[MS-0494.010.012.003]

The Superior Court
OF THE
State of California
COURTHOUSE SAN DIEGO 92101

CHAMBERS OF
EARL B. GILLIAM
JUDGE OF THE SUPERIOR COURT

MAILING ADDRESS
POST OFFICE BOX 2724
SAN DIEGO, CALIFORNIA 92112
(714) 236-2121

April 18, 1979

CALIFORNIA FEDERAL SELECTION COMMISSION
FOR FEDERAL JUDICIAL APPOINTMENTS

Mary G. Wailes, Esq.
State Bar of California
555 Franklin Street
San Francisco, California 94102

Re: Addendum to Personal Data Questionnaire
Earl B. Gilliam, Social Security [redacted]

Dear Ms. Wailes:

You are in receipt of a Personal Data Questionnaire which was filed earlier this year on or about February 15, 1979. Please change the home address thereon to ~~7367 Caminito Carlotta~~, San Diego, California, 92120.

Also, in answer to Question 8(c) wherein I described an impairment of eyesight, in the second line the word 'contract' was used. This should be corrected to read 'cataract.'

As an afterthought, I also thought it would be wise to submit for attachment to ~~to~~ the application a summary of additional judicial experience.

As a judge in the Municipal Court of California, San Diego Judicial District, during the years 1963-1975, I was assigned every function of that court, including the following: traffic arraignments; criminal arraignments, both felony and misdemeanor; civil law and motion, which included every phase of civil cases including pre-trial motions and trials; and regular trial departments wherein I handled criminal and civil trials. I also served as Presiding Judge of the Municipal ~~that~~ court, where it was my function to be the chief administrator of the court and direct the day-to-day operations, including the supervision of the attaches of the court. While on that court, I presided over long trials, some as long as ten weeks, ~~and also~~ as well as short matters.

One project of the Municipal Court was to set up a pre-trial department for criminal cases, ~~and~~ this was the first experience for any court in this country. We ~~This~~ instituted the setting up of an intermediate step between arraignment and trial, wherein in this area.

all cases would be reviewed by a judge ~~to see if they could be disposed of~~ for possible disposition. This project facilitated ~~in~~ cutting the time lag between ~~from~~ arraignment ~~to~~ and trial from two years to less than six months. Because of my experience in this area, I was able to assist the Superior Court of California, County of San Diego, in doing the same with their trial calendar. I also visited, advised and shared this experience with numerous other municipal courts in the State of California.

Since my elevation to the Superior Court of California, County of San Diego, in addition to being assigned to regular trial departments, both criminal and civil, I have been assigned to the domestic relations court and handled law and motion matters extensively in the psychiatric division of the court. In addition, I have had assignments in probate and adoptions.

Presently, I am the Presiding Judge of the Criminal Division of the Superior Court of California, County of San Diego, where~~in~~ my responsibilities are to handle the administrative and judicial details of this court, which include assignment of cases and intermediate motions. There are approximately six judges regularly assigned to this division, and sometimes this ~~that~~ total may reach as high as ten or twelve.

In addition to my duties as Presiding Judge of the Criminal Division, I am in the process of trying two large civil matters. The first one is entitled Cesco Development Corporation and Conde Investment Corporation v. Citizens Development Corporation, et al, San Diego Superior Court Case No. 3926 N, wherein the damages prayed for are in excess of $8 million. This case took more than six weeks to try, and presently, the transcripts of said trial are being reviewed for my final decision. The second case is entitled La Costa Village Homeowners Association, et al, v. La Costa Village Company, etc., et al, San Diego Superior Court Case No. N 6238, wherein the damages may well exceed $25 million. This action involves multiple defendants, and in addition thereto, will be tried on a theory ~~of~~ class action~~s~~. We are now in the process of cleaning up the pleadings with pre-trial motions, with the being next step to set up notice ~~re~~ class action~~s~~. The case may not come to trial for another year, and when it does, the time estimated for trial may ~~well exceed~~ appropriate six months.

Both of the foregoing cases are very complex, with the La Costa case being particularly complex with reference to the procedural problems.

I have just been assigned to work in the appellate division of the Superior Court of California, County of San Diego, and I undertake those duties ~~shortly.~~ immediately

The foregoing are some of the highlights of my experiences as a judge.

