[FS-0494.013.012.001]

PERSONAL DATA QUESTIONNAIRE

1. Full name and social security number.

   EARL BEN GILLIAM
   [redacted]

2. Office and home addresses, zip codes, telephone numbers and area codes.

   Office: 220 West Broadway, San Diego, California, 92101
   (714) 236-2626

   Home: 7367 Caminito Carlotta, San Diego, California, 92120
   (714) 583-7642

3. Date and place of birth.

   August 17, 1931
   Clovis, New Mexico

4. Are you a naturalized citizen? If so, give date and place of naturalization.

   Not applicable.

5. Family status:

   a) Are you married? If so, state the date of marriage and your spouse's full name including maiden name if applicable.

   b) Have you been divorced? If so, give particulars, including the date, name of the moving party, the number of the case, the court, and the grounds.

   c) Names of your children, with age, address and present occupation of each.

   a) Married, but separated.
   Date of marriage: December 6, 1956
   Wife's name: Barbara J. (Crawford)

   b) Divorce filed on May 25, 1978.
   Wife is the petitioner.
   Action filed in the Superior Court of California, County of San Diego, Case No. D 127654.
   California has faultless divorce theory.

   c) (1) Earl Kenneth Gilliam
   21 years of age
   Address: 5986 College Avenue, San Diego, CA 92120
   Occupation: Student

(2) Derrick James Gilliam
15 years of age
Address: 5986 College Avenue, San Diego, CA 92120
Occupation: Student

6. Have you had any military service? If so, give dates, branch of service, rank or rate, serial number and present status.

No military service.

7. List each college and law school you attended, including dates of attendance, the degrees awarded and, if you left any institution without receiving a degree, the reason for leaving.

a) College:
San Diego State College (now San Diego State University)
San Diego, California
1949-1953
B.A. Degree
Major - Business; Subfield - Accounting; Minor - Economics

b) Law School:
Hastings College of the Law, University of California
San Francisco, California
1953-1957
L.L.B. Degree (now J.D.)

8. List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

a) State Courts of State of California
December 17, 1957

b) Federal Courts
December 17, 1957

c) Workmen's Compensation Commission

9. Describe chronologically your law practice and experience after your graduation from law school and until you became a judge, including:

a) whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

b) whether you practiced alone, and if so, the addresses and the dates.

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.

d) any other relevant particulars.

Deputy District Attorney, County of San Diego
San Diego, California
1957-1961

Private practice (sole practitioner)
1961-1963

Addresses: 2847 1/2 Imperial Ave., San Diego, CA 92102
2835 Imperial Avenue, San Diego, CA 92102

10. a) What was the general character of your practice before you became a judge, dividing it into periods with dates if its character changed over the years.

b) Describe your typical former clients, and mention the areas, if any, in which you specialized.

1957-1961
Criminal prosecution

1961-1963
General practice; misdemeanors, felonies, probate, tax, business and miscellaneous civil
I did not specialize, however the majority of my practice was probate and business.

My typical client was lower-middle class.

11. a) Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

b) What percentage of these appearances was in

1) Federal courts
2) State courts of record
3) Other courts

c) What percentage of your litigation was

1) Civil
2) Criminal

d) State the number of cases in courts of record you tried to verdict or judgment (rather than settled),

indicating whether you were sole counsel, chief counsel, or associate counsel.

e) What percentage of these trials was

1) Jury
2) Non-jury

f) Describe ten of the most significant litigated matters which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case, and a succinct statement of what you believe to be the particular significance of the case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case a) the dates of the trial period or periods, b) the name of the court and the name of the judge before whom the case was tried, and c) the individual name, address and telephone numbers of co-counsel and of counsel for each of the other parties.

a) Regularly, both while a deputy district attorney and while in private practice.

b) 1) 5 percent
2) 85 percent
3) 10 percent

c) 1) 100 percent criminal (1957-1961)
2) 20 percent criminal; 80 percent civil (1961-1963)

d) I tried over 300 cases to verdict or judgment.

e) 1) 30 percent
2) 70 percent

f) See attached rider.

12. State the judicial office you now hold, and the judicial offices you have previously held, giving dates and details, including the courts involved, whether elected or appointed, periods of service and a description of the jurisdiction of each such courts with any limitations upon the jurisdiction of each court.

a) 1963-1975
I was appointed to the Municipal Court of the San Diego Judicial District, San Diego, California on December 27, 1963 by Gov. Edmund "Pat" Brown.
Jurisdiction and limitations:
Criminal - misdemeanors
Civil - up to $5,000.00
Small Claims - $750.00

b) 1975-present
I was elevated to the Superior Court of California, County of San Diego, San Diego, California on August 22, 1975.
General jurisdiction, no limitations.

Though appointed to both of the foregoing benches, I have run for election on at least three occasions, but I have never been in a contested election.

13. Describe ten of the most significant opinions you have written, or attach copies of them to your answers, and give the citations if the opinions were reported, as well as citations to any appellate review of such opinions.

See attached opinions (4).

14. Have your ever held public office other than a judicial office?

No.

15. Have you ever been an unsuccessful candidate for elective, judicial, or other public office?

No.

16. Have you ever been engaged in any occupation, business, or profession other than the practice of law or holding judicial or other public office? If so, give details, including dates.

My only occupation since finishing law school has been practicing law, holding judicial office and instructing law part time.

17. Are you now an officer or director or otherwise engaged in the management of any business enterprise?

a) If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

b) Is it your intention to resign such positions and withdraw from any participation in the management of any of such enterprises if you are nominated and confirmed? If not, give reasons.

a) My wife, Mrs. Gilliam, and I have a family corporation, BobEarl. It was set up for tax purposes. Mrs. Gilliam is a realtor and the corporation hires her to sell real estate. She is the President and I am the Secretary/Treasurer.

b) If my office or title is in conflict with my nomination, I will resign and relinquish my interest in said corporation.

18. Have you ever been arrested, charged, or held by federal, state, or other law enforcement authorities for violation of any federal law or regulation, county or municipal law, regulation or ordinance?

No.

19. Have you, to your knowledge, ever been under federal, state or local investigation for possible violation of a criminal statute?

No.

20. Has a tax lien or other collection procedure ever been instituted against you by federal, state or local authorities?

No.

