IN THE
SUPREME COURT OF CALIFORNIA

In re the Marriage of Sheryl Jones Davis and Keith Xavier Davis	**CASE NO.: S215050**
SHERYL JONES DAVIS, *Respondent,* vs. KEITH XAVIER DAVIS, *Appellant*	First District Court of Appeal Case No. A136858 Superior Court No. RF 08 428441 Alameda County

PETITIONER'S OPENING BRIEF ON THE MERITS

After a Decision by the Court of Appeal,
First Appellate District, Division One, Case no. A136858

Appeal From Bifurcated Order of the Alameda County Superior Court
Commissioner Elizabeth Hendrickson Presiding

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I. ISSUES PRESENTED

As per this Court's February 11, 2014 order granting review, the issue before this Court is "For the purpose of establishing the date of separation under Family Code section 771, may a couple be living 'separate and apart' when they reside in the same residence."

II. INTRODUCTION

This Court granted review following the First District Court of Appeal's affirmance of a bifurcated order of the Alameda County Superior Court regarding date of separation. In that order, the trial court held that the parties had separated as of June 1, 2006, even though wife did not file for dissolution or separation until December 2008 and continued to reside in the family home until July 2011. The First District affirmed. In so doing, that court specifically disagreed with the rule in *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 1162 that "living apart physically is an indispensable threshold requirement to separation...."

And yet this bright-line rule is not only consistent with the plain language of Family Code section 771; it is the only workable rule given the importance of date of separation in determining property rights and length of marriage for purposes of spousal support. This is particularly true in long marriages that may undergo significant periods of upheaval and strife before finally coming to an end.

This Court should determine that a couple may **not** be deemed living separate and apart for purposes of Family Code section 771 while they continue to reside under the same roof. In the alternative, this Court may craft a limited exception for rare and specific instances in which the couple has undergone a physical separation within the same residence that is qualitatively different than a physical separation they experienced during the marriage, which physical separation is contemporaneous with a subjective intent to separate and communicated to the other spouse.

III. STATEMENT OF FACTS AND CASE

Appellant Keith Xavier Davis ("Xavier") and Respondent Sheryl Davis ("Sheryl")[1] were married on June 12, 1993. (PR 1.)[2] They have two children born in 1995 and 1999. (PR 1.)

The parties stopped being sexually intimate in 1999 and did not share a bedroom after January 2004. (RT 1/10/12 at p. 31; PR 26.) They did not even go on a "date" after 1999. (RT 1/10/12 at p. 34.)

In 2001, Xavier was earning approximately $180,000 per year and Sheryl was earning about $115,000. (RT 5/2/12 at p. 35.)

Since 2003 Sheryl had a separate bank account that she used to manage her business funds and for personal uses. (RT 5/2/12 at pp. 83-84.)

As of January 2006, Xavier began working for Clorox, earning $240,000 annually. (RT 1/10/12 at p. 11; PR 26.) During that time, he put his earnings into his own separate bank account, but deposited $3,200 per month into a joint account to pay household bills. (RT 1/10/12 at pp. 11, 14; PR 26-27.) Xavier left Clorox in September 2006. (PR 27.) At the time of trial, he was self-employed and worked from home. (PR 27.)

As of June 2006, Sheryl had been unemployed for six months. (RT 5/2/12 at p. 76.) During that time, she was working as an independent contractor, earning about $3,000 to $4,000 per month. (RT 5/2/12 at p. 75.) In July 2006, she began working as a salaried employee, earning $138,000 per year, or $11,500 per month. (RT 5/2/12 at pp. 75-76.)

On June 1, 2006, Sheryl announced her intent to end the marriage. On that date, she presented Xavier with a "financial ledger" because she wanted to share

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[1]/ The parties are referred to as "Xavier" and "Sheryl" for convenience. No disrespect is intended.

[2]/ "PR" refers to the Partial Record on appeal Xavier filed on October 19, 2102.
"AR" refers to Appellant's Augmented Record on appeal.
"AR Sheryl" refers to Respondent's Augmented Record on Appeal.

community expenses equally but be solely responsible for respective personal expenses. (PR 27.) In July 2006, Sheryl set up a separate bank account "to segregate the financial aspect of the relationship." (RT 5/2/12 at p. 83.)