Respectfully submitted,

EARL B. GILLIAM

EBG/dc
cc: Senator Alan Cranston
Senator S. I. Hayakawa

The Superior Court
OF THE
State of California
COURTHOUSE SAN DIEGO 92101

CHAMBERS OF
EARL B. GILLIAM
JUDGE OF THE SUPERIOR COURT

MAILING ADDRESS
POST OFFICE BOX 2724
SAN DIEGO, CALIFORNIA 92112
(714) 236-2121

April 30, 1979

CALIFORNIA FEDERAL SELECTION COMMISSION
FOR FEDERAL JUDICIAL APPOINTMENTS

Mary G. Wailes, Esq.
State Bar of California
555 Franklin Street
San Francisco, California 94102

Re: Addendum to Personal Data Questionnaire
Earl B. Gilliam, [redacted]

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possible disposition. This project facilitated cutting the time lag between arraignment and trial from two years to less than six months. Because of my experience in this area, I was able to assist the Superior Court of California, County of San Diego, in doing the same with their trial calendar. I also visited, advised and shared this experience with numerous other municipal courts in the State of California.

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Respectfully submitted,

EARL B. GILLIAM

EBG/dc
cc: Senator Alan Cranston
Senator S. I. Hayakawa

CALIFORNIA FEDERAL SELECTION COMMISSION
FOR FEDERAL JUDICIAL APPOINTMENTS
AND UNITED STATES ATTORNEYS

Personal Data Questionnaire

Instructions: All applicants must submit separate copies of this form to Mary G. Wailes, Esq., State Bar of California, 555 Franklin Street, San Francisco, California 94102, and to the office of either Senator Alan Cranston or Senator S. I. Hayakawa, Senate Office Building, Washington, D.C. 20510. You may attach any other information you consider pertinent.

Position Sought: [ ] Court of Appeals [X] District Court, District Southern ; [ ] U.S. Attorney, District _____.

PERSONAL DATA

1. Full name: Earl Ben Gilliam

2. Social Security number: [redacted]

3. Date and place of your birth (if you are a naturalized citizen, please also give the date and place of your naturalization):
August 17, 1931
Clovis, New Mexico

4. Office address:
220 W. Broadway
Superior Court
San Diego, CA 92101
Telephone: (714) 236-2121

Home address:
4545 Collwood Blvd.
Unit 52
San Diego, CA 92115
Telephone. (714) 583-7642

5. List your residences for the past five years.
5986 College Avenue
San Diego, CA 92120

6. Indicate the periods of your military service, if applicable, including the dates, the branch in which you served and your rank or rate.
I was never in military service

7. List each college and law school you attended, including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.
San Diego State University (formerly San Diego State College)
1949-1953, B.A. degree

Hastings College of the Law, University of California
1953-1957, LL.B

8. (a) What is the present state of your health?
Good

(b) Have you ever been hospitalized or prevented from working due to injury or illness or otherwise incapacitated for a period in excess of ten days? Yes If so, please give the particulars, including the causes, the dates, the places of confinement, and the present status of the conditions which caused the confinement or incapacitation.
Appendectomy, 1964, off work approximately 6 weeks; hospitalized Mercy Hospital, San Diego, CA. Approximate date of entry was August 18, 1964. No reoccurrence of symptoms.

(c) Do you suffer from any substantial impairment of eyesight or hearing or any other physical handicap? Yes
If so, please give details.
My right eye is artificial. Soon after I was born, the right eye began to water and later a contract formed over it. In approx. 1945, the eyeball hardened and the eye was removed. Since that time, I have had an artificial eye. The cause and effect is not known, and I don't recall ever having sight in it.

(d) Date of your most recent general physical examination: Approx. 1966
Name, address and telephone number of supervising physician:
Dr. Ralph George, Jr.
2290 Sixth Avenue, SAn Diego, CA 92103

(e) Have you ever been treated for or had any problem with alcoholism or any related condition associated with consumption of alcoholic beverages or any other form of drug addiction or dependency? No If so, give details.

(f) Have you ever been treated for or suffered from any form of mental illness? _____No If so, give details.