21. Have you ever been sued by a client or a party? If so, give particulars.

I have been sued on two separate occasions.

a) Ronald Warren Briley v. State of California, Earl B. Gilliam, et al.
United States District Court, Southern District of Calif.
Case No. 74-534-T

This was a case in which the plaintiff sued for $5 million naming the aforementioned parties as party defendants, wherein certain surgical procedures were performed on said plaintiff pursuant to a criminal action filed in the Superior Court of the State of California. I was a member of the District Attorney staff and appeared for the District Attorney for the continuance of one of the hearings in this case. It is my understanding that this matter has been resolved by dismissal in the federal court.

b) Janet L. Owens v. Hon. Earl B. Gilliam
Small Claims Court, San Diego Judicial District
Case No. 255157

I was sued on July 11, 1977 by Janet L. Owens, 25582 Van Lewen Street, Loma Linda, Calif., 92354, for the sum of $181.00 for failure to refund $75.00 deposit. I owned apartments at 1255 Thomas Street, San Diego, California with Carol Wayman and G. Phelps, both of San Diego, California. In 1977 I was the partner who oversaw the manager of said apartments. My functions were generally to make sure that the deposits of rents were made to the bank and to pay the expenses. A dispute developed between Ms. Owens and the manager over her deposit and she filed a lawsuit naming me as defendant. The matter was resolved by settlement a short time after I received notice of the action. Said matter was dismissed on July 29, 1977.

22. Have you ever been a party or otherwise involved in any other legal proceedings?

No.

23. 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?

See attached rider.

24. With respect to your judicial service,

a) Have you participated in any proceedings in which you had a stock or other financial interest in one of the parties or in the matter in controversy? If so, give particulars.

b) Is there a rule or custom in your court as to judges sitting on such cases? If so, state the rule or custom and whether or not you have complied with it.

c) Have you to the best of your knowledge and belief complied with applicable statutes and Canons of the American Bar Assn. relative to such matters as were in force and applicable at the time? If not, give particulars.

d) Have you ever received compensation from outside sources for services rendered (other than fees or expenses for lectures or teaching)? If so, give particulars.

a) No
b) No
c) Yes
d) No

25. a) What is the present state of your health?

b) Have you in the last 10 years (i) been hospitalized due to injury or illness or (ii) been prevented from working due to injury or illness or otherwise incapacitated for a period in excess of ten days?

c) Do you suffer from any impairment of eyesight or hearing or any other physical handicap? If so, give details.

d) When did you have your most recent general physical examination, and who was the supervising physician?

e) Are you currently under treatment for an illness or physical condition? If so, give details.

f) 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?

g) Have you ever been treated for or suffered from any form of mental illness?

a) Good
b) No
c) Yes - artificial right eye
d) April, 1979; Dr. Arvin J. Klein, 6367 Alvarado Court, San Diego, Calif., (714) 583-3400
e) Yes - Dr. Klein has prescribed medicine for high blood pressure.
f) No
g) No

26. Furnish at least five examples of legal articles, books, briefs, or other legal writings which reflect your personal work. If briefs are submitted, indicate the degree to which they represent your personal work.

See attached opinions (4).

27. a) List all bar associations and professional societies of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

b) List also chairmanships of any committees in bar associations and professional societies, and memberships on any committees which you believe to be of particular significance.

c) Describe also your participation, if any, on judicial committees, in judicial conferences, and in sitting, by designation, as a temporary member of the court which reviews decisions of your court.

a) Formerly, California Bar Association, San Diego County Bar Association, Phi Alpha Delta legal fraternity (non-active);
Presently, Black Lawyers Association, San Diego County Judges Association, California Judges Association, National Bar Association.

b) I have formerly served as Chairman of the Traffic Committee for the California State Bar Association.

c) 1) I have served as a seminar leader on two occasions at conferences of the California Judges Association.

2) Presiding Judge of the Municipal Court of California, San Diego Judicial District in 1966.

3) Presiding Judge of the Criminal Division of the Superior Court of California, County of San Diego presently.

I have sat

4) I am now sitting in the Appellate Division of the Superior Court of California, County of San Diego.

28. List all organizations other than bar associations or professional associations or professional societies of which you are or have been a member, including civic, charitable, religious, educational, social and fraternal organizations.

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 Western State College of Law, Christians and Jews, and Hambray House. I presently head the trial practice division of and teach a class on contracts at Western State College of Law. In the past, I have taught torts and trusts. I have been an instructor for approximately 10 years. Western State College of Law is located at Front and Ash Streets, San Diego, California.

29. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

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

30. State any other information which may reflect positively or adversely on you, or which you believe should be disclosed in connection with consideration of you for nomination for the Federal Judiciary.

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 where I handled criminal and civil trials. I also served as Presiding Judge of that court, wherein it was my function to be the chief administrator of the court and direct the day-to-day operations, including the supervising of the attaches of the court. While on that court, I presided over long trials, some as long as ten weeks, and also short matters.

One project of the Municipal Court was to set up a pre-trial department of criminal cases, and this was the first experience for any court in this country. This instituted the setting up of an intermediate step between arraignment and trial, wherein all cases would be reviewed by a judge to see if they could be disposed of. This project facilitated in cutting the time from arraignment to 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 the 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, wherein 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 that total may reach as high as ten or twelve.

In addition to the above, I am presently assigned to the Appellate Division of the Superior Court.

RIDER

11(f). I will limit the number of significant litigated matters to four.

1. A case wherein the defendant was charged with pandering and/or selling obscene material, and the book in question was the Marquis de Sade. This was a municipal court action which I tried in approximately 1966 and the trial last six weeks. In this trial appeared expert witnesses having to do with literary value and the history of languages. This case was prosecuted by attorney Kenneth Lounsbery, presently City Manager for the City of Escondido, 100 Valley Boulevard, Escondido, California, 92025, (714)741-4631.

2. People v. Davis, 62 Cal.2d 791. I represented the defendant in this case prior to becoming a judge on the charge of murder. The verdict of the jury was that the defendant should be put to death. During the course of the trial I made an offer of proof of the testimony of two psychologists who were prepared to testify that the defendant suffered a temporary psychosis which rendered him unable to reason right from wrong; that is, temporary insanity. The trial judge, William P. Mahedy, now retired, refused to hear or decide the issue of whether or not said psychologists were competent. In the appeal, the appellate court ruled that psychologists, if competent, should be allowed to testify, and I believe this is a landmark case, in that this was the first time the California Supreme Court so ruled. The prosecutor in this case was John C. Van Benthem III, who is now in private practice in the City of San Diego.