Thereafter, Sheryl continued to live in the home with Xavier; continued to keep her personal belongings in the home; continued to receive mail and telephone calls at the home; and continued to cook meals at the home. (PR 27.)

Sheryl filed for dissolution on December 30 2008. (PR 1, 27.) Therein she listed the date of separation as June 1, 2006. (Ibid.) On February 2, 2009, Xavier filed a response, stating the date of separation was January 2, 2009. (PR 3.)

Sheryl remained in the family home until July 2011. (RT 5/2/12 at pp. 76-77; PR 27-28.) Her physical living arrangements remained the same during that time, other than what she described as the non-consolidation of their finances. (RT 5/2/12 at p. 77.) Prior to either claimed date of separation, the parties sometimes went to dinner and vacation together, and sometimes separately, and had not shared a bed for years. (RT 5/2/12 at p. 96.)

The issue of the date of separation was bifurcated from the other issues and tried separately. (See PR 47.) During trial, Xavier filed an Amended Response in which he listed the date of separation as July 1, 2011—the approximate date that Sheryl moved from the marital residence. (PR 27.)

The testimony as to date of separation was disputed. Xavier introduced photographs of the parties dining together and going to San Francisco as a family in 2008 and 2009. (RT 5/2/12 at pp. 22-25; AR at pp. 55-60.) He testified the parties continued to celebrate Christmas together as a family and that Christmas of 2010 was the first year they did not exchange gifts. (RT 5/2/12 at pp. 30-31.) He testified that the marriage was really no different after June 2006 than it was previously; the only real difference was the ledger. (RT 5/2/12 at p. 33-34 ["everything other than the ledger was pretty much the same."])

Sheryl described the marriage as "very turbulent...probably two years after the marriage." (RT 1/10/12 at pp. 30-31.) She had determined back in March

2000 that the marriage could not be saved and that they only stayed together for the children. (RT 1/10/12 at p. 40.) She stated that the marriage was a "façade" for about 10 years—since March 2000. (RT 1/10/12 at p. 55.) She testified that there were "a lot of...significant events" that caused her to believe the marriage was over, including her moving out of the bedroom in 2004; Xavier having quit his job with Whittman-Hart in March 2001 (see RT 1/10/12 at p. 11); Xavier having allegedly assaulted her in October 2005; and Xavier's decision to only contribute $3,250 of his monthly earnings into the joint account. (RT 1/10/12 at pp. 30-33.) She testified that the October 2005 incident was "the final straw." (RT 1/10/12 at p. 56.) Sheryl testified that things changed in October 2005 when Xavier assaulted her, and then changed even more in January 2006 when he started earning $240,000 per year, but only put $3,200 per month in the joint account. (RT 5/2/12 at p. 87.) She testified that in June 2006, she told Xavier "this is done," she was through, and that she would only be contributing her income up to 50% of the joint household expenses into the joint account. (RT 1/10/12 at p. 32.) She developed a spreadsheet itemizing the household expenses, for which each of them was equally responsible, and the rest of their respective earnings they could spend as they pleased. (RT 1/10/12 at p. 32-33.) She provided Xavier with a ledger and told him that each of them would pay 50% of the household expenses, and that they would each pay for their own expenses from their own income. (RT 5/2/12 at p. 88.) In July 2006, Sheryl set up a separate bank account "to segregate the financial aspect of the relationship." (RT 5/2/12 at p. 83.) She stated that the "last component that anyone could call a marriage would be the finances, because there was nothing else at that point that dictated or indicated that we had a marriage." (RT 1/10/12 at p. 34.) She said the "last piece that...could bind us as a family was the finances, the credit cards, vacations and any social events. And once I had that conversation with him in June, that was it...it was clear that my intent was to separate from this marriage in the direction of a divorce and that's what I did." (RT 5/2/12 at pp. 87-88.)