9. If you are now an officer or director or part of the management of any business organization or if you have an interest of 10% or more in any business, please give details, including the name of the enterprise, the nature of the business, the title of your position, the nature of your duties, and the term of your service. If it is not your intention to resign such positions, give up any other participation in the management of and divest yourself of any interest in any of the foregoing enterprises, please so state, giving reasons.

Bob Earl Corp. I hold office of Sec-Treas. It is a family-owned corporation wherein my wife as a real estate broker is hired by the corporation and sells property for the corporation. I don't see any need to resign due to lack of any conflict. However, if there is a conflict, there would be no hesitancy on my part.

10. What is your current occupation?

Judge of the Superior Court, County of San Diego, State of California

PROFESSIONAL EXPERIENCE

11. Date of your admission to the California Bar: December 17, 1957

12. List all courts in which you are presently admitted to practice, including the dates of admission in each case. Give the same information for administrative bodies having special admission requirements.

Prior to becoming a judge: (a) Federal Courts (12/17/57
(b) State Courts of California (12/17/57)
(c) Workmen's Compensation Commission, etc.

13. Describe chronologically your law practice and experience after your graduation from law school, including:

(a) If you served as clerk to a judge, the name of the judge, the court, and the dates of the period you were a clerk.

(b) If you practiced alone, the addresses and the dates.

July 1961 through December 1963, I was sole practitioner with my offices located at 2847-1/2 and 2835 Imperial Avenue, San Diego, CA.

(c) The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

See attached 13(d)

14. What has been the general character of your practice? Divide it into periods with dates, if its character has changed over the years, describe your typical clients, and mention the areas, if any, in which you have specialized.

(a) Misdemeanors
(b) Felony
(c) Probate
(d) Business
(e) Tax
(f) Misc. Civil

I did not specialize, however, the majority of my practice was probate and business.

15. (a) How often have you appeared in court? [ ] Regularly [ ] Occasionally [ ] Not at all

I have been a judge since 1963. Question not applicable to me.

(b) What percentage of your appearances in the last five years was in:

(1) Federal courts _____ (2) State courts of record _____

(3) Other courts or administrative tribunals or agencies _____

What percentage of such appearances was in: (1) Trial courts _____ (2) Appellate courts _____

(c) What percentage of your litigation in the last five years was: (1) Civil _____ (2) Criminal _____

(d) What percentage of your trials in the last five years was: (1) Jury _____ (2) Non-jury _____

(e) State the number of cases in courts of record (a) you tried to verdict or judgment (rather than settled) in the last five years and (b) you handled on appeal in the last five years, indicating whether you were sole counsel, chief counsel, or associate counsel.

(f) Describe five of the more significant litigated matters which you have handled (whether at the trial or appellate level) and give the citations if the cases were reported. Please list the judges and your opposing counsel in each case.

16. Summarize your experience in court prior to the last five years. If during any period you appeared in court with greater frequency than during the last five years, indicate the periods during which this was so and give for such prior periods the same data which was requested in Question 15(a)-(e). Prior to December 1963:

(a) I appeared in court almost on a daily basis - regularly;
(b) 5% in Federal Court;
95% in State Courts
100% in trial courts
(c) 15% Civil
85% Criminal
(d) 60% Jury
40% Non-jury
(e) Sole counsel 99% of time, approximately 100% to verdict or judgment; only two appeals as I recall.
(f) Peo. v. Davis, 62 Cal. 2d 791

17. Have you ever been engaged in any occupation, business or profession other than the practice of law? Yes
If so, please give the details, including dates.
1946-1961, worked parttime for my father in his fish market at 2835 Imperial Avenue, San Diego, CA.

1953-1957, worked as janitor at the law school while attending school.
1954-1956, worked parttime as recreation director, San Fran. Recr.Dept.whi while attending la school.

18. Have you ever held judicial office, or have you ever been a candidate for such an office? _____
If so, give the details, including the courts involved, whether elected or appointed, and the periods of service.
See Answer to Question 13.
I was appointed to both the Municipal and Superior Courts. I have had to run for both but never was opposed.

19. Have you ever held public office other than a judicial office, or have you ever been a candidate for such an office? No
If so, give the details, including the offices involved, whether elected or appointed, and the length of your service.

20. List any legal books or articles you have published, giving the citations and dates. Please attach two examples of legal articles, books, briefs or other legal writings which reflect your personal work.

