then calls Dad; Dad is cold and reiterates that he wants nothing to do with Mom or child.



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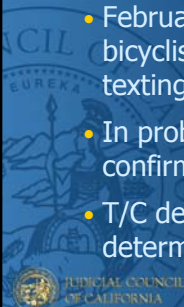
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**Estate of Britel  
(2015) 236 Cal.App.4th 127**

- February 2011 - At age 41, Dad, a bicyclist, is hit and killed by a drunk, texting driver.
- In probate case that follows, DNA test confirms bio paternity.
- T/C denies Mom's petition for determination of heirship.



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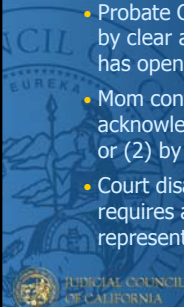
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**Estate of Britel  
(2015) 236 Cal.App.4th 127**

- Probate Code 6453(b)(2): "Paternity is established by clear and convincing evidence that the father has openly held out the child as his own."
- Mom contends this was satisfied (1) by Dad acknowledging paternity to Mom and to his friend or (2) by Dad failing to deny paternity to them.
- Court disagrees and holds that "openly held out" requires an "unconcealed affirmative representation of paternity in open view."



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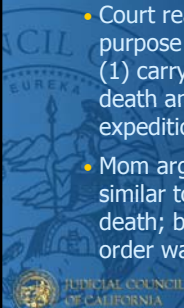
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**Estate of Britel  
(2015) 236 Cal.App.4th 127**

- Court reasons that this is consistent with purpose of intestacy succession statutes to (1) carry decedent's likely intent at time of death and (2) to do so in an efficient and expeditious manner.
- Mom argues that Dad owed an obligation similar to child support obligations owed at death; but Court disagrees as no support order was established while Dad was alive.



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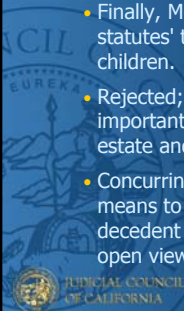
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**Estate of Britel**  
**(2015) 236 Cal.App.4th 127**

- Finally, Mom claims an equal protection violation for statutes' treatment of nonmarital vs. marital children.
- Rejected; statute is substantially related to important state interest of orderly disposition of estate and carrying out decedent's likely intent.
- Concurring opinion invites legislature to create means to establish paternity through DNA testing if decedent acknowledged paternity even if not in open view.



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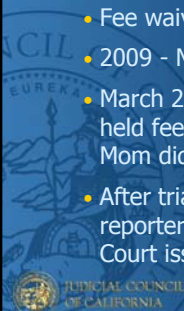
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**C.S. v. W.O**  
**(2014) 230 Cal.App.4th 23**

- Fee waiver case
- 2009 - Mom's initial fee waiver granted.
- March 2013 - prior to custody trial, court held fee waiver hearing, determining that Mom did not have to pay court reporter fees.
- After trial, Mom paid \$1000 for expedited reporter's transcript for possible appeal; Court issued OSC to reconsider fee waiver.



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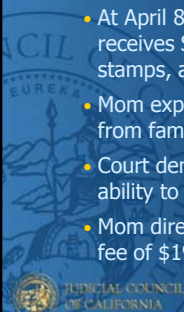
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**C.S. v. W.O**  
**(2014) 230 Cal.App.4th 23**

- At April 8 hearing, Mom provided proof that she receives Supplemental Security Income, food stamps, and cash aid.
- Mom explained that she got the \$1000 from loans from family, but had no proof that it was a loan.
- Court denied fee waiver based on my Mom's ability to pay for transcript.
- Mom directed to pay her share of court reporter fee of \$191.



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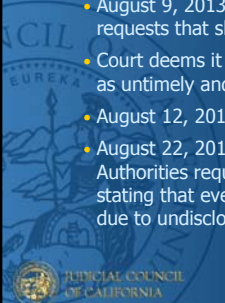
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**C.S. v. W.O**  
**(2014) 230 Cal.App.4th 23**

- August 9, 2013 - Mom files new fee waiver request and requests that she not have to pay \$191 reporter fee.
- Court deems it a request for reconsideration and denies as untimely and without new facts to justify order.
- August 12, 2013 - Mom files new request; again denied.
- August 22, 2013 - Mom files request with Points and Authorities requesting formal hearing; request denied stating that even if CCP 1008 did apply, request denied due to undisclosed income.



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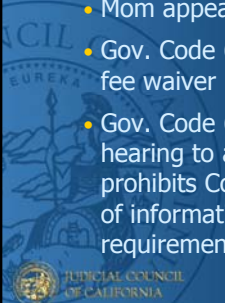
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**C.S. v. W.O**  
**(2014) 230 Cal.App.4th 23**

- Mom appeals all 3 August denials
- Gov. Code 68632 permits litigant to obtain fee waiver if s/he receives public benefits.
- Gov. Code 68636 allows Court to set hearing to assess continued eligibility and prohibits Court from requiring submission of information not related to eligibility requirements.



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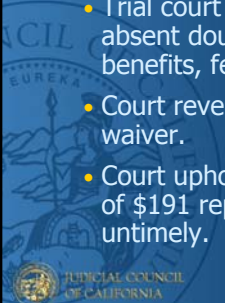
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**C.S. v. W.O**  
**(2014) 230 Cal.App.4th 23**

- Trial court erred in considering loan; absent doubt about receipt of public benefits, fee waiver must be granted.
- Court reverses order denying fee waiver.
- Court upholds denial of reconsideration of \$191 reporter fee as request was untimely.



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**Helgestad v. Vargas**  
(2014) 231 Cal.App.4th 719

**JACKSON CREDITS AVAILABLE WHEN UNMARRIED PARENTS RECONCILE**

- *Jackson v. Jackson* (1975) 51 Cal.App.3d 363
- i.e. Payor gets full CS credit when has 100% custody of child
- Not a retroactive modification
- "Jackson credits"

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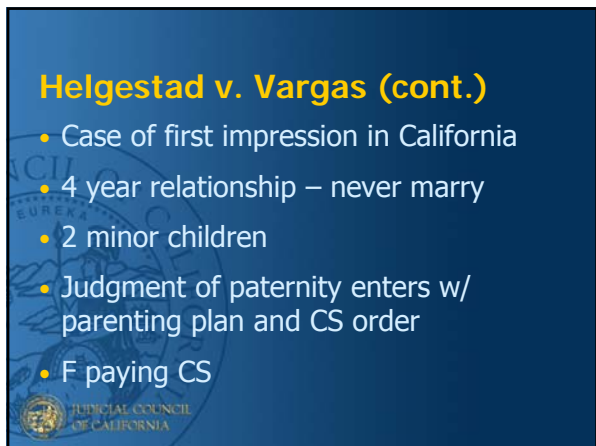
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### Helgestad v. Vargas (cont.)

- Case of first impression in California
- 4 year relationship – never marry
- 2 minor children
- Judgment of paternity enters w/ parenting plan and CS order
- F paying CS



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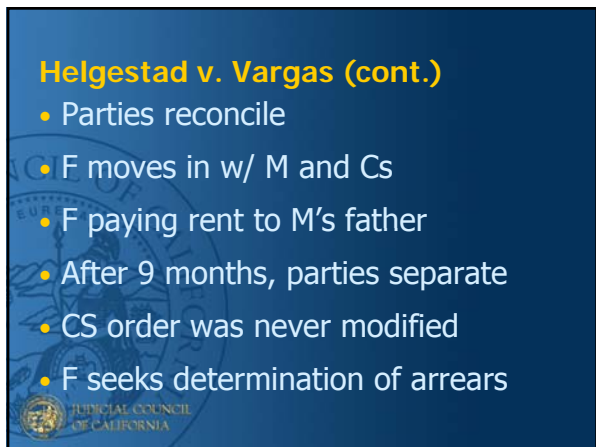
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### Helgestad v. Vargas (cont.)