Sheryl testified that her living conditions after June 2006 "were different from the perspective that we no longer consolidated our finances." (RT 1/10/12 at p. 34.) The physical living arrangements between the parties remained the same after June 1, 2006: Sheryl continued to live in the home, keep her clothes and belongings in the home, and eat family meals in the home unless she was traveling for work. (RT 5/2/12 at pp. 20, 57-59; PR 27.) She did not move out until 2011. (RT 5/2/12 at pp. 76-77; PR 27.) Her physical living arrangements remained the same during that time. (RT 5/2/12 at p. 77.) After June 1, 2006, Sheryl continued to deposit money into the parties' joint account for household expenses. (RT 5/2/12 at pp. 71-72; see AR 66-68.)

On March 24, 2007, Xavier sent Sheryl a lengthy email. (See RT 1/10/12 at p. 9; AR Sheryl at p. 21b.) He explained that Sheryl had "basically announced [she was] going to stop putting money into the account [they] shared for almost 14 years," that there had been no discussion, and Sheryl had made this "rather significant change" when she was generating income and Xavier no longer was. (RT 1/10/12 at pp. 10-11.) Xavier stated, "...your motives are clear. But until we are engaged in dissolution we both need to be selfless to protect our children's perspective of family." (RT 1/10/12 at p. 23.) At trial, Xavier described this email as "a husband venting to his wife." (RT 1/10/12 at p. 23.)

The parties continued to do things together as a family after June 1, 2006. They continued to celebrate special occasions together, including the children's and each other's birthdays. (RT 5/2/12 at pp. 23-25, 65; AR 55-60.) Both before and after June 1, 2006 the parties went on vacations together and apart. (RT 5/2/12 at p. 96.) They went to Hawaii together as a family in August 2006. (PR 27.) Sheryl testified that because it was prepaid and they did not want to disappoint the children, and that thereafter, each of Sheryl and Xavier took the children on vacations separately. (RT 1/10/12 at p. 35.) But they all visited Sheryl's family in the winter of 2007-2008. (RT 1/10/12 at p. 23; PR 27.) And Sheryl admitted that Xavier typically continued to invite her on vacations,

although she did not go. (RE 1/10/12 at p. 55.) In fact, the children had no knowledge of the parties' relationship until June 2011—just before Sheryl moved out of the home. (RT 5/2/12 at pp. 68-69.)

Sheryl continued to use the email address xavierwife@aol.com in 2008 and at least through February 18, 2009. (RT 5/2/12 at pp. 61-62, 64; AR 63-64.) She testified that she kept this email address because when she went to change it she did not have the password, and only changed the address when her friend set up a new account for her. (RT 5/2/12 at pp. 80-81.)

Ultimately, the trial court held that the date of separation was June 1, 2006. (RT 5/2/12 at p. 98; PR 49-50.) It held that (1) Sheryl had consistently maintained June 1, 2006 (or possibly July 1, 2006) as the date of separation, while Xavier asserted it was January 2, 2009, then later argued July 1, 2011; (2) prior to even June 1, 2006, they sometimes went to dinner together, vacationed together and separately, had not shared a bedroom for a number of years, and characterized the marriage as dysfunctional; (3) the parties had email exchanges around June 2006; (4) their one remaining thing they did together, which was share finances, changed in June 2006; (5) the decision about finances was significant and intentional; and (6) no case law supports a claimed date of separation 1½ years after dissolution was filed. (PR 49-50; see also RT 5/2/12 at pp. 95-98.)

On October 25, 2013, the First District Court of Appeal affirmed in a published opinion. On February 11, 2014, this Court granted review on the issue of whether, under Family Code section 771, a couple may be "living separate and apart" when they reside in the same residence.

IV. STANDARD OF REVIEW

"Date of separation is a factual issue to be determined by a preponderance of the evidence." (*In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, 930, citing *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1493-1494.) Appellate review is thus "'limited to determining whether the court's factual

determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.'" (*Manfer, supra* at p. 930, citing *In re Marriage of De Guigne* (2002) 97 Cal.App.4th 1353, 1360.)

Nevertheless, where the facts are undisputed, a trial court's application of law to those facts is reviewed de novo. (See, e.g., *Marriage of Manfer, supra* at pp. 928-929, 933 [reviewing date of separation as legal issue]; see also *In re Marriage of von der Nuell* (1994) 23 Cal.App.4th 730, 736.) The issue of whether a couple may be living "separate and apart" under Family Code section 771 when they continue to share a residence is obviously a legal decision for this Court.