Attached are examples of legal writings, as Answers No. 20.

21. List all bar associations and professional societies of which you are a member and give the titles and dates of any offices which you have held in such groups. List also your chairing of any committees in bar associations and professional societies, and memberships on any committees which you believe to be of particular significance (e.g., judicial selection committee, committee of censors, grievance committee).

California Judges Association

COMMUNITY SERVICE/AWARDS

22. List any honors, prizes, awards, or other forms of recognition which you have received, both professional and non-professional.

1964, Young Man of Year, San Diego
1969, Commission General of 200th Anniversary of San Diego

23. Describe the nature and extent of any free legal services you have provided to non-profit organizations, indigent individuals and others, including the names and addresses of such organizations and/or individuals where appropriate.

While in private practice, I tried approx. 20 trials and in addition thereto I represented approximately 60 other persons in matters that were resolved prior to trial in the Municipal and Federal Courts. In those days attorneys received no pay for representing indigents.

24. Describe the nature and extent of your non-professional involvement in community affairs.

I have served on boards of various organizations including: YMCA, Salvation Army, Boys Club, Urban League, NAACP, Navy League, Board of Overseers for Hastings College of the Law. I presently serve on Boards of Directors for: (1) Western State College of the Law; (2) Christian & Jews; (3) Hambray House. I presently head the trial practice division of and teach a class on contracts

LEGAL OR DISCIPLINARY PROCEEDINGS

at Western State College of Law. In the past, I have taught torts and trusts. I have been an instructor for approx. 10 years.

25. Have you ever been arrested, charged, or held by Federal, state or other law-enforcement authorities for violation of any Federal law, state law, county or municipal law, regulation or ordinance? No If so, please attach details. Do not include traffic violations for which a fine of $50 or less was imposed.

26. Have you, to your knowledge, ever been under Federal, state or local investigation for possible violation of a criminal statute? No If so, attach particulars.

27. Has a tax lien or other collection procedure ever been instituted against you by Federal, state or local authorities? No If so, attach particulars.

28. Have you ever been sued by a client? No . If so, attach particulars.

29. Have you ever been a party or otherwise involved in any other legal proceedings? No If so, attach particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Include all legal proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or co-respondent, and any grand jury investigation in which you figured as a subject, or in which you appeared as a witness.

30. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group? No If so, please attach particulars.

31. Have any allegations ever been printed or broadcast or otherwise been made public concerning you or your activities or statements (irrespective of the factual accuracy of such allegations) which reflect adversely on your character or job performance? No If so, please attach full explanation.

32. Describe any aspects of your personal business or professional conduct which may reflect positively or adversely on you or which you believe should be disclosed prior to further consideration of you for nomination for the Federal Judiciary or U.S. Attorney.

See above

PHILOSOPHY

33. List the qualities or attributes you believe an individual should possess for the position you are seeking.

Experience, discipline, industrious, scholarly, fair, patient, firm.

34. What is your personal philosophy concerning the position you are seeking? If you are appointed, what do you hope to accomplish, and what would you consider to be your principal role? Please limit to 250 words.

See Attached No. 34.

Signature Carl B. Wilke

Date February 13, 1979

13. (d)

October 1957, through December 1957, special investigator, San Diego County District Attorney's Office where I supervised the Family Support Division.

December 1957 through June 1961, Deputy District Attorney, San Diego County -- I tried all types of criminal cases, i.e., misdemeanors to felony murder.

July 1961 through December 1963, I was a sole practitioner with my offices located at 2847-1/2 and 2835 Imperial Avenue, San Diego, California.

December 27, 1963, to August 24, 1975, Judge of the Municipal Court, San Diego Judicial District, San Diego, California.

August 24, 1975 to present -- Judge of the Superior Court, County of San Diego, California.

ORIGINAL

FILED
NORTH COUNTY BRANCH
FEB 8 1978
ROBERT D. ZUMWALT
CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

WILLIAM HENRY and LARRY CAIRNCROSS, Plaintiffs, vs. VISTA GROWERS, INC., a corporation; ENVIRONMENTAL NURSERIES, INC., a corporation, H. HUNNICUTT, and JOHN DOES I through XV, inclusive, Defendants.	NO. N 6351)
HARVEY HUNNICUTT, et al., Cross-Complainants, vs. WILLIAM HENRY, et al., Cross-Defendants.	No. N 8302) MEMORANDUM OF INTENDED DECISION
VISTA GROWERS, INC., et al., Plaintiffs, vs. WILLIAM HENRY, et al., Defendants.	