- Parties reconcile
- F moves in w/ M and Cs
- F paying rent to M's father
- After 9 months, parties separate
- CS order was never modified
- F seeks determination of arrears



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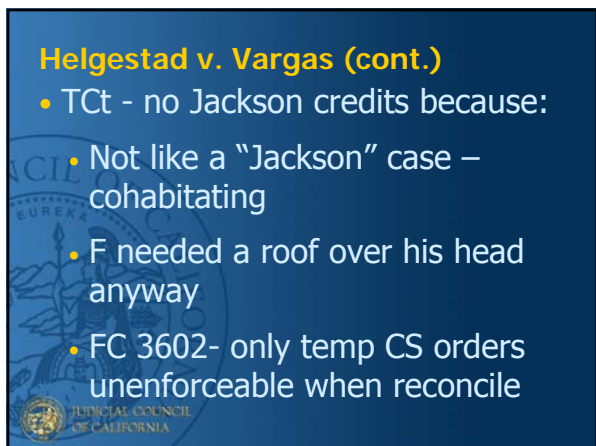
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### Helgestad v. Vargas (cont.)

- TCt - no Jackson credits because:
  - Not like a "Jackson" case – cohabitating
  - F needed a roof over his head anyway
  - FC 3602- only temp CS orders unenforceable when reconcile



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**Helgestad v. Vargas (cont.)**

- F should have modified when reconciled w/ M
- FYI - if they had married, CS order would have terminated per *Wilson & Bodine* (2012)



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**Helgestad v. Vargas (cont.)**

REVERSED & REMANDED!

- "We see no reason to differentiate total changes of custody from periods of living together in the same household; actual support is actual support."



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**Helgestad v. Vargas (cont.)**

- Vast majority of other states allow credits during reconciliation
- Equity/trial court discretion
- Public policy consideration of promoting reconciliation
- Chilling effect having to go to Court when trying to reconcile



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**Helgestad v. Vargas (cont.)**

- Consistent w/ FC 3602 (temp CS unenforceable if reconcile) intent of promoting reconciliation
- CA remanded to TC to consider whether credits would issue, yet indicated it found F's paying rent to GP was not for C's as they had been living there rent free previously




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**Helgestad v. Vargas (cont.)**

- CA went to lengths to discuss emotional, fragile state of parents trying to reconcile and fact it is not in Cs best interests to force parents to have an expensive legal proceeding that could ruin the chances reconciliation
- Equity, equity, equity...




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**IRMO Daugherty**

(2014) 232 Cal.App.4th 463

**DERIVATIVE SOC. SECURITY BENEFITS ARE CS CREDIT**

- Parties have 2 Cs - F paying CS
- DCSS brings motion to modify CS
- F's sole income is SSDI
- \$796/mo derivative Soc. Security (from F's SSDI) being paid to M for C's




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**Daugherty v. DCSS (cont.)**

- M argues the \$796 is additional income to F per FC 4058 – after all, the definition of “income” includes income from any source
- TCt orders \$796/mo is a credit against current CS order and overage is a credit towards arrears
- M appeals



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**Daugherty v. DCSS (cont.)**

AFFIRMED!

- Federal SSA - 42 U.S.C. Section 402(d) - qualifying Cs of a disabled person “shall be entitled” to derivative benefits
- These are payments to and for the Cs and not income to the disabled parent



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**Daugherty v. DCSS (cont.)**

- FC 4504(b) - Derivative payments “shall be credited toward the amount [of CS]... to be paid by the noncustodial parent unless the [amount paid to obligee was]... taken into consideration by the court in determining the amount of support to be paid.”



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## EARNING CAPACITY



JUDICIAL COUNCIL OF CALIFORNIA

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### IRMO McHugh

(2014) 231 Cal.App.4<sup>th</sup> 1238

CAN USE EARNING CAPACITY WHEN JOB COULD HAVE BEEN KEPT AND WAS LOST DUE TO BAD BEHAVIOR

- DOM 1992 – Separated 9/2009 – 1 C - 13 yrs.
- H - \$24,159/mo Amcor salesman
- W - stay at home mom
- 11/2009 – Temp CS \$2,227 and SS \$4,773

JUDICIAL COUNCIL OF CALIFORNIA

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### IRMO McHugh (cont.)

- Early/2010 – H seeks modif. – says income cut in half– best client left Amcor
- Also, W is licensed atty and should work
- 3/2011 – CS \$1,275 and SS \$2,840

JUDICIAL COUNCIL OF CALIFORNIA

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### IRMO McHugh (cont.)

- 3/2011 – Both H and W file motions re CS and SS
- W wants to set aside modification
- H wants further downward modification based on loss of job and fact new job provides less income
- TCT hears set aside motion first

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### IRMO McHugh (cont.)

- W has VP of Amcor testify:
  - H top salesman w/ Amcor
  - 2009 - H requested and got lesser paying position but Amcor declined more "aggressive" requests
  - Severe decline in H's commissions and H commission hiding/sharing
  - H diverting clients to H's father's competing company

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### IRMO McHugh (cont.)

- H apologized and wanted to "come clean"
- Amcor had 3 conditions: disclose; pay restitution; and sign "last chance" contract
- H refused to disclose or pay restitution
- H could have kept his job if he'd just met the 3 reqmts.

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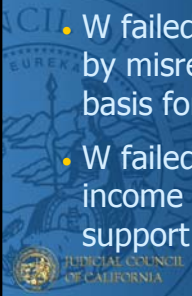
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### IRMO McHugh (cont.)

- TCt denies set aside
- W failed to show H defrauded Ct. by misrep. his income (W's only basis for set aside)
- W failed to show any actual income diverted in 3/2011 when support modification ordered



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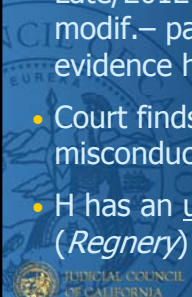
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### IRMO McHugh (cont.)

- Late/2012 –hearing on H's motion to modif.– parties stip. Ct. uses same evidence heard at set aside hearing
- Court finds H could have kept job & misconduct related to CS & SS
- H has an unwillingness to work (*Regnery*)



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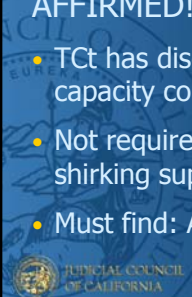
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### IRMO McHugh (cont.)

AFFIRMED!

- TCt has discretion to use earning capacity consistent w/ best interests
- Not required to find party is deliberately shirking support responsibility
- Must find: Ability & Opportunity to work



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**IRMO McHugh (cont.)**

- BOP depends on who seeks the modification of support
- Payor: - must show lack of ability or opportunity
- Payee: - must show ability & opportunity exists



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**IRMO McHugh (cont.)**

- W showed H had oppty. to keep job
- H bore burden to show couldn't meet Amcor's 3 reqmts.
- CA finds substantial evid. supports TCt – no abuse of discretion
- H voluntarily left his job and, thus, can impute income to him at prior earnings



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**IRMO McHugh (cont.)**

- CA distinguishes *Bardzik* and *Berger* - In those cases, a party voluntarily left a job much earlier than had to yet opposing party failed to show current oppty. – Here, W showed H had oppty. at relevant time period



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### IRMO McHugh (cont.)

- TCt grants W's request to increase support
- Uses \$24,159/mo for H & \$8,333/mo for W
- CS \$2,047/mo retro to 8/2012 (no SS indicated in order)
- TCt finds order is in BI of C
- H appeals – argues res judicata



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### IRMO McHugh (cont.)

- CA - No res judicata
- Set aside related to assertion H lied about actual income he earned
- In modif. request, W sought to impute based on earning capacity
- Although based on same basic facts, each required different burdens to meet (actual income versus imputation of income)



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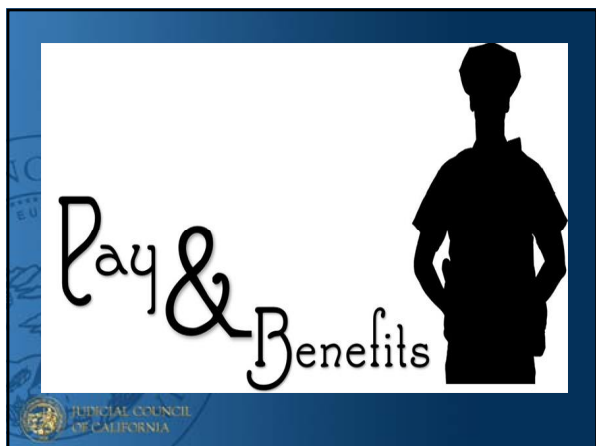
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### Speer v. Commissioner (2015) 144 T.C. No. 14

#### LEAVE PAY IS NOT WORKER'S COMP PAY – NOT EXCLUDABLE

- Retired LAPD detective
- Cashed out \$53K vacation and sick leave – “leave pay”
- Claims portion of “leave pay” excludable b/c related to disability periods



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### Speer v. Commissioner (cont.)

