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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SHIRLEY ANN FAESSEL, Plaintiff, vs. JOHN L. FAESSEL, et al., Defendants.	)	No. 414296 MEMORANDUM OPINION

This matter came on for hearing on May 24, 1978, in Department 3 of the Superior Court, the Family Law and Motion Department, on petitioner's order to show cause, both parties being present; petitioner Shirley M. Faessel being represented by her attorney, Michael A. Clark, and respondent represented by his attorney, Thomas Ashworth III.

At the hearing, declarations of the parties and attorneys were submitted and filed with the Court. In addition thereto, points and authorities were filed on behalf of both parties.

Following oral argument the matter was taken under submission by the Court to determine the issue of whether or not the

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Court has jurisdiction to grant to petitioner a pendente lite order for temporary support. Petitioner has heretofore prior to this hearing filed a complaint seeking relief re breach of contract, specific performance, quasi-contract, etc. (numerous other actions other than a cause of action under the Family Law Act). Respondent at the time of this hearing has not filed an answer to the aforementioned complaint.

Petitioner alleges that the petitioner and respondent have lived together as husband and wife for approximately six years and that there is an agreement for the division of assets acquired during said relationship.

Respondent admits living with petitioner for six years but denies any agreement re the division of assets and further alleges that he informed the petitioner that he was disillusioned in the status of matrimony.

Petitioner and respondent never participated in a marriage ceremony of any kind nor were any children born to or during said relationship.

The issue to be resolved is whether the Court has jurisdiction to award temporary support to one party of a meretricious or nonmarital relationship, pending the judgment and outcome of a lawsuit, in the absence of an agreement and/or absence of a marriage ceremony and/or the absence of children born to said relationship.

As of this date the Court is unaware of any appellate decisions on said issue; however, several trial courts have considered the same and their decisions are in conflict.

In 1976 the Supreme Court of this State decided the case of Marvin v. Marvin, 18 Cal.3d 660, wherein the property rights of parties to a meretricious or nonmarital relationship were considered and defined.

At the time of the Marvin decision, the appellate courts were in conflict as to whether or not such a person had a right to interest in property acquired during such a relationship. One line of cases such as In re Cary, 34 Cal.App.3d 345 decided in 1973, held the Family Law Act (Code of Civil Procedure 4000) was applicable to custody of children born to a couple who lived in a nonmarital relationship without the benefit of matrimony, and said case further required an equal division of property acquired by said couple during said relationship. The Estate of Atherley, 44 Cal.App.3d 758 (1975), followed the ruling of Cary in theory and rationale.

On the other hand, another district court of appeal decided Beckman v. Mayhew, 49 Cal.App.3d 529 (1975), and refused to follow Cary and Atherley and held that such a spouse could not recover any of the assets acquired during the nonmarital or meretricious relationship, except in the case of an express agreement to pool funds, or in the absence of an agreement that said spouse contributed funds toward the acquiring of said property. The Mayhew case followed the lead of the earlier cases of Vallera v. Vallera, 21 Cal.2d 681 (1943); and Keene v. Keene, 57 Cal.2d 657 (1962). It must be noted that none of the foregoing cases decided dealt directly with the issue of whether or not the court had jurisdiction in such cases to award a pendente lite order for temporary support. The Marvin case disapprove

and rejected the reasoning set forth in Cary and held that the Family Law Act did not apply to a meretricious or a nonmarital relationship.

> "No language in the Family Law Act addresses the property rights of nonmarital partners, and nothing in the legislative history of the act suggests that the Legislature considered that subject. The delineation of the rights of nonmarital partners before 1970 had been fixed entirely by judicial decision; we see no reason to believe that the Legislature, by enacting the Family Law Act, intended to change that state of affairs." Marvin, supra at p. 681.

However, Marvin did not recognize that if a party to such a relationship does have certain rights, they may be protected, and therefore rejected the views of Vallera and Keene and Mayhew.

> "We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed." Marvin, supra at p. 684.

Marvin did not decide the issue of temporary support, but did mention same in a footnote.

> "We do not pass upon the question whether, in the absence of an express or implied contractual obligation, a party to a nonmarital relationship is entitled to support payments from the other party after the relationship terminates." Marvin, supra at p. 685, fn. 26.

Civil Code Section 4359 (part of the Family Law Act) provides:

> "During the pendency of any proceeding under Title 2 (commencing with Section 4400) or Title 3 (commencing with Section 4500) of this part, upon application of either party in the manner provided by Section 527 of the Code of Civil Procedure, the superior court may issue ex parte orders (1) restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the

> necessities of life, and if such order is directed against a party, requiring him to notify the other party of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures; (2) enjoining any party from molesting or disturbing the peace of the other party <u>or any person under the care, custody, or control of the other party</u>; (3) excluding either party from the family dwelling or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, as provided in Section 5102; and (4) determining the temporary custody of any minor children of the marriage."

The cause of action of the petitioner is based on contract and other civil cause of action and not on an allegation of marriage nor child support nor child custody.

The rights of the parties to a lawsuit are not determined by the face of the pleadings which are filed in said action, but rather by the relief granted pursuant to a judgment which comes after a hearing on the merits generally. See Code of Civil Procedure Section 577:

> "A judgment is the final determination of the rights of the parties in an action or proceeding."

This Court, in light of <u>Marvin v. Marvin</u>, holds that the Family Law Act is not applicable in the case at bar.

If the Court were to grant petitioner's motion for temporary support, it would be taking respondent's property without due process of law and in essence respondent would be faced with paying over his property without a decision on the merits of this lawsuit.

> Example: Suppose, as in this case, the Court were to grant petitioner's motion for temporary support pendente lite based merely on the pleadings and declarations filed herein, prior to a determination on the merits of petitioner's claim. Then, after the trial, the Court should find on behalf of respondent, i.e., no agreement, and that respondent was

entitled to retain all of said property as his separate property, the Court would have granted to petitioner respondent's property without a prior decision in said suit.

Such a result would be that respondent would have paid over his property to petitioner before due process and/or trial of the matter on its merits.

For the foregoing reasons, the Court finds that it is without jurisdiction in such a case as the one at bar to grant petitioner any orders for temporary support and said matter is transferred to the Civil Law and Motion Department of this Court.

Dated: June 28th, 1978.

Judge of the Superior Court