ANSWER NO. 20

The aforesaid matters on June 17, 1977 came on for hearing in the North County Branch of the Superior Court, and at that time the Court ordered a judicial hearing with reference to the settlement agreement of the parties hereto which was consummated on February 23, 1977. The Court further ordered at said time that the trial and hearing of said matters, N 6351 and N 8302, were to take place at the same time before the same Judge. Said order further provided that the judicial hearing and trial shall be decided by the trial Judge who also should determine the appropriate issues, the order of proof, the order of trial of issues and ultimately, the conclusions of law.

The aforesaid matters came on for trial and hearing on December 5, 1977 in Department C of the aforementioned Court. William Henry and Larry Cairncross herein and hereafter referred to as plaintiffs are seeking money damages.

Vista Growers, Inc. and Environmental Nurseries, Inc. are herein and hereafter referred to as defendants and are seeking relief as follows:

(a) First cause of action, relief from enforceability of said settlement agreement;

(b) Second cause of action, judgment that plaintiffs be ordered to specifically perform and recovery of loss of profits;

(c) Third cause of action, attorney's fees; and

(d) Fourth cause of action, all costs and damages as a result of plaintiffs' breach.

The issues to be resolved by the Court are as follows:

1. What was the settlement agreement of February 23, 1973?

2. Was there breach by the defendants and if so, was it material or minor?

3. Was there breach by plaintiffs and if so, was it material, minor or excused?

4. What are the damages of the respective parties.

1. WHAT WAS THE SETTLEMENT AGREEMENT OF THE PARTIES?

Numerous exhibits and oral evidence was received by the Court relative to said agreement. Exhibit 1-B was received as evidence of the agreement of the parties, and in addition thereto, parole evidence relative to said agreement was offered:

(1) To show the entire agreement of the parties was not reduced to writing as per Exhibit 1-B, and/or

(2) To show what was the agreement of the parties, and/or

(3) To show the meaning of certain terms, words, etc. of said agreement.

Parole evidence is admissible to show that the parties to a transaction did not reduce all of the terms of the agreement to writing, that is whether or not the agreement is integrated. Masterson v. Sine (1968) 68 Cal. 2d 222, 65 Cal.Rptr. 545, Brawthen v. H. & R. Block, Inc. (1972) 28 Cal.App.3d 131, 104 Cal.Rptr. 486, Jefferson's California Evidence Benchbook § 32.2.

Parole evidence is admissible to show the intended agreement of the parties, i.e., to explain or interpret the meaning of the agreement and its terms. Moss Development Co. v. Geary (1974) 41 Cal.App. 3d 1, 115 Cal.Rptr. 736, P.G. & E. v. G. W. Thomas Drayage & Riggins

Co. (1968) 69 Cal. 2d 39, 69 Cal.Rptr. 561, Jefferson's California Evidence Benchbook § 32. Therefore, the parole evidence, both oral and written, offered at the time of trial is admissible to allow the Court to determine what was the agreement of the parties which was entered into on February 22, 1977.

The Court finds that the parties agreed that the overall settlement figure would be $43,750.00.

The Court further finds that the agreement provides that the defendants are to pay $5,000.00 of the $43,750.00 by allowing plaintiffs to select $5,000.00 worth of nursery supplies, i.e., nonplant materials, from a list of such supplies to be supplied to plaintiffs by defendants (Exhibit 1-B). Said list was to contain a list of said supplies, which total value was to exceed $5,000.00, i.e. in order for plaintiffs to select they must have a list of more than $5,000.00 worth of plant materials to select from.

The balance of the total amount that defendants agreed to pay plaintiffs, $38,750.00 ($43,750.00 minus $5,000.00), was to be paid in nine installments. On March 20, 1977, defendants were to pay plaintiffs 20% of $38,750.00 and 10% of $38,750.00 on the 20th day of each month for the next eight months. The agreement further provides that the method of payment shall be by plant materials valued by an objective method of valuation as set forth in the evidence, which were to be selected by plaintiffs from lists of plant materials to be supplied by the defendants. The total value of said materials on said list was not to exceed $80,000.00.