3. Cesco Development Corp. and Conde Investment Corp. v. Citizens Development Corp., et al.
San Diego Superior Court Case No. 3926 N
This was a court trial which took more than six weeks to try, and I tried this case in the latter part of 1977. The damages in this case could well exceed $8 million; the issue being whether or not the plaintiff should be entitled to damages due to the defendant's interfering with plaintiff's future profits in the sale of land where defendant restricted memberships in a golf club. The attorneys involved are Clinton F. Jones, P. O. Box 1506, Escondido, California, 92025, (714)745-4400, and Roscoe D. Keagy, 304 Kalmia Street, San Diego, California, 92101, (714)239-3861. The transcripts of the trial are presently being prepared, and even though I have given a tentative decision, I will soon be in preparation of the decision of said case. This case involves the complex issue of possibly determining damages based on loss of profits due to appreciation of land values, etc.

RIDER (Continued)

4. La Costa Village Homeowners Assn., et al. v. La Costa Village Company, etc., et al.
San Diego Superior Court Case No. N 6238
This is a case in which the damages may well exceed $25 million, and there are more than twenty parties involved in this litigation. There are multiple plaintiffs and defendants. I was assigned this case for all purposes; that is, pre-trial motions involving pleadings and the issue of class action. This case is not due to be tried for approximately one year, and the trial time is expected to exceed six months. So far, I have handled all of the pre-trial motions and the case is now ready for determination of the issue of class action and who are members of the class. Attached hereto is a list of the attorneys involved in said action.

23. I have never been disciplined or cited for breach of ethics, however, two complaints have been filed against me.

a) In 1962, prior to becoming a judge, one of my clients complained to the local bar that my fee was too high. I answered that complaint with my response and I have never heard anything else further about it.

b) In 1975 a complaint was filed against me to the State of California, Commission on Judicial Qualifications; to wit, Valdemira Silva Kaler v. San Diego Fish Company, et al., Small Claims Case No. 214009. I responded to the complaint and the matter was dropped. Please find enclosed a copy of the complaint and my explanation.

FILED
Robert D. Zumwalt, Clerk
APR 18 1979
BY R. PRICE, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CRAIG P. FITZGERALD, Plaintiff, v. ROBERT O. CONLEY and DOES I through V, inclusive, Defendants.	Case No. 413863 MEMORANDUM OF INTENDED DECISION

The above-entitled matter came on for trial in Department 11 on June 19, 1978. Plaintiff, Craig P. Fitzgerald, appearing in propria persona, and Robert O. Conley, the defendant, appearing in person and by counsel, Merle N. Schneidewind.

This matter was submitted by way of stipulation as to the facts, and the matter was taken under submission and respective counsel submitted points and authorities.

At a later date, one of said counsel informed the Court that a decision need not be made, in that a collateral action had been settled.

A long period of time elapsed and the Court is informed that there was a misunderstanding reference whether or not the Court should

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make a decision.

The Court finds that the defendant called and asked the plaintiff to draft an antenuptial agreement prior to his then pending marriage approximately Christmas of 1969. Defendant, at said time, gave the plaintiff a copy of an antenuptial agreement which had been drawn up by another attorney reference a previous marriage of the defendant. The present agreement, which is the subject of this action, was then drafted and prepared by plaintiff, and the defendant and his present wife came to the plaintiff's office to review and sign the agreement. The agreement was a wedding gift from the plaintiff to the defendant, and the defendant never paid for said agreement to be prepared.

The primary issue raised by the pleadings and by the parties hereto is: Did the plaintiff-attorney owe a duty to the defendant based on the gift of an antenuptial agreement?

A duty will exist if the existence of an attorney-client relationship is determined. As a general rule, the determination is one of law. "However, where there is a conflict in the evidence the factual basis for the determination must first be determined, and it is for the trial court to evaluate the evidence." Meehan v. Hopps, 144 Cal.App.2d 284, 287 (1956).

Generally, all persons are required to use ordinary care to prevent others from being injured as a result of their conduct.

The Restatement Second of Torts provides in Section 324A:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

> necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

In the case at bar, the plaintiff-attorney undertook to render services to the defendant, which he should have recognized as necessary for the protection of defendant's property. Therefore, it would be foreseeable that defendant would suffer harm if plaintiff did not exercise due care.

The fact that the plaintiff did not charge a fee should not alter the finding that a relationship of attorney-client existed. In In re Soale, 31 Cal.App. 144, 153 (1916) the court stated: "The fact that in this particular transaction he did not enter any fee charges against her does not change the situation at all, for he was entitled to charge such fees if he so desired." The court went on to find that the attorney had violated confidences of his client regarding business transactions, even though no fee was paid.

Witkins on California Evidence (Second Edition) at page 746 discusses the attorney-client privilege, and the same is discussed in the Evidence Code. The substance of Witkins and the Evidence Code is that once an attorney has been contacted in his professional capacity, the attorney-client relationship commences to exist, and it exists for the purpose of claiming the privilege and for the purpose

of acting on behalf of an individual, and it is for the purposes of establishing a duty and standard of care that is due from the attorney to the individual. The Court further looks to similar situations where appointed counsel represent indigent clients, and said services are performed for free. There are cases that indicate in such situations that appointed counsel enter into an attorney-client relationship, and said counsel are held to the same standard as though they were privately retained. Smith v. Superior Court of Los Angeles County, 68 Cal.2d 547.

Based on the foregoing, the Court finds that plaintiff-attorney owed a duty to defendant on the basis of an attorney-client relationship, and judgment should be entered accordingly.

Dated: APR 18 1979

Earl B. Gilliam
Judge of the Superior Court
EARL B. GILLIAM

FILED
Robert D. Zumwalt, Clerk
OCT 18 1978
By R. PRICE, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

VIRGINIA A. GARCIA, Plaintiff, vs. JANE LaROSA and DOES I through V, inclusive, Defendants.	No. 404095 MEMORANDUM OF INTENDED DECISION

This matter came on for trial in Department 11 on June 23, 1978, plaintiff, Virginia A. Garcia, appearing in person and through her attorney, Craig P. Fitzgerald, and defendant, Jane La Rosa, appearing in person and through her attorney, Douglas F. Webb. Evidence was taken by the Court and argument was presented by the respective counsel. The matter was taken under submission and respective counsel were to submit points and authorities.

The Court finds from the evidence that was submitted that plaintiff and defendant entered into an agreement for the sale of a home located at 4260 Clairemont Drive, San Diego, which provided

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that defendant was to convey title to plaintiff and the sale price was $42,250. Pursuant to said agreement, an escrow was opened at the Mission Escrow Company.

Plaintiff signed escrow instructions (Plaintiff's Exhibit 1) on or about July 8, 1977, and thereafter the defendant signed said escrow instructions (Plaintiff's Exhibit 2) and said escrow instructions and exhibit were received by said escrow company on or about July 22, 1977.