- IRC Section 104(a)(1) – \$\$\$ received under Workmen’s Comp Act is compensation for personal injuries or sickness and, thus, is excludable from gross income
- LA Admin Code is similar to later enacted CA Labor Code section providing no salary loss for police officers during disability



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### Speer v. Commissioner (cont.)

- Thus, same treatment as a Worker’s Comp Act statute
- BUT – question is whether “fringe benefits” are excluded
- “Leave pay” is paid per MOU with union – not per statute
- “Leave pay” that is unused can only be cashed out after retirement



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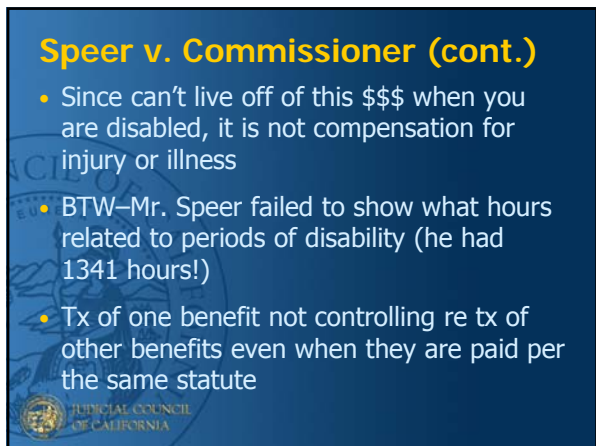
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### Speer v. Commissioner (cont.)

- Since can't live off of this \$\$\$ when you are disabled, it is not compensation for injury or illness
- BTW—Mr. Speer failed to show what hours related to periods of disability (he had 1341 hours!)
- Tx of one benefit not controlling re tx of other benefits even when they are paid per the same statute




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### SPOUSAL SUPPORT OR NOT?




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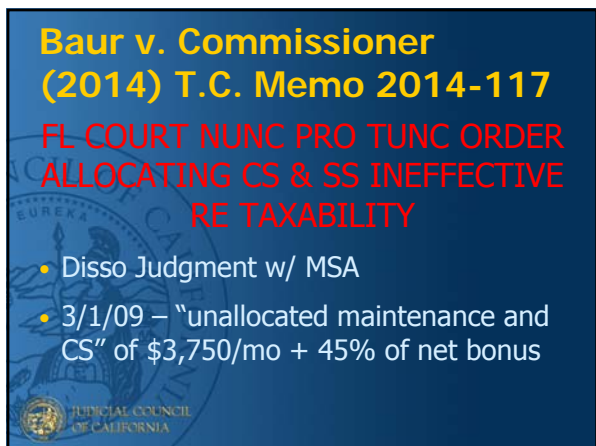
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### Baur v. Commissioner (2014) T.C. Memo 2014-117

FL COURT NUNC PRO TUNC ORDER ALLOCATING CS & SS INEFFECTIVE RE TAXABILITY

- Disso Judgment w/ MSA
- 3/1/09 – “unallocated maintenance and CS” of \$3,750/mo + 45% of net bonus




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**Baur v. Commissioner (cont.)**

- Terminates on death, remarriage, cohabitation
- Modifies to "maintenance of \$1,800/mo" when C emancipates
- 100% is taxable to Wife and deductible by Husband
- Review in 2 years



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**Baur v. Commissioner (cont.)**

- H claims deduction of \$42K in 2010 – basically 100% paid
- IRS disallows \$27K
- 9/6/12 – TCt made Nunc Pro Tunc order re H's "Petition to clarify intent"
- TCt orders all payments were SS and all taxable to Wife



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**Baur v. Commissioner (cont.)**

- IRC 215(a)-(b) – can deduct SS
- IRC 71(b)(1) – defines SS
  - Divorce or legal sep. document
  - Doc doesn't exclude as income
  - H and W not living together
  - Terminates upon death of either payor or payee



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### Baur v. Commissioner (cont.)

- IRC 71(c)(2) – if support is reduced upon contingency related to a child, then it's CS
- Statute determines whether SS or CS – not parties intent
- Disregard retroactive order
- UNLESS, correcting "clerical error" type mistake (here, "reject" court's finding)



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### Peery v. Commissioner (2014) T.C. Memo 2014-151

#### EQUALIZING PAYMENT IS NOT DEDUCTIBLE SS

- 37 year marriage
- MSA provides SS to W of 40% of all of H's income
- MSA divides all property



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### Peery v. Commissioner (cont.)

- MSA – "an award of property settlement in the sum of \$63,500" payable in 30 days
- H writes "Spousal Support" in memo line of \$63,500 check
- W crosses it out



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### Peery v. Commissioner (cont.)

- Tax Court – if fail to meet one statutory requirement of IRC 71(b)(1), not SS
- Here, MSA says “property settlement”
- Thus, not SS



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### SAME SEX MARRIAGE



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### Obergefell v. Hodges (6/26/15) USSCT No. 14-556, 2015 WL 2473451

- Can 4 states deny same sex couples the right to marry or refuse to recognize their legal out-of-state marriages?
- Indiv. State Courts said NO
- Sixth Circuit said YES



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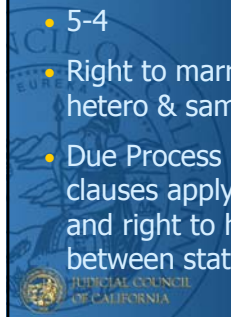
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### Obergefell v. Hodges (cont.)

Supremes say NO!

- 5-4
- Right to marry is a fundamental right of hetero & same sex couples
- Due Process and Equal Protection clauses apply to both the right to marry and right to have marriages recognized between states



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## Tax Exemptions



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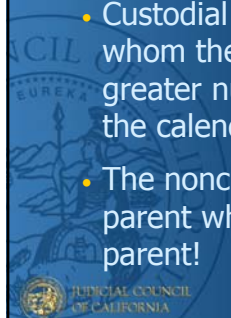
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### General Rule

- Custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year (1.152-4(d)(1))
- The noncustodial parent is the parent who is not the custodial parent!



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## General Rule

- Residing with a parent for a night means:
  - Sleeps at parent's residence *or*
  - Sleeps in the company of parent when C does not sleep at P's residence.



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## General Rule

- NCP may claim dependency exemption deduction if CP executes a written declaration releasing CP's claim to the deduction *AND*
- NCP attaches Dec. to tax return



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## Application:

- Easy Example



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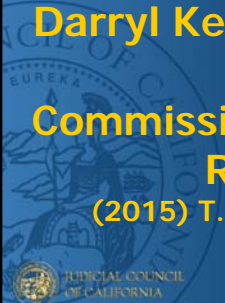
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**Darryl Keith Stapleton, II**  
**V.**  
**Commissioner of Internal Revenue**  
**(2015) T.C. Memo 2015-171**



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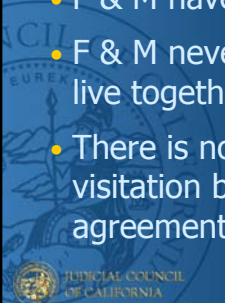
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**Facts**

- F & M have 2 children
- F & M never married and did not live together during 2011
- There is no court order re: visitation but F & M have a verbal agreement



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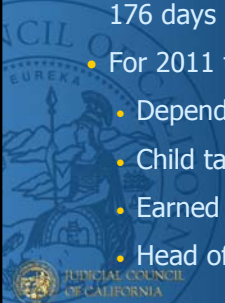
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**Facts**

- F & M stipulate that F had the children 176 days in 2011
- For 2011 tax return, F claims:
  - Dependency exemption
  - Child tax credit
  - Earned income credit
  - Head of household



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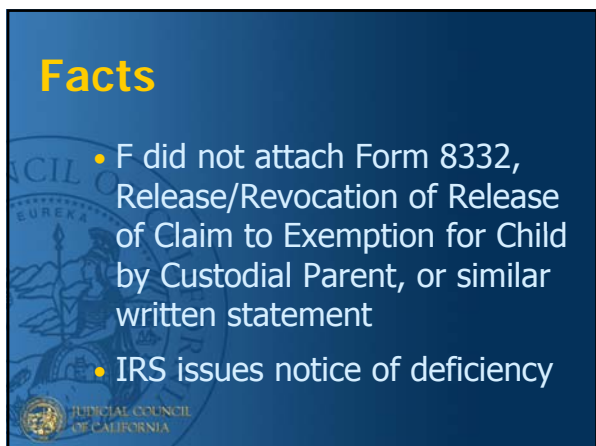
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## Facts