V. LEGAL ARGUMENT

A. Parties Cannot Be Deemed "Living Separate and Apart" When They Continue to Share a Residence

1. A bright-line rule is important if not essential

Pursuant to statute, the date of separation is the date on which the parties are living "separate and apart." (Fam.Code §771.) The "statutory phrase 'living separate and apart' has been the subject of only a handful of published opinions in this state.'" (*In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 1161-1162 Citations omitted.) The issue herein is what constitutes "separate and apart."

In 2002, the Sixth District in *Norviel* created a bright-line rule that parties cannot live together and yet be separated. (*Id.* at p. 1162 ["Decisional law thus clearly establishes that parties may live apart and yet not be separated. The question here is whether the reverse is also true. We conclude it is not."]) That Court specifically held that, in the absence of what it termed "unambiguous, objectively ascertainable conduct amounting to a physical separation under the same roof" parties could not be deemed living separate and apart under Family Code section 771 while they lived in the same house. (*Id.* at p. 1164, emphasis added.) "'Living separate and apart...applies to a condition where the spouses

have come to a parting of the ways and have no present intention of resuming the marital relations and taking up life together *under the same roof.*'" (*Norviel, supra* at p. 1162, citation omitted; italics in *Norviel.*) "By at least one creditable definition, 'living separate and apart' means '*residing in different places* and having no intention of resuming marital relations.'" (*Ibid*, citing Black's Law Dict. (7th ed. 1999) p. 945, italics in *Norviel.*)

This bright-line rule has been the law in this state since 2002. It has not been superseded or even modified by the Legislature, despite *Norviel's* request the Legislature do so if it believed a more flexible rule was appropriate. Respondent therein had argued that a rule requiring separate dwellings as a predicate to separation "could preclude California's less affluent couples from establishing a date of separation and ending the accumulation of community property." (*Id* at p. 1163.) The *Norviel* Court stated that such argument "flies in the face of the strong presumption of community property that generally applies in this state." (*Id* at pp. 1163-1164 [citations omitted].) It further stated "that unfortunate state of affairs is not a sufficient basis for courts to ignore a clear statutory mandate," and that the policy argument "is more appropriately directed to the Legislature." (*Id.* at p. 1164.) Despite this clear invitation, in the intervening 12 years, the Legislature has not amended Family Code section 771(a) to address this concern. Such is a fairly clear directive from this State's lawmakers that *Norviel's* interpretation of section 771(a) that living separate and apart requires separate dwellings is correct and should be followed. Permitting trial courts to find that couples are living "separate and apart" under Family Code section 771 while they continue to live together would be an unwarranted amendment to Family Code section 771(a).

Bright-line rules provide clear directives and guidance to judges and a measure of predictability to attorneys and litigants. They create uniformity among courts in the dispensing of justice and the enforcement of statutes. This encourages an understanding that laws are applied fairly, without undue subjectivity that allows certain people to be treated differently than others.

The standard created by the First District in this case, permitting the trier of fact to draw "reasonable inferences from *all* evidence presented" (Slip Op. at p. 11) to determine whether a couple is living separate and apart is simply unworkable. Family courts already have enough difficulty trying to determine date of separation in contested cases without the standard for "living separate and apart" to include couples who continue to live together. While the existence of separate residences is easy enough to prove, the existence of objective conduct evidencing "a final break in the marriage" and trying to determine when that occurred based upon the totality of the circumstances is not. Requiring each of the hundreds of family-law judges in this state to decide for themselves what constitutes "living separate and apart" based upon "reasonable inferences" without at least requiring that the parties no longer live together is unfair to the courts and to litigants. Requiring at least that the couple be residing separately provides a black and white in the murky sea of grays surrounding so many family-law issues.