Plaintiff did, pursuant to said agreement, deposit with said escrow company the sum of $1,000 on July 7, 1977 (Plaintiff's Exhibit 3) and plaintiff proceeded to arrange for the financing pursuant to said escrow instructions by contacting Glendale Federal Savings and Loan and said savings and loan did approve the loan for said premises and committed itself to lend money for the purchase of said premises (Plaintiff's Exhibit 8). On July 22, 1977, the said commitment was forwarded to said escrow company.

The Escrow Instructions (Plaintiff's Exhibits 1 and 2) which become the contract, provide that the escrow is to close on or before July 29, 1977, and provide in paragraph 6, in addition to other things, for a right of termination by either party of said contract.

On August 10, 1977, defendant did cancel said escrow and contract (Plaintiff's Exhibit 5). Defendant raises several issues as to whether or not said contract is enforceable, adequacy of consideration, delay by plaintiff, hence giving defendant the right to terminate and lastly if defendant can rely upon time of the essence.

The contract provides that the escrow should close on or before

July 29, 1977, and the evidence was that defendant did not return her signed copy of the escrow instructions, that is sign the contract, until July 22, 1977. At said time plaintiff had paid the deposit of $1,000 and the same was held by the escrow holder and the plaintiff had caused to be sent to the escrow holder the approval of the loan by Glendale Federal. The only thing left was for the escrow holder to make demand upon plaintiff for the balance of said down payment and for plaintiff to comply with same.

There is no evidence that plaintiff was delaying in complying with the terms and conditions of said escrow, but to the contrary the evidence is that plaintiff was doing everything possible to comply with the terms and conditions of said contract.

On the other hand, defendant did not inform the escrow company or give notice to them as to her agreement to the contract until July 22, 1977, and thus it is the finding of the Court that said action was either a hindrance or evidence of delay on the part of defendant. If the Court interprets said contract to contain the provisions that time was of the essence, then the Court would find that the defendant, by her conduct in failing to return said signed escrow instructions, i.e. contract, until July 22, 1977, would constitute a waiver of her right to enforce the time of essence provision.

However, on the other hand, the Court finds that said agreement did not contain a time of the essence provision but that the interpretation of the contract should be that if plaintiff should be given a reasonable time to comply with the terms and conditions of the contract and unless said conditions were complied with within a

reasonable time after July 22, 1977, defendant would then have the right to terminate the agreement.

The Court does not feel that between the dates of July 22, 1977, and August 10, 1977, was a reasonable time, that is the escrow company did not have a reasonable time to gather all of its important data, documents and information and to make demands from plaintiff and for plaintiff to comply with said demands such as the balance of the down payment. Hence, defendant exercised her right to terminate said agreement before a reasonable time had elapsed.

The defendant also raises the issue of adequate consideration and the Court must inquire as to the adequate consideration when plaintiff is seeking specific performance as a remedy in such case. The evidence submitted at the time of trial was that the plaintiff and defendant negotiated the price orally and they orally agreed upon the amount of $42,250. The evidence further shows that the defendant had indicated that a house similar to hers in the same neighborhood sold for $43,000 recently. There was also evidence by the defendant that the market value at said time was $50,500, but the defendant also related that this was based on information received at a later date.

The Court finds that the consideration of $42,250 in payment for the house was an adequate consideration. For the foregoing reasons, the Court finds that the plaintiff should be entitled to judgment against said defendant as prayed for.

Dated: OCT 18 1978

Earl B. Gilliam

Judge of the Superior Court

EARL B. GILLIAM

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 Departmen 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 _____, 1978.

Judge of the Superior Court

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
VISTA GROWERS, INC., et al., Plaintiffs, vs. WILLIAM HENRY, et al., Defendants.	

MEMORANDUM OF INTENDED DECISION

Answer to No. 13 and No. 26.

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

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Attachment to Answer No. 11(f).

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Van Londersele & Sons Masonry
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Mr. Robert J. Tiglio
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Thomas M. Dymott, Esq.
Rhoades and Hollywood
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San Diego, California 92101

JUSTICE BERTRAM D. JANES
CHAIRMAN

JACK E. FRANKEL
EXECUTIVE OFFICER

State of California
Commission on Judicial Qualifications
3041 State Building
San Francisco, California 94102
557-0686

July 10, 1975

Confidential

HONORABLE EARL BEN GILLIAM
Judge of the Municipal Court
San Diego Municipal Court District
220 West Broadway
San Diego, California 92101

Dear Judge Gilliam:

Certain information has been reported to the Commission concerning which your comment is invited.

It has been reported that a small claims court hearing was set for March 11, 1975 in proceeding Valdemira Kaler v. San Diego Fish Company, Phillip Saccio, President, which was an action on an installment note; that you took the position small claims court did not have jurisdiction to hear the matter and you directed the plaintiff to have her attorney prepare a brief explaining why the attorney felt the case did belong in small claims court; that thereafter in the lobby of the courthouse you approached the plaintiff and her daughter, stated that you had just called "Phillip" and substantially "no problem. He will be glad to pay the money. What is the amount he owes?".

The Commission would appreciate your comment with respect to this matter.

Very truly yours,

Jack E. Frankel
JACK E. FRANKEL

JEF:ph

Attachment to Answer No. 23.

The Municipal Court
SAN DIEGO JUDICIAL DISTRICT
EARL B. GILLIAM, JUDGE
236-2121

July 15, 1975

Commission on Judicial Qualifications
3041 State Building
San Francisco, CA 94102

Attention: Mr. Jack E. Frankel
Executive Officer

Re: Valdemira Silva Kaler v. San Diego Fish Co.,
Small Claims Case No. 214009

Dear Mr. Frankel:

In response to your letter of July 10, 1975, with reference to the above-captioned small claims case, I shall attempt to set forth herein the facts in this case.

This action was filed on November 26, 1974, by the plaintiff, in our court. On the top of this file is a typed memo, which I presume and suspect, sets forth that a clerk of this court, at the time of filing of this action, informed the plaintiff that some doubt existed as to whether or not her case should be filed here.

On January 16, 1975, the matter came on for hearing, and on said date the plaintiff appeared in court with a young woman whom I believe was her daughter. The defendant did not appear. The plaintiff made an explanation as to why she felt that she was entitled to judgment. After hearing same, it was my decision that the matter be dismissed for lack of jurisdiction. (As I recall, plaintiff related that she was attempting to sue on a note and/or judgment for child support rendered in the Superior Court.) The plaintiff also indicated that her attorney, Jose G. Otero of this city, had suggested that she file said action.

Sometime between January 16 and February 25, 1975, Mr. Otero contacted me with reference to this case, and I seem to remember that his version of the facts and background were different from that of the plaintiff. I then decided that I would grant the plaintiff a new hearing. Both the plaintiff and defendant were notified that such hearing would be held on March 11, 1975, at 8:30 a.m.