- F did not attach Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or similar written statement
- IRS issues notice of deficiency



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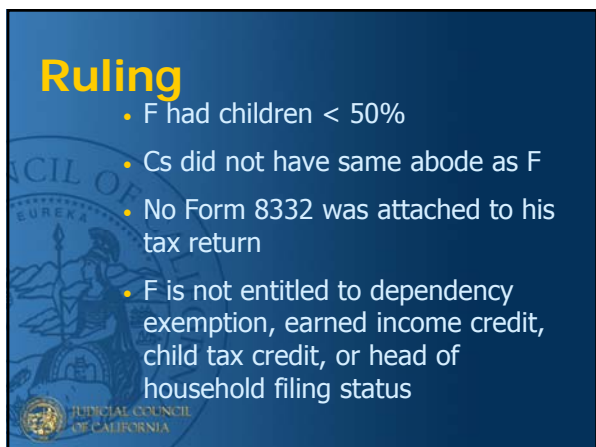
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## Ruling

- F had children < 50%
- Cs did not have same abode as F
- No Form 8332 was attached to his tax return
- F is not entitled to dependency exemption, earned income credit, child tax credit, or head of household filing status



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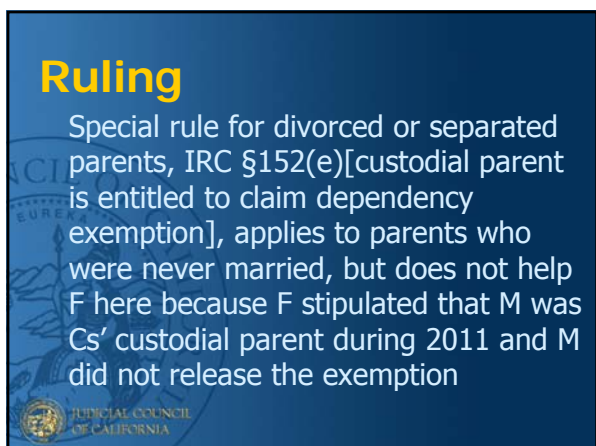
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## Ruling

Special rule for divorced or separated parents, IRC §152(e)[custodial parent is entitled to claim dependency exemption], applies to parents who were never married, but does not help F here because F stipulated that M was Cs' custodial parent during 2011 and M did not release the exemption



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**QUESTION:**

- How do we determine who has >50%?

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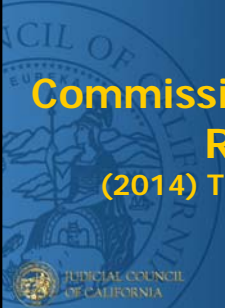
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**Harris**  
**v.**  
**Commissioner of Internal Revenue**  
**(2014) T.C. Memo 2014-69**



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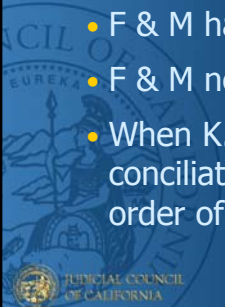
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**Facts**

- F & M have a child, K.H.
- F & M never married
- When K.H. is 2yo, F & M sign conciliation agreement (became order of court)



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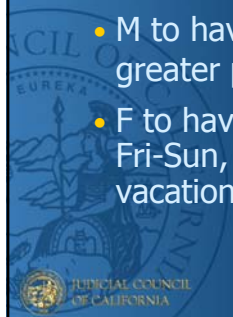
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### Agreement Terms:

- M to have physical custody greater part of year
- F to have 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> weekend, Fri-Sun, some holidays and vacation.



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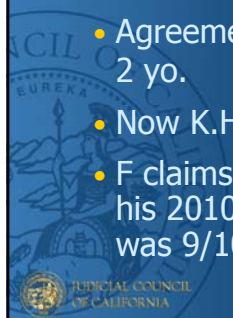
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### But...

- Agreement signed when K.H. is 2 yo.
- Now K.H. is 9 yo.
- F claims K.H. as dependent on his 2010/11 tax returns (K.H. was 9/10 yo).



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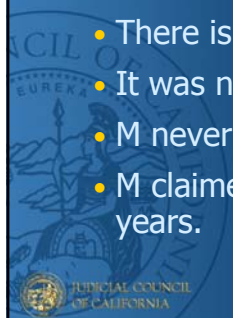
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### Can He Do it?

- There is a court order.
- It was never modified.
- M never signed a release.
- M claimed K.H. for the same tax years.



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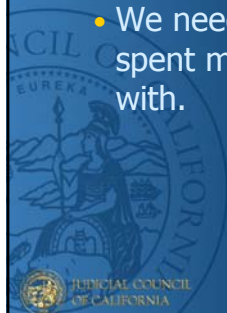
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### What's Missing?

- We need to know who K.H. spent more than half the year with.



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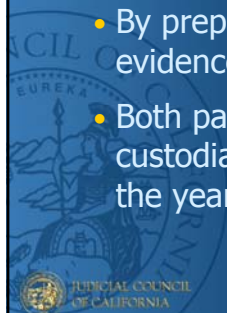
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### How to Prove it?

- By preponderance of the evidence.
- Both parents: I was the custodial parent more than 1/2 the year.



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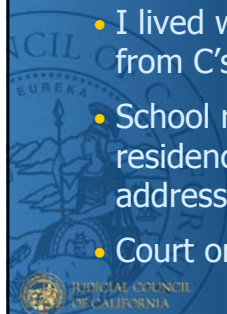
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### Mother's Case

- I lived within walking distance from C's school, F lived far
- School records have my residence address as primary address.
- Court order says I'm P >50%



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### Father's Case

- I helped K.H.'s football career
- I helped K.H.'s football career
- and one more thing:
  - I helped K.H.'s football career!
  - I coached his basketball team
  - K.H. stayed with me at Great Aunt's house mid-week



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### Court's Ruling

- Father helped K.H.'s football career
- From a logistical standpoint, it is unlikely that Ms. McFall, alone, could have managed K.H.'s highly mobile daily activities
- M didn't have a car (but GM did)



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### Court's Ruling

- F spent >50% with K.H.
- C slept at F's resident or in the company of F at Great Aunt's residence more than 50% during 2010-2011.
- F gets the exemption.



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**QUESTION:**

- What if Parties were living together for all but 5 months during a tax year?

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**Rolle  
v.  
Commissioner of Internal  
Revenue  
(2015) T.C. Memo 2015-93**

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**Facts**

- F & M marry in 2006.
- They have two children
- F & M separate 7/31/11. M files for divorce on 1/9/12.
- Disso: each claims 1 C for 2013
- No mention of 2011

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### Facts

- F & M were living together from 12/2010 to 7/31/2011.
- Who should claim the exemptions for 2011?
- Parties lived together for more than 1/2 the year.

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### F Files 2011 tax return

- F claims HH.
- F claims exemption for both children.
- Earned income credit.
- Child tax credit.
- Child care credit.

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### IRS Response

- Changed filing status to single.
- No dependency exemption.
- No earned income credit.
- No child tax credit.
- No child care credit.

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### What's Missing?

- Does it matter who had the majority of the time with the children for the five months after separation? (8-1 to 12-31)
- In case it matters: M did.

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### Tax Court Verdict

- Custodial time for five months matters.
- One with majority time gets all claims.
- Father isn't the one. Father loses.

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### Tax Court Verdict

- F did not have children >50%
- Cs were not his qualifying Cs:
  - No earned income credit.
  - No child tax credit.
  - No child care credit.
- No HH

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## QUESTION

- What if we have a Judgment awarding a parent the right to claim a child on his/her tax return?

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## Hendricks v. Commissioner of Internal Revenue (2014) T.C. Memo 2014-192

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## Facts

- Anthony Hendricks and Marie Williams marry on 10/26/1996.
- Two children: A.H. & A.R.H.
- 2007, Marie had enough.
- Marie files for divorce.

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## Facts

- 2/27/07, final Judgment signed by Court.
- Judgment mailed to both parties that same day.