Family Code section 771 requires that the parties be living separate and apart in order for earnings thereafter to be separate. This can be a very important consideration where, as here, the earnings of one spouse during the time at issue are substantial. (See *Marriage of Norviel, supra* 102 Cal.App.4th at p. 1158.) This is because "property acquired during a legal marriage is strongly presumed to be community property and that presumption is fundamental to the community property system." (*In re Marriage of Von der Nuell* (1994) 23 Cal.App.4th 730, 734.) Moreover, a marriage lasting 10 or more years is presumptively a "long marriage." (Fam.Code §4336(b).) Thus, date of separation can be a very important factor in dividing community property and setting spousal support. This is already an amorphous concept that requires judges to make credibility determinations and weigh evidence; allowing "living separate and apart" to include "living together" does not assist judges in their task.

Moreover, unless such a physical separation is required for a married couple to be "living separate and apart," one spouse—typically the higher-earning

spouse—can easily manipulate the finances in a bad marriage by "back-dating" the date of separation upon filing for dissolution to a date during which the parties continued to reside together but the marriage was rocky and difficult. If such is accepted by the court, the higher-earning spouse will thus retain a significant portion of what the other spouse believed were community earnings. Permitting one spouse to "backdate" the date of separation—particularly to the date on which he or she began earning substantial sums—would allow that spouse to erode the community without the other's knowledge. Thus the higher-earning spouse may continue to reap the benefits of living in the home—eating meals, doing laundry, and receiving mail—and then years later, upon filing for dissolution, refer back to other, more subtle conduct as evidencing a "breakdown" in the marriage and claim that all earnings from that day forward are separate. Moreover, such may avoid the presumption of a long-term marriage. This will only further erode the concept of community property and disadvantage the lower-earning spouse. (See, e.g., *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, 446-449.)

Here, it was undisputed that throughout most of the marriage, Sheryl and Xavier were more like roommates than a married couple. But many married couples live like "roommates" for years—especially couples like Xavier and Sheryl who have high-powered careers and young children. Many long-term marriages look more like a business than a romance novel. This does not mean the couple is no longer married. It does not terminate community property rights. To the contrary, such couples continue to be married, and continue to acquire community property and community debts.

> [I]it is not uncommon for parties to a marriage gone sour to live their lives separate and apart while maintaining some vestiges of the marital relation. Many marriages are 'on the rocks' for protracted periods of time and it may be many years before the spouses decide to formally dissolve their legal relationship. In such situations, separation dates can often be 'guesstimates' or approximations selected at random or without careful consideration.

(*In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 452, citing *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 657, internal quotations omitted.)

Separate residences are essential so that both parties are aware that they are no longer part of the community; that there is no longer a community to speak of; and their earnings and expenditures from that day onward are theirs alone. With marriages under difficult circumstances, husbands and wives look for whatever "sign" their spouse is "still there," despite confusing and contradictory actions. This is why a physical separation is so important: there is no potential for confusion or manipulation by either spouse to obscure the fact that a clear choice has been made to live their lives separately. This case is a prime example of how, given conflicting evidence as to date of separation (continued celebratory dinners together and a Hawaiian vacation on one hand, contrasted with Sheryl's statement "we're done" and the financial ledger on the other), the lack of a bright-line rule can create uncertainty in the application of the law.

The law must prohibit schemes in marriage where one spouse, bound by emotions, family, and religious beliefs, remains committed to their marriage even under poor circumstances, and assumes the other feels the same, while the other leverages the technical requirements of the law for economic gain. Section 771 requires the parties be living separate and apart. This means physically living separate and apart. This is the opposite of the couple continuing to reside together.

2. This bright-line rule is consistent with prior authority

In affirming the lower court, the First District stated that "the issue of physical separation is more persuasively discussed in the other cases relied on by the trial court, *Hardin, supra*...and *Manfer*." (Slip Op. at pp. 9-10.) And yet a close look at both *In re Marriage of Hardin* (1995) 38 Cal.App.4th 448 and *In re Marriage of Manfer* (2006) 144 Cal.App.4th 925 reveals that neither supports a

date of separation during which the couple continues to reside together. In fact, in each of those cases, something more than merely living in separate residences was required for the couples to be living "separate and apart." As such, the determination that a couple may be living "separate and apart" while continuing to reside together is not inconsistent with either of these cases, and neither need be distinguished for the bright-line rule sought herein.

a. *In re Marriage of Hardin*

In *Marriage of Hardin, supra*, husband left the family residence in 1969. Wife asserted the date of separation was 1983; husband claimed it was June 28, 1969, when he moved out. The trial court ruled in favor of husband, asserting the standard was whether "society at large" would deem the couple separated based on the facts and evidence presented. (*Ibid.*) The Fourth District reversed.