On March 11, 1975, the plaintiff appeared with the same young lady who had been with her on January 16th;

again defendant did not appear. After again hearing her explanation with reference to this matter, I was still not satisfied that the court had jurisdiction. At this hearing, I took the matter under submission.

At both of said hearings, the plaintiff seemed to be somewhat distraught, and hysterical, at my suggestion that perhaps she was in the wrong court. And, at the hearing on March 11, she appeared to be even more distraught, upset, and, as I recall, she cried. During said hearing, she also rambled on about the problems that she had had in collecting said child support payments, and she went on for some extended time.

After the hearing was completed and the plaintiff had left the courtroom, realizing the frustration that plaintiff was experiencing in attempting to enforce her claim; that is, (1) she had had difficulty in enforcing the matter in the Superior Court; (2) the problem in her mind of attempting to file the action; and (3) the obstacle that I seemed to place in front of her in ruling a lack of jurisdiction; I decided that I would call the defendant, Phillip J. Saccio, at the San Diego Fish Company. (He was named in the complaint.)

I identified myself when calling Mr. Saccio, and the person answering the phone said that he was Mr. Saccio. The substance of our phone conversation was, did he know the lady and did he owe her any money. If so, was there any reason why he would not pay it? Mr. Saccio inquired of the bookkeeper, and in a few minutes, indicated that he did owe the money and would put a check in the mail to the plaintiff in the next couple of days. (This whole conversation took a very short time.)

I then walked down to the lobby of the courthouse and there I found the plaintiff being comforted by the young lady who had accompanied her. I spoke with them. I informed them that I had called the defendant and he indicated that he would forward the money to them within a couple of days. I then suggested that she relax and go home, and if she did not receive the money within the next 3-4 days, to give me a call. After I did not hear further from the plaintiff, I placed the matter off calendar on April 21, 1975. (Assuming since I did not hear from her that she had received the money.)

With reference to my referring to the defendant as "Phillip", I can only say that in the course of my conversing with plaintiff's attorney, Mr. Otero, he had referred to two people with the same last name of Saccio - one the father and one the son. I feel that this reference to "Phillip" was merely to identify the father from the son, in addition to the difficulty in pronouncing the last name.

My only reason for contacting the defendant by telephone was because of the obvious distraught condition of the plaintiff, and what seemed to be a difficult problem for her in view of what I believed to be legal and technical objections.

If I can be of any further assistance, please feel free to call upon me.

Respectfully submitted,

EARL B. GILLIAM
Judge

EBG:mem

JUSTICE BERTRAM D. JANES
CHAIRMAN

JACK E. FRANKEL
EXECUTIVE OFFICER

State of California
Commission on Judicial Qualifications
3041 State Building
San Francisco, California 94102
557-0686

July 16, 1975

Confidential

HONORABLE EARL BEN GILLIAM
Judge of the Municipal Court
San Diego Municipal Court District
220 West Broadway
San Diego, California 92101

Dear Judge Gilliam:

Thank you for your letter of July 15, 1975 and for the information which you have supplied. This will be of value to the Commission in its consideration of this matter.

Your explanation of the situation is appreciated.

Very truly yours,

Jack E. Frankel
JACK E. FRANKEL

JEF:ph

JUSTICE BERTRAM D. JANES
CHAIRMAN

JACK E. FRANKEL
EXECUTIVE OFFICER

State of California
Commission on Judicial Qualifications
3041 State Building
San Francisco, California 94102
557-0686

July 10, 1975

Confidential

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Judge of the Municipal Court
San Diego Municipal Court District
220 West Broadway
San Diego, California 92101

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Attachment to Answer No. 23.

The Municipal Court
SAN DIEGO JUDICIAL DISTRICT
EARL B. GILLIAM, JUDGE
236-2121

July 15, 1975

Commission on Judicial Qualifications
3041 State Building
San Francisco, CA 94102

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Executive Officer

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I identified myself when calling Mr. Saccio, and the person answering the phone said that he was Mr. Saccio. The substance of our phone conversation was, did he know the lady and did he owe her any money. If so, was there any reason why he would not pay it? Mr. Saccio inquired of the bookkeeper, and in a few minutes, indicated that he did owe the money and would put a check in the mail to the plaintiff in the next couple of days. (This whole conversation took a very short time.)

I then walked down to the lobby of the courthouse and there I found the plaintiff being comforted by the young lady who had accompanied her. I spoke with them. I informed them that I had called the defendant and he indicated that he would forward the money to them within a couple of days. I then suggested that she relax and go home, and if she did not receive the money within the next 3-4 days, to give me a call. After I did not hear further from the plaintiff, I placed the matter off calendar on April 21, 1975. (Assuming since I did not hear from her that she had received the money.)

With reference to my referring to the defendant as "Phillip", I can only say that in the course of my conversing with plaintiff's attorney, Mr. Otero, he had referred to two people with the same last name of Saccio - one the father and one the son. I feel that this reference to "Phillip" was merely to identify the father from the son, in addition to the difficulty in pronouncing the last name.

My only reason for contacting the defendant by telephone was because of the obvious distraught condition of the plaintiff, and what seemed to be a difficult problem for her in view of what I believed to be legal and technical objections.

If I can be of any further assistance, please feel free to call upon me.

Respectfully submitted,

EARL B. GILLIAM
Judge

EBG:mem

JUSTICE BERTRAM D. JANES
CHAIRMAN

JACK E. FRANKEL
EXECUTIVE OFFICER

State of California
Commission on Judicial Qualifications
3041 State Building
San Francisco, California 94102
557-0686

July 16, 1975

Confidential

HONORABLE EARL BEN GILLIAM
Judge of the Municipal Court
San Diego Municipal Court District
220 West Broadway
San Diego, California 92101

Dear Judge Gilliam:

Thank you for your letter of July 15, 1975 and for the information which you have supplied. This will be of value to the Commission in its consideration of this matter.

Your explanation of the situation is appreciated.

Very truly yours,

Jack E. Frankel
JACK E. FRANKEL

JEF:ph

JUSTICE BERTRAM D. JANES
CHAIRMAN

JACK E. FRANKEL
EXECUTIVE OFFICER

State of California
Commission on Judicial Qualifications
3041 State Building
San Francisco, California 94102
557-0686

September 16, 1975

Confidential

HONORABLE EARL BEN GILLIAM
Judge of the Municipal Court
San Diego Municipal Court District
220 West Broadway
San Diego, California 92101

Dear Judge Gilliam:

The matter about which we have corresponded came before the Commission at its August meeting. It has been concluded that the facts do not constitute grounds for proceeding further.