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## Terms of Judgment

- Commencing 2007, and continuing each and every year thereafter, Ms. Williams should be awarded the right to claim the parties' minor child, A.H. born 2004, for purposes of filing Federal Income Taxes."

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## Terms of Judgment

- Likewise, commencing 2007, and continuing each and every year thereafter, Mr. Hendricks should be awarded the right to claim the parties' minor child, A.R.H born 1997, for purposes of filing Federal Income Taxes."

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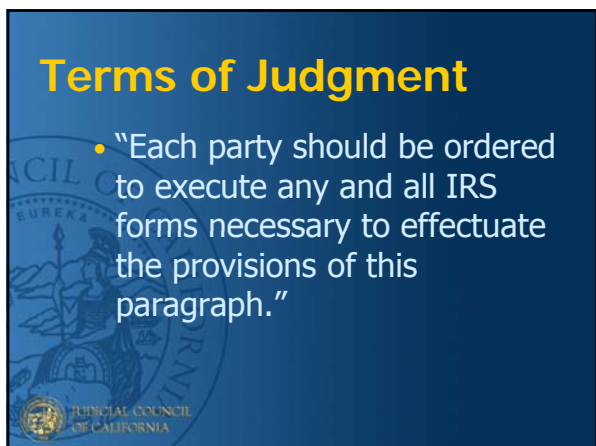
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## Terms of Judgment

- “Each party should be ordered to execute any and all IRS forms necessary to effectuate the provisions of this paragraph.”



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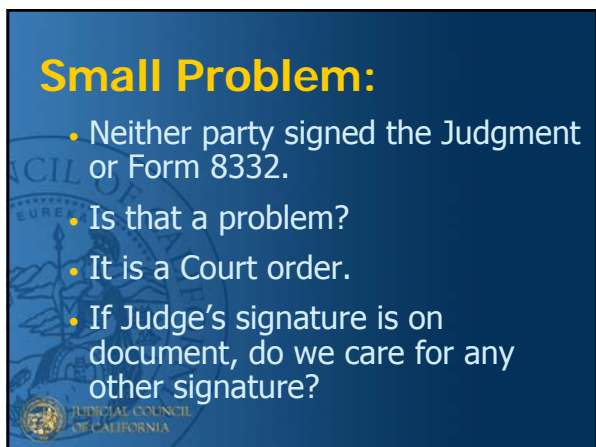
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## Small Problem:

- Neither party signed the Judgment or Form 8332.
- Is that a problem?
- It is a Court order.
- If Judge’s signature is on document, do we care for any other signature?



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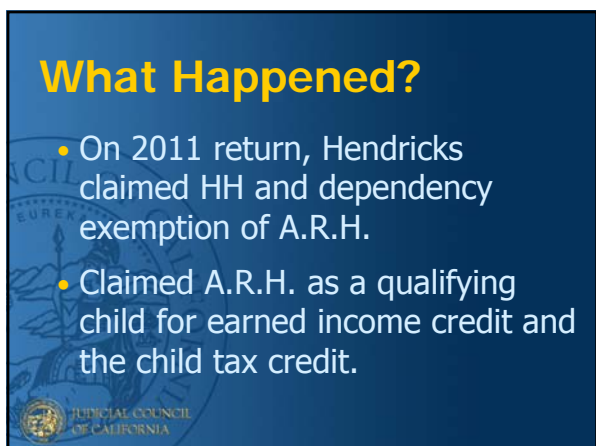
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## What Happened?

- On 2011 return, Hendricks claimed HH and dependency exemption of A.R.H.
- Claimed A.R.H. as a qualifying child for earned income credit and the child tax credit.



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## What Happened?

- IRS sent notice of deficiency.
- Said "can't claim A.R.H."
- Hendricks files a petition disputing IRS determination.



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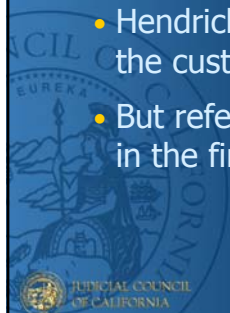
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## Important:

- Hendricks admits that he is not the custodial parent of A.R.H.
- But refers to the Court's orders in the final judgment.



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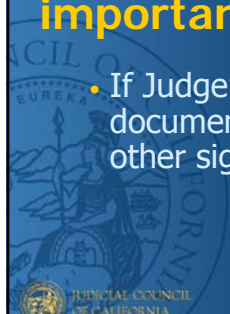
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## Back to what's MORE important:

- If Judge's signature is on document, do we care for any other signature?



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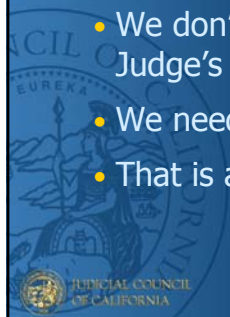
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## Decision

- We don't care about the Judge's signature.
- We need the party's signature
- That is all that matters.



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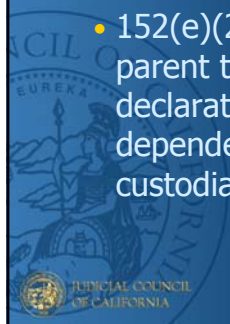
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## Decision

- 152(e)(2) requires custodial parent to sign a written declaration releasing dependency exemption to non custodial parent.



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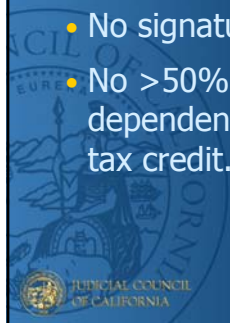
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## Decision

- No signature = no release.
- No >50% custody = no right to dependency exemption or child tax credit.



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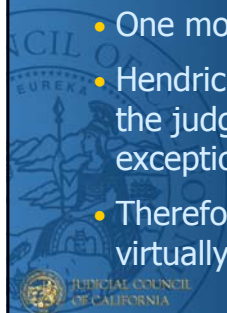
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## But Wait...

- One more argument...
- Hendricks says "we did not sign the judgment...but neither filed exception or appeal.
- Therefore, final judgment was virtually signed!



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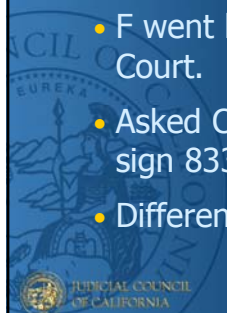
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## What If???

- F went back to Family Law Court.
- Asked Court to direct Clerk to sign 8332 form.
- Different outcome?



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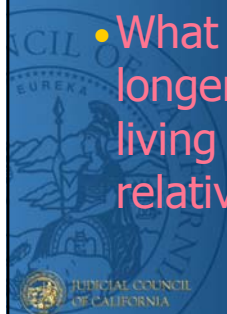
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## QUESTION

- What if Child is no longer a minor and is living with another relative?



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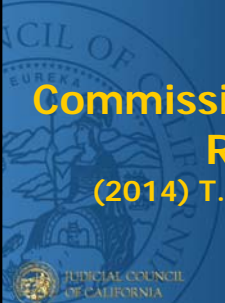
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**Davis**  
**v.**  
**Commissioner of Internal Revenue**  
**(2014) T.C. Memo 2014-147**



JUDICIAL COUNCIL OF CALIFORNIA

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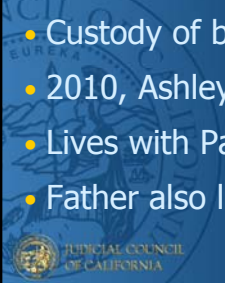
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**Facts**

- F & M divorce in 1997
- Custody of both children -> M
- 2010, Ashley (19) FT student
- Lives with Paternal Gmother
- Father also lives with Gmother



JUDICIAL COUNCIL OF CALIFORNIA

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**Facts**

- F claims Ashley as qualifying child for his 2010 tax return
- IRS sends the dreadful notice



JUDICIAL COUNCIL OF CALIFORNIA

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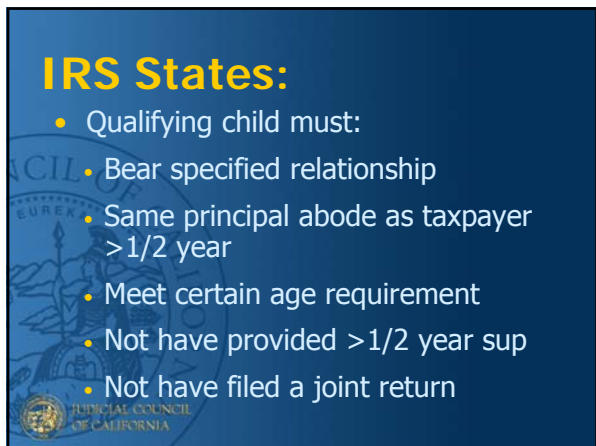
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### IRS States:

- Qualifying child must:
- Bear specified relationship
- Same principal abode as taxpayer > 1/2 year
- Meet certain age requirement
- Not have provided > 1/2 year sup
- Not have filed a joint return



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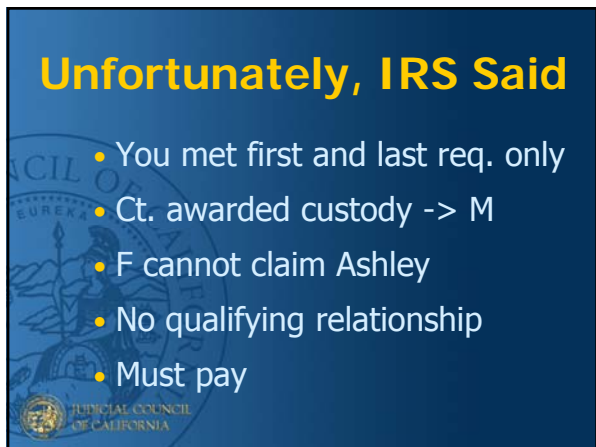
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### Unfortunately, IRS Said

- You met first and last req. only
- Ct. awarded custody -> M
- F cannot claim Ashley
- No qualifying relationship
- Must pay



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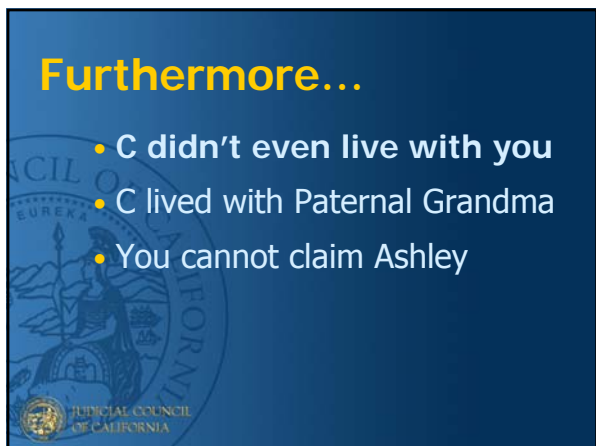
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### Furthermore...

- C didn't even live with you
- C lived with Paternal Grandma
- You cannot claim Ashley



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## Court's Decision

- Family Law Judge awarded custody of Ashley to Mother
- ***WE DON'T CARE!!!***

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## Why?

- We look at parent who had child > 50% of the time for year in question
- Child was with F not M
- F can claim Ashley

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## Court's Decision

- But Ashley was living with Paternal Grandma
- ***WE DON'T CARE!!!***

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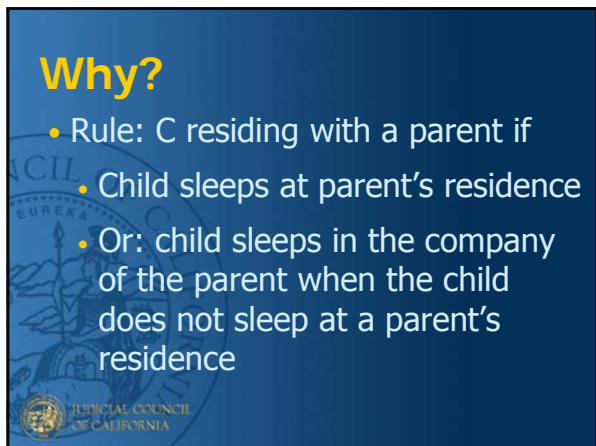
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### Why?

- Rule: C residing with a parent if
  - Child sleeps at parent's residence
  - Or: child sleeps in the company of the parent when the child does not sleep at a parent's residence



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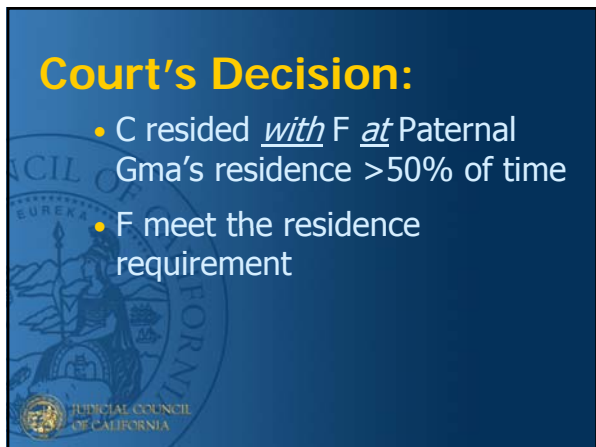
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### Court's Decision:

- C resided with F at Paternal Gma's residence >50% of time
- F meet the residence requirement



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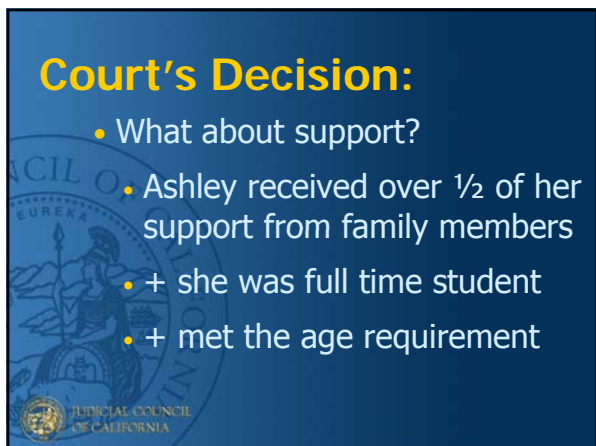
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### Court's Decision:

- What about support?
  - Ashley received over 1/2 of her support from family members
    - + she was full time student
    - + met the age requirement



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### Just a Little Huge Issue

- Ashley is 19 years of age
- Shouldn't she be emancipated?
- Well... maybe, but
- ***WE DON'T CARE!!!***



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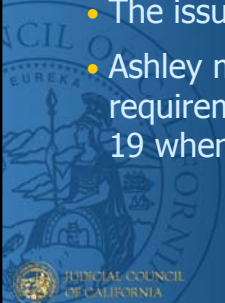
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### Just a Little Huge Issue

- The issue was not raised
- Ashley meets the age requirement because she was 19 when the tax year started.



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### QUESTION:

- Who has the burden of proof?



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**SERGIENKO & CORONA**  
**v.**  
**Commissioner of Internal Revenue**  
**(2014) T.C. Memo 2014-56**



JUDICIAL COUNCIL OF CALIFORNIA

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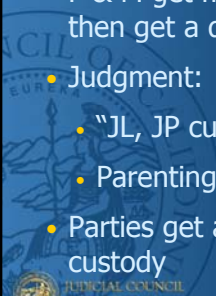
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**Facts**

- F & M get married, have a child (AIG) then get a divorce (2009)
- Judgment:
  - "JL, JP custody,
  - Parenting time is by agreement.
- Parties get along and share physical custody



JUDICIAL COUNCIL OF CALIFORNIA

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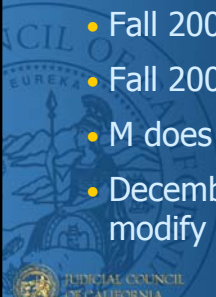
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**Facts**

- Fall 2009, F finds new love.
- Fall 2009, M marries.
- M does not allow F's visits.
- December 2009, F files RFO to modify visitation:



JUDICIAL COUNCIL OF CALIFORNIA

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### Father's Declaration

- M and I shared AIG on equal basis.
- This past fall I became involved in a serious relationship. M began preventing me from seeing AIG.
- This occurred until I filed an RFO in 12/1/09.
- I want a fixed schedule.

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### Family Court:

- April 2, 2010, Ct. set week on/ week off visitation schedule.
- Parties follow the schedule.

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### Current Issues:

- M + New Husband file 2010 tax return:
  - \$17,531 total income.
  - Claim AIG for Dependency exemption, tax credit, income tax credit.