In reviewing the case law interpreting Family Code section 771, the Fourth District concluded, "the date of separation occurs when either of the parties does not intend to resume the marriage and his or her actions bespeak the finality of the marital relationship." (*Id.* at p. 551.) That Court further noted that "the filing of a dissolution petition or recitations in a marital settlement agreement do not by themselves compel a finding the parties were thereafter living separate and apart." (*Ibid*, citations omitted, emphasis added.)

In finding the trial court's error "clear," the *Hardin* court stated,

> The ultimate question to be decided in determining the date of separation is whether either or both of the parties perceived the rift in their relationship as final. The best evidence of this is their words and actions. The husband's and the wife's subjective intents are to be objectively determined from all of the evidence reflecting the parties' words and actions during the disputed time in order to ascertain when during that period the rift in the parties' relationship was final.

(*Hardin, supra* at p. 452, footnote omitted.)

In *Hardin*, husband had moved out of the family residence in 1969—well before the date of separation urged by wife. Thus, the issue posed therein was whether the parties were not living "separate and apart" despite the fact that husband had moved out of the residence, had never moved back, and both parties dated other people. The Fourth District held the parties had not separated when husband moved out, stating, "the date of separation is determined by more than when a party leaves the family residence or files a dissolution petition." (*Hardin, supra* at p. 453, emphasis added.) The operative language is "more than." This is because "Many couples experiencing marital problems stop living in the same residence but nevertheless maintain financial ties and a cordial relationship until they finally go forward with the dissolution." (*Id.* at p. 450.) As such, *Hardin* supports a determination that separate residences are essential to spouses living "separate and apart"—even if such alone is not "determinative." (*Hardin* at pp. 451-452.)

b. *In re Marriage of Manfer*

Marriage of Manfer was decided in 2006—after both *Hardin* and *Norviel*. Therein, the court held that separation occurred when, among other things, the couple had "'a parting of the ways and [had] no present intention of resuming the martial relations and taking up life together under the same roof....'" (*Manfer, supra* at p. 933, emphasis added.) Thus, it was the couple's physical separation when husband moved out, combined with the contemporaneous subjective intention of both parties to end the marriage that constituted date of separation. (See *ibid.*) Thus, in *Manfer*, the couple began living separate and apart when they not only jointly decided to part ways and stopped having intimate relations, but when husband moved out of the family residence. (*Id.* at p. 928.)

In *Manfer, supra*, the court looked at all of the evidence to determine when the rift became final, which evidence included the physical separation of the husband moving from the home. (*Manfer, supra* 144 Cal.App.4th at 933

[referring to the "live-apart period"].) That court also referred to *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444. (*Manfer, supra* at 931-932.) In *Baragry*, husband filed for dissolution, listing the date of separation as four years earlier, when he physically left the marital home and began living in an apartment with his girlfriend. (*Baragry, supra* at pp. 446-447.) However, he kept the home as his mailing address and maintained continuous significant contact with his wife and children, often eating dinner at the family home, taking wife to social outings, even vacations, sending her cards and presents on holidays, including their anniversary, and even continued to have wife do his laundry. (*Id.* at p. 447.) In *Baragry*, the court understandably looked askance at husband's assertion of a date of separation that was four years prior to his filing for dissolution. As the *Manfer* court concluded, this was partly because "wife, unaware of her husband's decision never to return, dutifully did his laundry and cooked his meals for four years!" (*Manfer, supra* at 933.) As *Manfer* held, "The *Baragry* reviewing court reversed the trial court's premature date of separation precisely because 'there [was] no sufficient evidence to rebut the presumptive status of a legal marriage continuing' until the husband filed for dissolution." (*Manfer, supra* at 933, citing *Baragry, supra,* 73 Cal.App.3d at p. 449.) Thus, *Manfer* also stands for the proposition that something more than simply moving from the residence is required.