Your cooperation has been appreciated.

Very truly yours,

Jack E. Frankel

JACK E. FRANKEL

JEF:ph

United States Senate

MEMORANDUM

Judge

Please
send
a responsive
specific affidavit - Especially
re Kaipenski. Burt

August 1, 1980

Mr. Burton Wides
United States Senate
Dirksen Senate Building, Room 2306
Washington, D. C. 20510

Dear Mr. Wides:

Thank you kindly for your telephone call this morning in reply to my telegram to Senator Kennedy.

I am enclosing a copy of the letter concerning the events that took place in two separate hearings in Small Claims Court while Judge Gilliam presided.

Judge Gilliam has been intertwined in my life and the events I told you about on the telephone are still a big part in my life today. I cannot prove all those allegations, but if closely investigated, I believe they would not be found wrong.

Judge Gilliam cannot keep the facts straight; in fact, he is very nervous. After a lengthy conversation with reporter Mark Orwoll on July 29, 1980, he became confused about the questions Mr. Orwoll put to him and the interview ended. Minutes later, Judge Gilliam called Mark Orwoll back and told him that he should not print the story in the newspaper as it might hurt Mrs. Kaler. Mr. Wides, I consider that a threat, and I must tell you and your committee that if anything happens to me, my family or the witnesses, I hold him responsible for it.

Judge Gilliam in the past was never concerned how his decisions would hurt me, his main concern was to cover up his crooked friends and not abide by the very solemn oath of office he took. His association with the Saccios, people that have consistently broken the law, is dangerous to his reputation because they are using his power for improper purposes. If Judge Gilliam would stoop so low in the Municipal Court to help his friends when such a small amount of money was involved, what will he do in a Federal Court, a lifetime position with additional power? I feel that Judge Gilliam is letting his own race down by his unethical conduct. My main purpose and determination is to expose Judge Gilliam and to bring the truth and justice into focus for everyone concerned, because he has hurt me a great deal and obstructed justice. Senator Kennedy has very strong beliefs about matters of this type and is fighting for a better system; I'm doing the same thing on a much smaller scale.

You have my full cooperation.

Sincerely,

Valdemira S. Kaler

VALDEMIRA S. KALER

Enclosure

2395 Fleetwood
San Diego, CA 92111
Telephone: 714-279-8005

March 18, 1975

The Honorable Edmund G. Brown
The Governor of California
State Capitol
Sacramento, California 95814

Dear Sir:

I wrote to you last week concerning the conduct of Municipal Court Judge Earl B. Gilliam in Small Claims Court, San Diego, California, on March 11, 1975, Case #214009, in regard to the collection of a note signed by Phillip Saccio, President of the San Diego Fish Company.

I should now like to give you more details concerning this matter, in the hope that you will see fit to conduct an investigation into Judge Gilliam's behavior.

PREFACE:

My daughter, Karen Jane Saccio, was born on June 9, 1964. Her father was Charles Joseph Saccio, then President of the San Diego Fish Company, and also father of Phillip Saccio. I had a great deal of trouble establishing legally that Charles Saccio was the father of my child, but eventually in 1964 he was ordered by the court to pay me $70 a month and all expenses connected with her birth. It became extremely difficult to collect this child support from him, even after he was brought into court several times and charged with contempt of court. I have suffered much mental anguish because of this situation. My attempts to collect this money seem to have been thwarted at every turn.

It was through my association with Mr. Saccio that I learned that he knew many influential people in town. He warned me several times that I should not push him too far. He specifically mentioned a friendship with Judge Earl B. Gilliam, saying that he played golf and lunched with him, and that it was possible for him to "fix" traffic violations for him and his sons.

Mr. Charles Saccio opened the Fish Factory and the newly located San Diego Fish Company in approximately the summer of 1974. My new attorney was about to file a lawsuit against the business for collection of the child support, when we were advised by Phillip Saccio that his father Charles no longer headed the business, which was now a corporation. Phillip Saccio offered the sum of $1,250 to me for dismissal of the separate action against his father. I received a check from him for $500 and a note signed by Phillip Saccio as President of the San Diego Fish Company, payable at $50 a week. If any installment was missed, the whole sum would become due immediately.

After $400 had been paid, payments ceased, and no amount of pressing from my attorney produced any results; only weak excuses were received. In November 1974 I took the case to small claims court, after having been advised by two attorneys that this was the proper procedure, the amount due being under $500. Because Phillip Saccio avoided service, it was necessary for me to refile for the hearing, which was eventually held on January 16, 1975.

FIRST HEARING IN SMALL CLAIMS COURT:

On January 16, 1975, a hearing was held in Small Claims Court concerning the collection of the note in question. No one connected with the case appeared in court except my daughter Valerie Summers and me. The judge was Judge Earl B. Gilliam. His decision was that the case did not belong in Small Claims Court, but in Superior Court. He humiliated me by informing me that I should be more careful in my choice of husbands. He also made the statement that he had never known a person in the fishing business to be dishonest. He also advised me that he would have a serious talk with my attorney and advise him never to send cases like this to Small Claims Court again.

My attorney informed me that after considerable research, he talked to Judge Gilliam and Judge Maas. He stated that Judge Gilliam had agreed to rehear my case. I never received a notice of the hearing after this conversation. Finally on about February 25, 1975, I called and was advised by Judge Gilliam's office that I would be notified. After two more phone calls I received a notice of the hearing postmarked February 28, 1975. The date set for the hearing was March 11, 1975.

SECOND HEARING IN SMALL CLAIMS COURT:

The hearing was set for 8:30 a.m. in Department Six. I was accompanied by my daughter, Valerie Summers, and my friend, Ruby L. Cotter.

Judge Gilliam arrived late, and after hearing two brief cases before mine, he called my case. He then announced that the fourth case would leave the courtroom and be heard in another court.

Judge Gilliam told me that he had talked to my attorney and had agreed to hear my case a second time because he understood he had not heard all I had to say the first time. He asked me to comment on my case.

Judge Gilliam seemed to have difficulty pronouncing the Saccio name at the commencement of the hearing, asked if it was pronounced "Sack-ee-oh." As the case went on, the name seemed to come more easily to his lips.

I told the Judge that I was trying to collect on an installment note signed by Phillip J. Saccio, President of the San Diego Fish Company, on June 6, 1974 for the amount of $757.00. No payment had been made after the amount of $400.00 had been paid. I offered the note to the Judge to review, but he said he did not need to look at it as he was familiar with the case.