This arrangement was based on discussions of the parties wherein

it was disclosed that the defendants had a cash flow problem and that the plaintiffs could use said plant materials and nursery supplies in their business.

In more particular, the Court finds that the agreement provides that on March 28, 1977, defendants were to make available to plaintiffs plants in the two inch, four inch and six inch category, the total value of plants the defendants would make available to make selection from to equal $16,000.00 ($80,000.00 x 20%) and plaintiffs could select plants valued up to $7,750.00.

The agreement also called for the minimum value of $600.00 in each category and also a minimum of varieties in each of the categories that is, five varieties in the two inch category and ten varieties in the four inch category and ten varieties in the six inch category, and the same to be valued as follows: two inch category, $3,000.00 (5 x $600.00); four inch category, $6,000.00 (10 x $600.00); and six inch category, $6,000.00 (10 x $600.00). Therefore, defendants were to make available to plaintiffs to select plant materials of total value on March 28, 1977 in the sum of $15,000.00.

In each of the months that followed defendants were to make available $8,000.00 worth of plant materials from which they were to select $3,875.00. There was to be a minimum of $400.00 value in each variety and five varieties in the two inch category, ten varieties in the four inch category and ten varieties in the six inch category. Therefore, in the two inch category, $2,000.00 (5 x $400.00) and the four inch category, $4,000.00 (10 x $400.00) and in the six inch catetory, $4,000.00 (10 x $400.00). Total value of all the varieties

is $10,000.00.

The $80,000.00 figure which represented a total amount value and minimum which defendants were to make available in order for plaintiffs to select from was a figure that was not carefully worked out but was arrived at in great haste and are therefore two areas of contradiction which result therefrom.

(1) That on the initial selection of March 28, 1977, the total value as per category and varieties that defendants would have to make available totals $15,000.00, whereas 20% of $80.000.00 is $16,000.00 and;

(2) That each of the eight installments were in the total value that defendants were to submit equals $10,000.00 as per varieties and categories, but 10% of $80,000.00 equals $8,000.00.

This is a minor conflict. The court finds that defendants are obligated to submit a list equal to the lessor of the two figures at the date of each installment, the intent of the parties being that plaintiffs should be allowed to select.

2. DID DEFENDANTS BREACH THEIR AGREEMENT?

This is a contract which calls for payments to be made by installments, that is, $5,000.00 of nonplant material on or about April 7, 1975, $7,750.00 of plant material on March 28, 1977, and eight installments of $3,875.00, each on the 28th of each month beginning April 28, 1977 and defendants were to provide materials of a value greater than the amount of payments due on each date so that plaintiffs could select therefrom up to the amount of the payment due.

On March 7, 1977 (Exhibit 2) defendants did make available to

plaintiffs nonplant material but failed to make available to plaintiffs more than $5,000.00 worth of nursery supplies, therefore, defendants failed to make available to plaintiffs their contract right to select. Hence defendants breached the agreement.

On March 28, 1977, defendants submitted a list (Exhibit 2, page 2) wherein they made available to plaintiffs plants in the categories of two inch, four inch and six inch but failed to make available a total value in at least of $15,000.00 wherein plaintiffs could make a selection from all categories so that they might obtain a variety. In addition thereto, those varieties of plants made available by defendants from March 28 for the most part were ivy. That too meant plaintiffs were unable to obtain a broader range of varieties of plants. Hence here too, defendants have breached.

2 A. WAS THE BREACH OF DEFENDANTS MINOR OR MATERIAL?

Defendants performance was a series of promises to be performed on specific dates in the future and the breach of said defendants were at the offset of defendants performance.

Whether a partial breach is material depends upon the importance or seriousness thereof and the probability of the injured party getting substantial performance. Even a slight breach at the outset of the performance may justify termination. Associated Lathing Etc. Co. v. Louis C. Dunn (1955) 135 Cal.App.2d 40, 286 P.2d 825.