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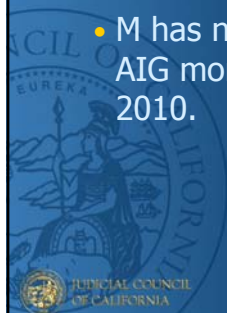
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## IRS Response

- M has not proven that she had AIG more than 50% during 2010.



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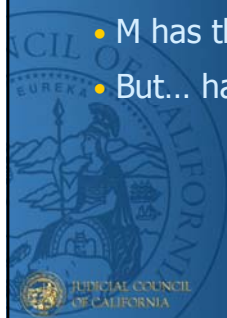
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## Tax Court

- M has the burden of proof.
- But... has she met the burden?



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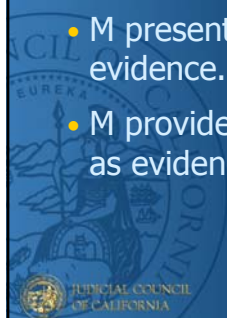
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## Evidence Presented:

- M presents F's declaration as evidence.
- M provides her own declaration as evidence.



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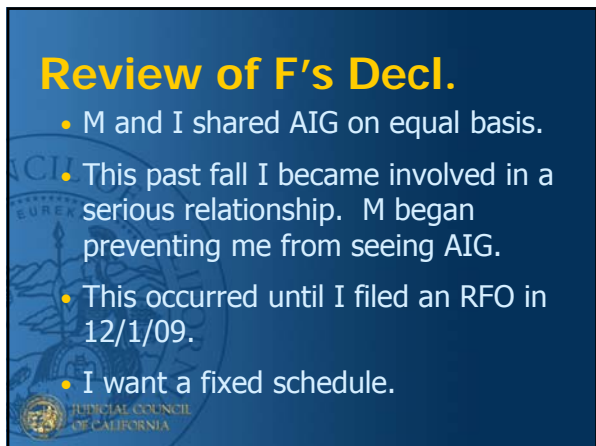
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### Review of F's Decl.

- M and I shared AIG on equal basis.
- This past fall I became involved in a serious relationship. M began preventing me from seeing AIG.
- This occurred until I filed an RFO in 12/1/09.
- I want a fixed schedule.



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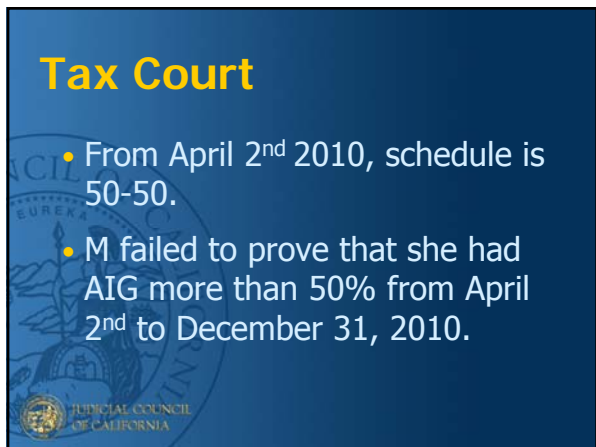
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### Tax Court

- From April 2<sup>nd</sup> 2010, schedule is 50-50.
- M failed to prove that she had AIG more than 50% from April 2<sup>nd</sup> to December 31, 2010.



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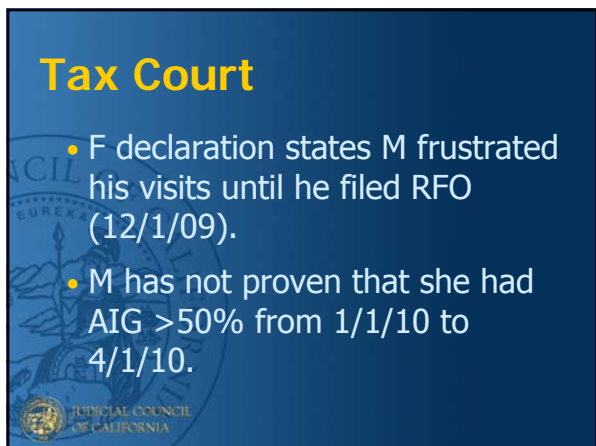
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### Tax Court

- F declaration states M frustrated his visits until he filed RFO (12/1/09).
- M has not proven that she had AIG >50% from 1/1/10 to 4/1/10.



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## But...

- What about M's own testimony?



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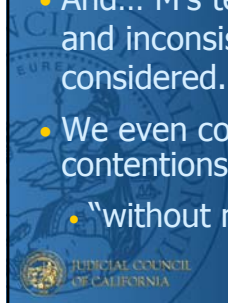
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## Tax Court

- And... M's testimony is not credible and inconsistent. It will not be considered.
- We even considered all other contentions and arguments:
  - "without merit, irrelevant, moot!"



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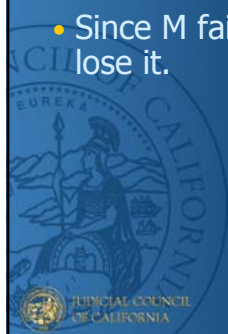
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## The Verdict:

- Since M failed to prove it. She will lose it.



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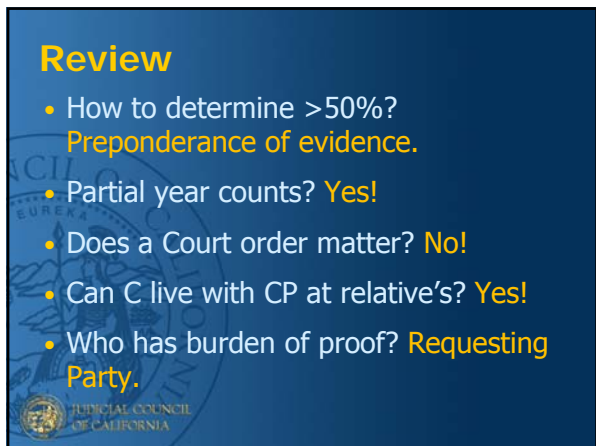
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### Review

- How to determine >50%? **Preponderance of evidence.**
- Partial year counts? **Yes!**
- Does a Court order matter? **No!**
- Can C live with CP at relative's? **Yes!**
- Who has burden of proof? **Requesting Party.**



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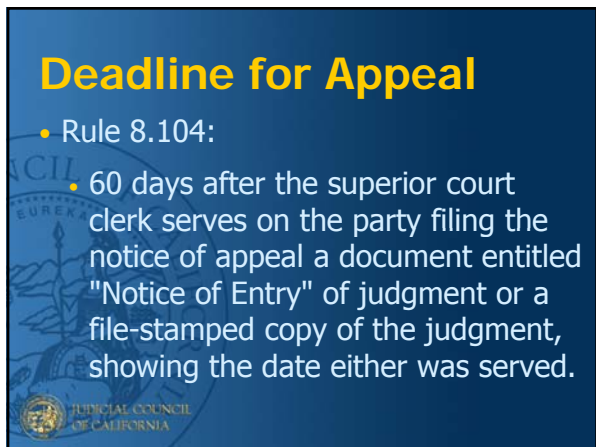
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### Deadline for Appeal

- Rule 8.104:
  - 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was served.



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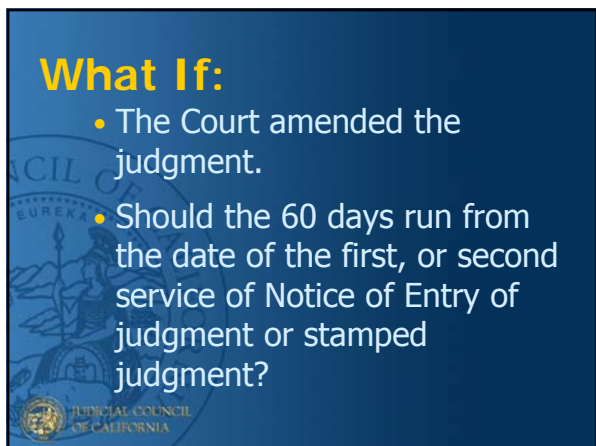
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### What If:

- The Court amended the judgment.
- Should the 60 days run from the date of the first, or second service of Notice of Entry of judgment or stamped judgment?