My daughter, Valerie Summers, then mentioned that the note was an action separate from the original case in Superior Court and that her mother had been advised that the non-payment of this note could be handled in Small Claims Court, as it was for an amount under $500.00.

At about this point Judge Gilliam casually introduced Mr. Karpinski, an attorney. Mr. Karpinski stated that he was well acquainted with the Saccio family and had represented Mrs. Margaret Saccio (once married to Charles Saccio)

in a divorce action. Mr. Karpinski was represented as just having dropped into the courtroom, being in town on other business. He was invited by the Judge to comment on various matters as the case proceeded.

I was questioned by the Judge as to the reason for the debt owed to me. I explained that it was a debt assumed by Phillip Saccio as partial payment of a debt owed by his father for child support. The Judge then stated that he still felt the case belonged in Superior Court instead of in Small Claims Court.

Judge Gilliam directed me to have my attorney prepare a brief and send it to him, explaining the reason the attorney felt the case belonged in Small Claims Court. I reminded the Judge that my attorney had discussed the case over the telephone with him several times.

I asked the Judge what would happen after he received the brief from my lawyer. The Judge said that he would consider the lawyer's statements and then write me a letter informing me of his final decision. I asked how long this would talke; the Judge gave no definite answer. I then fell silent, being a little bewildered about this turn of events.

My daughter, Valerie Summers, then questioned the Judge, "Isn't it true that you know Mr. Saccio personally?" The Judge became visibly upset, distraught, nervous, obviously caught off-guard, and then stammered out a reply to the effect that he had known the Saccios earlier, that his own father was in the fish business and he had seen the men in question, but probably wouldn't recognize the man if he walked in the courtroom today. I commented that the Saccios certainly knew him well. The Judge observed, why would he jeopardize his $37,000+ a year job (plus other benefits) for $250.00? (I do not understand why he mentioned this amount of money; the note in question is not for that amount.)

Mr. Karpinski arose from his seat and approached the Judge at this point, leaning across the table. I asked the attorney what he was doing at this hearing. The Judge interceded that Mr. Karpinski was his friend and he had asked him to come there for consultation. He asked Mr. Karpinski what he thought about the case. Mr. Karpinski took the note in his hands and asked me, Mrs. Kaler, several questions about it.

I asked the Judge why, if he knew the Saccio family, he hadn't transferred my case to another judge. The Judge replied that he had considered it, but had decided to hear the case himself. I then asked why he did not refer the case to another judge at this point; he replied that he would handle it himself. He then repeated brusquely that he wanted my attorney to advise him in writing why he felt the case still belonged in Small Claims Court.

On our way out of the courtroom, my daughter, Valerie Summers, asked the Judge why it was necessary for me to obtain the services of an attorney in a small claims case. The Judge turned to Mr. Karpinski. I asked Mr. Karpinski if he was going to advise the Judge on this case. Mr. Karpinski said that he was going to discuss the matter with the Judge. I said that I wanted to hear what was going to be said; however, Mr. Karpinski said he would talk to the Judge after I left the courtroom. Mr. Karpinski was observed to be making hand and facial signals to the Judge at various times during the hearing.

I became extremely upset at the outcome of the hearing and was taken from the courtoom by my daughter, Valerie Summers, and Ruby Cotter. After an interval of perhaps fifteen minutes, we all proceeded to the lobby on the main floor of the courthouse, and Mrs. Cotter left the group to use the pay telephone. At this point my daughter and I observed Judge Gilliam looking about the lobby; when he had spied us, he approached us with words to the effect of "Man, I just called Phillip!" (Please note use of first name.) "No problem! He will be glad to pay the money. What is the amount he owes?" I did not speak to him. He also asked what the costs would be, in addition to the amount owed. My daughter gave him a slip of paper with the amount due, and interest, noted on it. He seemed to be fumbling around his pockets trying to locate something. My daughter asked him if he needed a pen; he said that he did, and she gave him hers. However, he did not use it, but returned it to her. He then left with the paper.

Mrs. Cotter rejoined the group at this point. The Judge then returned, came up to the trio, and advised them that Phillip would be putting a check into the mail that very day. He commented, "You know, I don't have to do this, I'm a Judge."

My daughter advised the Judge that Phillip Saccio had promised payment before, but had not kept his word. She asked the Judge if she could call him back personally in a couple of days if the check did not arrive. The Judge said that she might. He repeated that he was a Judge.

COMMENTS:

The check in question did indeed arrive from Phillip Saccio, President of the San Diego Fish Company, the very next day. The stub which is usually retained by the writer of the check was still attached. I have taken the check to the bank for collection, but have not yet received the cash; I have been advised that it will be a few more days before I can obtain the cash.

Mrs. Ruby Cotter and I have contacted Judge Gilliam's office and also the Small Claims Court Office several times since the hearing in an effort to learn the Judge's disposition of the case. We have been informed that the case is still in the Judge's office, under submission, probably off-calendar, and that he is probably waiting until the check is cashed so that he can indicate that the case has been settled.

On Monday, March 10, 1975, I went to the San Diego Fish Company with a friend. I was advised by an employee that Mr. Charles Saccio had come to San Diego from San Felipe, Mexico that very day on important business, would return to Mexico, and also that he was quite well off financially. Mr. Charles Saccio has left the country, to the best of my knowledge, and I understand that there is a warrant out for his arrest.

I shall complete this letter with a list of questions that I should like to have answered in connection with this case. Please refer to Page Five of this letter for the queries I feel need an answer from you, Governor Brown. I should mention that I am addressing this letter to you, as I understand Municipal Court Judges and Superior Court Judges are appointed by the Governor of California. I am also advised that Judge Earl B. Gilliam is under consideration for appointment to Superior Court Judge.

QUESTIONS:

1. I should like to know why Judge Earl B. Gilliam did not disqualify himself at the time of the first Small Claims Court hearing, since he admits being acquainted with the Saccio family (even though he sometimes has difficulty pronouncing the Saccio name).

2. I should like to know why Judge Earl B. Gilliam felt he had the right to humiliate me at the time of the first Small Claims Court hearing by telling me that I should be more careful in my choice of husbands. He also made a rather startling statement that he had never known a person in the fishing business to be dishonest (which is rather a surprising statement to be coming from a judge); does this mean that I am to accept his statement and assume that the Saccio family are completely honest?

3. Why does Judge Earl B. Gilliam keep insisting that my case does not belong in Small Claims Court, when I have two lawyers' advice that it does belong there?

4. Why does the burden of proving that my case belongs in Small Claims Court fall upon my attorney? Why does not the Judge cite a reference that proves conclusively that my case does not belong there?