The evidence in the case at Bar discloses that plaintiffs were setting up their own business and defendants knew same and the plaintiffs were willing to accept the nonplant materials and the plant materials to facilitate their beginning their business. Plaintiffs

were also desirous of beginning to start an inventory for their business and this defendants well knew. Plaintiffs and defendants were also aware that plaintiffs needed a well rounded variety of plants and materials for said inventory.

Therefore, the Court finds that the two aforementioned breaches, that is defendants failure to provide a list in excess of $5,000.00 reference nursery supplies and a well rounded list for plant supplies on March 28 were material breaches.

Where a promissor partially breaches and accompanied by or followed by a repudiation, the promisee may treat such partial breach as total. Goldmin. & Water Co. v. Swinerton (1943) 23 Cal.App.2d 19, 142 P.2d 22. The defendants herein submitted a list which was similar to that list of March 20, 1977 which did not comply with said agreement. Said action on the defendants part would amount to a repudiation. That is, that they did not intend to comply with the terms of the agreement on April 20, 1977.

Therefore, plaintiffs herein may treat defendants breach as total and plaintiffs have the election to terminate said agreement. Coughlin v. Blair (1953) 41 Cal.App.2d 587, 262 P.2d 305, Sackett v. Spindler (1967) 248 Cal.App.2d 220, 56 Cal.Rptr. 437.

3. WAS THERE BREACH BY PLAINTIFFS AND IF SO, WAS IT EXCUSED, MINOR OR MATERIAL?

Because of the foregoing findings, that is defendants breaches are material and total, any breach on the part of the plaintiffs herein will be excused and defendants will not be entitled to any damages caused thereby.

4. WHAT DAMAGES ARE PLAINTIFFS ENTITLED TO?

Due to the defendants breaches and repudiation as above set forth, plaintiffs are entitled to recovery from said defendants the settlement figure sum of $43,750.00 with interest.

Therefore, judgment shall be entered accordingly.

DATED: 2/8/78

Earl B. Gilliam

JUDGE OF THE SUPERIOR COURT

EARL B. GILLIAM

ORIGINAL

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO

Case No. N6351 N8302

FILED
NORTH COUNTY BRANCH
FEB 9 1978
ROBERT D. ZUMWALT
CLERK

I HEREBY CERTIFY:

I am not a party to the cause referred to herein.

On the date as shown below, at San Diego, California, I placed a true copy of

MEMORANDUM OF INTENDED DECISION

the original/a copy of which is attached hereto, in a separate envelope addressed to each addressee as listed below and each envelope was then sealed and deposited in the mail with the postage fully prepaid:

William T. Fitzgerald, Esq.
McInnis, Fitzgerald, Rees
& Sharkey
1010 Second Avenue, Suite 1301
San Diego, California 92101

Lee Sacks, Esq.
Glasser and Sacks
230 Newport Center Drive
Suite 200
Newport Beach, California 92660

Dated FEB 9 1978

Robert D. Zumwalt
Clerk of the Superior Court

By Lillian M. Tusa
Deputy
LILLIAN M. TUSA

CLERK'S CERTIFICATE OF SERVICE BY MAIL (C.C.P. 1013a(3).

Form 288 Co. Clk. (1-71)

FILED
Robert D. Zumwalt, Clerk
JUN 28 1978
BY R. PRICE, Deputy

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

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 or any person under the care, custody, or control of the other party; (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 Marvin v. Marvin, 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 _____, 1978.

_____
Judge of the Superior Court
[illegible] D. GREENING

No. 34

A federal court judge has a grave responsibility to the people who appear in the courts, to the public, and to this country as a nation of laws. Such responsibility includes promoting ideals such as making sure that all persons and litigants who appear before the court are treated fairly and equally under the law. Furthering the ideals of the Constitution of the United States, the laws should be applied equally, firmly and fairly with reference to all citizens regardless of their station or position in life.

At all times, not only must justice be done, but it should also appear that justice is being done. The judge should at all times be patient, calm and courteous in the handling of the court business.

To be consistent with the foregoing and under the Constitutional protections, I submit that it would be my role as a judge that all matters, such as motions and trials, be acted on promptly; that the matters be handled competently and with judicial dispatch; that the decisions of the court be scholarly, judicious, fair and prompt; that the parties appearing before the court each have a full and fair hearing.

In accomplishing these goals, the court would be satisfying one of the main pillars of a democratic society which would be a reflection of a true democracy.