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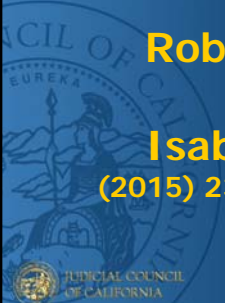
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**Robert T. Ellis**  
**v.**  
**Isabel M. Ellis**  
**(2015) 235 CalApp.4th 837**

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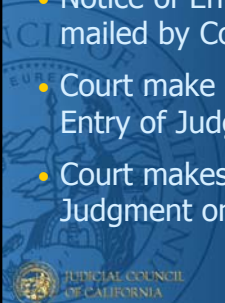
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**Facts:**

- Notice of Entry of Judgment for Disso mailed by Court Clerk on 3-11-13.
- Court make changes. 2<sup>nd</sup> Notice of Entry of Judgment mailed 3-18-13.
- Court makes more changes to Judgment on 5-15-13.

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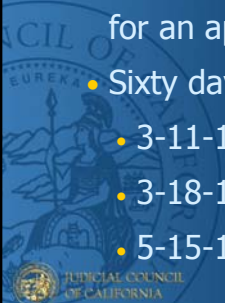
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**Question:**

- What is the last date of filing for an appeal?
- Sixty days from
  - 3-11-13?
  - 3-18-13?
  - 5-15-13?

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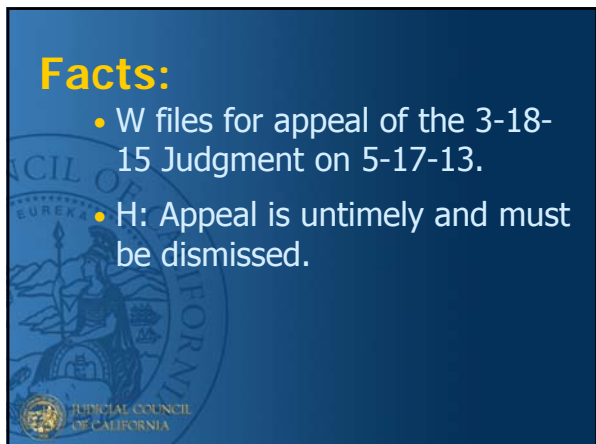
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### Facts:

- W files for appeal of the 3-18-15 Judgment on 5-17-13.
- H: Appeal is untimely and must be dismissed.



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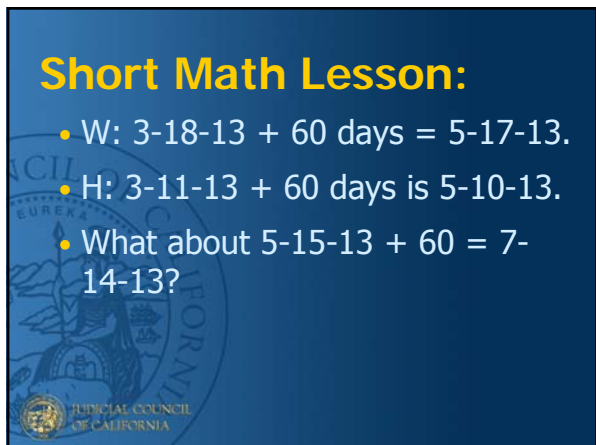
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### Short Math Lesson:

- W:  $3-18-13 + 60 \text{ days} = 5-17-13$ .
- H:  $3-11-13 + 60 \text{ days} = 5-10-13$ .
- What about  $5-15-13 + 60 = 7-14-13$ ?



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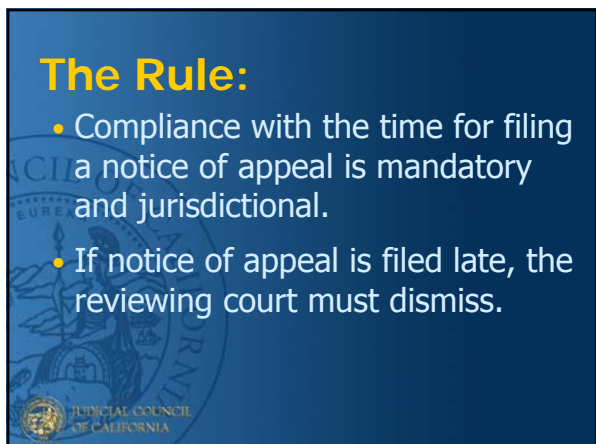
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### The Rule:

- Compliance with the time for filing a notice of appeal is mandatory and jurisdictional.
- If notice of appeal is filed late, the reviewing court must dismiss.



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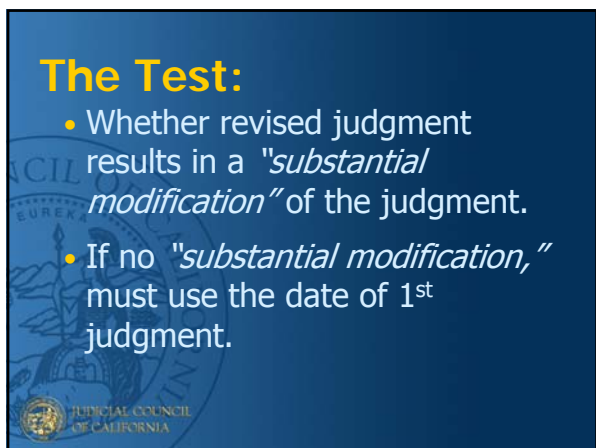
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### The Test:

- Whether revised judgment results in a "*substantial modification*" of the judgment.
- If no "*substantial modification*," must use the date of 1<sup>st</sup> judgment.



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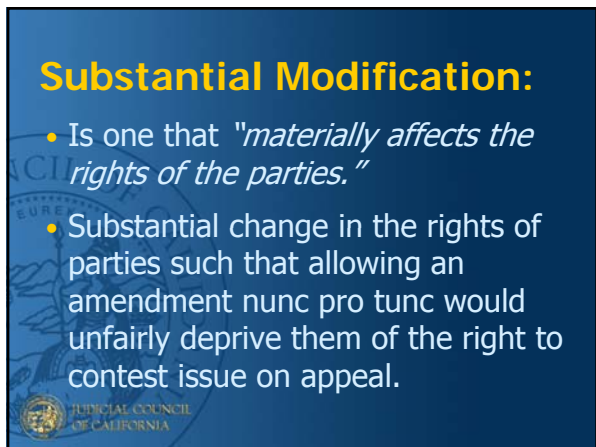
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### Substantial Modification:

- Is one that "*materially affects the rights of the parties.*"
- Substantial change in the rights of parties such that allowing an amendment nunc pro tunc would unfairly deprive them of the right to contest issue on appeal.



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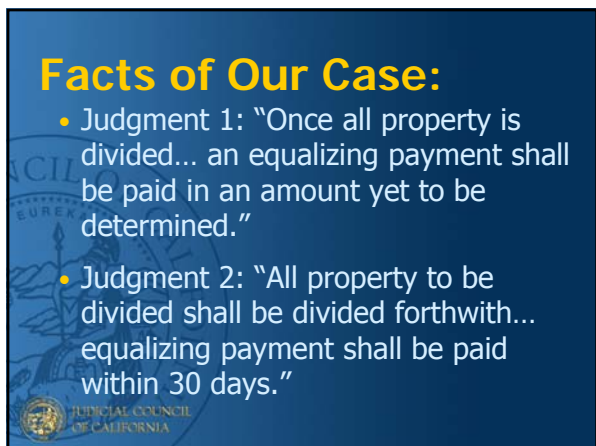
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### Facts of Our Case:

- Judgment 1: "Once all property is divided... an equalizing payment shall be paid in an amount yet to be determined."
- Judgment 2: "All property to be divided shall be divided forthwith... equalizing payment shall be paid within 30 days."



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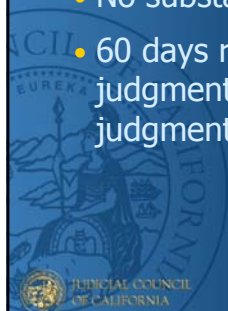
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**Ruling:**

- No substantial change.
- 60 days run from date of first judgment, NOT modified judgment.



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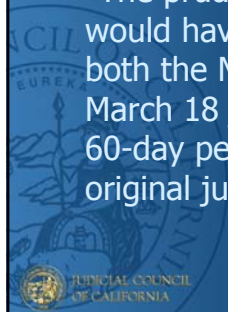
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**Court:**

- "The prudent course of action would have been to appeal from both the March 11, 2013 and March 18 judgments within the 60-day period running from the original judgment."



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