5. Why does the Judge advise me to have my attorney prepare a brief to prove that my case belongs in Small Claims Court, when he knows that this will entail additional expense? My reason for using Small Claims Court was to avoid additional expense, as the Judge very well knows, and he very well knows that this will cause additional delay in closing the case.

6. Why did the Judge not refer my case to another judge after he became aware that I knew he was acquainted with the Saccio family?

7. Why does he feel the need of an attorney, Mr. Karpinski, who is obviously well acquainted with the Saccio family, and gave the Judge hand and facial signals during my hearing?

8. Why was I not allowed to remain to hear Mr. Karpinski's advice to the Judge?

9. Why did Judge Earl B. Gilliam feel it necessary to seek my group out in the lobby after we had left the courtroom and advise us that "Phillip" would be sending the check that very day?

10. Why has not Judge Earl B. Gilliam closed the case? Why is the case still "under submission?" Can he dispose of the case by making a notation that it was settled out of court? He advised me differently in the courtroom. I have not yet had my attorney furnish the brief the Judge requested, yet a check signed by Phillip Saccio is suddenly received by me. I have not made any settlement out of court. When I left the courtroom I was under the impression that the case was a long way from being settled, and as a result of this impression, I became emotionally upset and distraught at the idea of another delay in this string of continuous delays.

Governor Brown, I beseech you to have this case investigated and furnish me some answers. I do not feel I have the right to accuse Judge Earl B. Gilliam of any specific crime, but I do feel that somewhere along the way justice and ethical conduct have been lost..... only temporarily, I pray.

Please let me have a reply from you at the earliest opportunity.

Very truly yours,

VALDEMIRA SILVA KALER

2395 Fleetwood Street
San Diego, California 92111
Telephone: 560-9979

Enclosures (2)

March 18, 1975

I have read the contents of Valdemira Silva Kaler's letter addressed to Governor Edmund G. Brown and feel that its contents are substantially true and correct.

I was a witness at both Small Claim Court hearings referred to in my mother's letter and feel that because of Judge Earl B. Gilliam's behavior, my mother's ten questions should be answered.

Valerie Summers

Valerie Summers

1628 Upas St
San Diego, Ca 92103

March 18, 1975

I have read the contents of Valdemira Silva Kaler's letter addressed to Governor Edmund G. Brown, dated March 18, 1975, and feel that its contents are substantially correct.

I was a witness at the second Small Claims Court hearing referred to in Mrs. Kaler's letter, and feel that because of Judge Earl B. Gilliam's behavior, her ten questions should be answered.

I have been acquainted with Mrs. Kaler for approximately ten years. I have in fact assisted her with the preparation of her letter, knowing that she was European-born, the member of a minority race, and in need of assistance with the written word.

RUBY L. COTTER

3660 Dwight Street
San Diego, California 92104

Earl B. Gilliam

SUPPLEMENT TO FEDERAL DATA QUESTIONNAIRE

11(f). The following is an additional six significant litigated matters before me:

1. People vs. Kenneth Byron Kendall, San Diego Superior Court Case No. CR-39894. This is a case of first impression under new law in California, reference the mental competency of said defendant re development disability. This is the first defendant who came to trial on criminal charges and the defense of the criminal proceedings was whether or not, under California law, the defendant had a defense for said crime based on the fact of him being developmentally disabled, the concept being an extension of the precepts of not being competent by reason of insanity. The Court made a finding that the defendant was developmentally disabled and therein had to interpret law for the first time as to the procedures to handle him, which included determining whether or not there was retardation and how the defendant should be housed in the future under complex California procedures. The lawyers who acted in the case were Patrick O'Connor and William Meyer of this city.

2. Claude C. Sweet vs. Roy L. Cantrell, et al., San Diego Superior Court No. N-7602. This was a complicated matter wherein plaintiff and defendants entered into a partnership for the purchase of land to grow crops. Problems developed such as washouts, acquiring of seeds and financial difficulties. The trial included extensive accounting, dissolving of said partnership, sale of the property, and interpreting trust deeds and other liens. The attorneys were Nelson Millsberg for the plaintiff and Daniel Cronin and Kenneth Miller for defendants. Said attorneys practice in this county.

3. Antonia Martinez vs. John Martinez, San Diego Superior Court No. D-125456. This case presented a complex and very intriguing issue involving the retirement benefits of the husband. During the course of the marriage of the parties the husband had earned certain retirement benefits and at the time of the divorce under California law the wife is entitled to a portion of said benefits. In the settlement of the case, the parties brought to the Court the issue

of what would happen to the benefits the wife was entitled to if the wife died first, that is, could she will said benefits to other persons.

4. Craig P. Fitzgerald vs. Robert O. Conley, et al., San Diego Superior Court No. 413863. This was a declaratory relief action and herein the plaintiff and the attorney had made a gift to his neighbor of an antenuptial agreement on Christmas of 1969 where the defendant was about to enter into a new marriage. The new marriage proved unsuccessful and legal problems arose as to the antenuptial agreement and the legal question was whether or not the lawyers malpractice insurance would cover him if the defendant chose to seek relief or damages due to defects in said antenuptial agreement. Craig P. Fitzgerald appeared in proper person and the defendant was represented by Merle N. Schneidewind, both of this city.

5. Shirley Ann Faessel vs. John F. Faessel, et al., San Diego Superior Court Case 414296. The legal problem presented here is an extension and further interpretation of the Marvin vs. Marvin case which was tried in the Los Angeles Superior Court, that is, does the court have jurisdiction to grant temporary support orders to a person who is not married, but who have lived as husband and wife and there are no children of said partnership. The author's decision was one of the early cases in this area and said decision has provided a precedent for future decisions on said issues. The attorneys were Michael Clark for petitioner and Thomas Ashworth, III for respondent.

6. People vs. Chadd, Superior Court Case CR45638. The defendant in this case was accused of several murders and the District Attorney indicated that it would seek the death penalty. California law at the time of said case provided that a defendant subject to the death penalty could not plead guilty without advice of counsel and in this case counsel did not acquiesce in defendant's request to plead guilty. In order to expedite the trial of said matter the Court considered the foregoing issue and allowed said defendant to plead guilty without the acquiescence of his counsel. To do this, the Court established a procedure of first impression wherein before taking such pleas the Court made determinations during the hearings as to whether or not the defendant understood the nature, circumstances and consequences of

such a plea and, secondly, whether or not the defendant was competent and intelligent enough to represent himself under the rules of Federal Supreme Court decisions. In light of said findings, and in this case both were in the affirmative, the Court could accept said pleas without the acquiescence of counsel and save numerous days in Court time, witness time and expenses. The attorneys involved were Michael Pent for the prosecution and David Pitkin for the defense.