A determination that a couple must no longer be residing together to be "living separate and apart" is thus consistent with both *Hardin* and *Manfer*. Despite whatever other manifestations of separation may or must be present, one essential manifestation is actually residing separately.

3. A bright-line rule is consistent with the law in other states

In reaching its decision that living separate and apart must include separate residences, the *Norviel* court looked to decisions from other jurisdictions which "explicitly hold that parties residing in same house are not living separate and apart." (*Id.* at p. 1163.) This led the *Norviel* court to conclude, "The plain

language of the statute and the weight of persuasive authority thus support the view that spouses are not 'living separate and apart' within the meaning of the statute unless they reside in different places. Typically, that would entail each spouse taking up residence at a different address." (*Id.* at p. 1163, emphasis added.)

In addition to those cases cited therein, additional cases, including those in other jurisdictions, also support the notion that parties must be living in separate dwellings in order to be living separate and apart.

In *Billac v. Billac* (La.App. 1985) 464 So. 2d 819, 821, the Louisiana Court reversed a grant of separation even though wife had lived in a separate bedroom in the marital home for over a year, stating "Living separate and apart for specified periods can be grounds for both separation and divorce. However, in order to fulfill the 'separate and apart' criterion in the Code, the parties must actually reside in different dwellings."

In *Gross v. Gross* (Ala. 1956) 265 Ala. 58, 59 the court reversed a decree of divorce based on abandonment in which wife had in moved to a different room in the same house and ceased discharging her marital duties as a wife and housekeeper. That court stated, "The evidence shows that the parties had 'ups and downs,' as expressed by the witnesses, and did much fussing and had many contentions of various kinds. But all the indications are that they have lived in the same house, though in different rooms, until the 10th of April 1956. There is no voluntary abandonment while husband and wife occupy the same dwelling." (*Id.* at p. 59, emphasis added.)

In *Jordan v. Jordan* (1949) 69 Idaho 513, 516-517, the court reversed a decree of divorce, finding the parties had not been continuously living separate and apart for a period of five years without cohabitation, as required by statute. Therein the court stated, "'Separate' and 'apart' mean substantially the same, implying disunity, or to withdraw from each other...and living apart necessarily implies the living in a separate abode." (*Id.* at p. 517, emphasis added.)

A requirement that parties be living in separate dwellings in order to be living "separate and apart" is thus consistent with the law in other jurisdictions with similar statutes requiring that parties be living separate and apart.

B. Any Physical Separation Under the Same Roof Must Be Qualitatively Different From any Prior Separation and Contemporaneous With a Subjective Intent and Communication of that Intent to Separate

This Court requested briefing on the issue of whether a couple may be living separate and apart when they continue to occupy the same residence. As set forth herein, they may not. However, if this Court is concerned that such a rule may operate unjustly in certain limited circumstances, then a narrow exception may be created to permit a finding of separation where a couple has quite obviously intended to separate, as communicated in by words and in deeds, but one of them has failed to move from the residence.

The *Norviel* court left open the possibility that parties could continue living together and yet be physically separated in certain circumstances. It states, "our conclusion does not necessarily rule out the possibility of some spouses living apart physically while still occupying the same dwelling. In such cases, however, the evidence would need to demonstrate unambiguous, objectively ascertainable conduct amounting to a physical separation under the same roof." (*Norviel, supra* at p. 1164, emphasis added.) That court further added,

> even acknowledging that there may be cases in which parties could remain under the same roof and still *live apart physically* within the meaning of the statute, this is not such a case. True, the parties here slept in separate bedrooms, but they had done so for nearly four years before Husband announced his decision to finally end the marriage. In this case, nothing changed as a result of Husband's decision to separate except the parties' habit of sometimes taking Sunday dinner alone together. It seems to us that-at a minimum-the physical separation required by the statute must be **qualitatively different** from the parties' conduct during their ongoing marriage. Here, it was not.

(*Id.* at p. 1164.)

The situation calls to mind the 1989 film *War of the Roses* starring Michael Douglas, Kathleen Turner and Danny DeVito. In that film, husband and wife fight over who will stay in the marital home after their marriage has clearly ended, each barricading him or herself in separate quarters, trying desperately to force the other to move, destroying the home in the process.

This is an extreme example, and for good reason. If this Court fashions an exception to the bright-line rule that living separate and apart requires separate residences, such exception must be narrowly tailored and must operate only in extreme circumstances in which (1) both spouses have the subjective intent to separate, which they have communicated to one another; and (2) they have physically separated in a manner that is qualitatively different as of the date of separation than had previously existed. As such, if one spouse wishes to separate, that spouse must both communicate a intent to separate and must contemporaneously do something in order to establish a physical separation that is qualitatively different from how the parties had been living previously. The physical separation must be contemporaneous with a subjective intent to separate and communication of that intent so that both spouses are aware that they are separated yet continue residing together—albeit under a different physical arrangement than had previously existed in the marriage.

This narrow exception is consistent with *Popescu v. Popescu* (1941) 46 Cal.App.2d 44, 52 in which a divorce was granted even though the parties were still living in the same house. In that case, the wife had unsuccessfully sought to evict husband from the home; but she occupied separate, locked rooms within the residence, refused to speak to husband, and twice called police when husband entered her rooms. This is precisely the type of extreme example that this Court may determine constitutes separation—albeit under the same roof.

Additionally, such physical separation must be contemporaneous with and demonstrative of a subjective intent to separate and communicated to the other

spouse. "Later conduct that is merely consistent with an earlier decision to separate does not support an earlier separation date." (*Norviel, supra* 102 Cal.App.4th at p. 1160, citing *In re Marriage of Hardin, supra,* 38 Cal.App.4th at p. 453.) As the *Norviel* court held, "separation cannot occur until intent and conduct are present simultaneously." (*Ibid.*) In *Norviel*, husband argued that communication of the intent to separate was sufficient conduct to support a finding of separation. The Sixth Circuit disagreed, noting "actions speak louder than words." (*Id.* at p. 1160, citing *Marriage of Hardin,* 38 Cal.App.4th at p. 453 ["'The best evidence of [the parties' intent] is *their words* ***and actions***.'" (Italics in *Hardin*, bolding in *Norviel*].)

If this Court decides to craft this exception, it must be careful about permitting separation under the same roof to constitute "living separate and apart" under section 771. It is probably the minority of marriages in which one or both parties have not availed themselves of the couch or the spare bedroom, sometimes for an extended period of time, while not having the subjective intent to end the marriage. It would be dangerous indeed for one party to later take advantage of such "breathing room" to assert that the couple was thereupon living "separate and apart." Moreover, where a couple has slept in separate bedrooms for years, something more is required. In such a circumstance, one of the parties must move from the residence in order to demarcate a "separation."

A marriage is like a living being: it may be on life support for many years before it is pronounced dead. Some marriages die quickly: like getting hit by a truck, a husband comes home to find his wife with another man, and moves out immediately, with no intention to return. Some marriages are chronically ill for years, slowly deteriorating but refusing to die. As one may not "backdate" a death certificate to the date on which the patient was pronounced terminally ill or even when a breathing tube was inserted, in the case of a marriage, one may not "backdate" the date of separation.

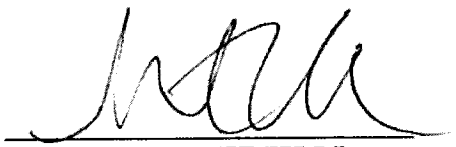
As a matter of public policy, and in furtherance of a bright-line rule that all courts and litigants can use to determine date of separation, parties must be physically separate as of the date of separation. This typically means they are no longer living under the same roof. A rule permitting a court to find the parties had separated even though they continue to live together and have experienced not qualitatively different physical separation other than that which existed at the time of the marriage would "fl[y] in the face of the strong presumption of community property that generally applies in this state." (*Norviel, supra* at pp. 1163-1164.)

VI. CONCLUSION

This Court should determine that, as a matter of law, in order for a couple to be "living separate and apart" under Family Code section 771(a), they must be physically separated, meaning they are no longer living under the same roof. In the alternative, if this Court deems such law may operate unduly harshly, it may permit a finding of separation in certain rare circumstances. But these circumstances must be limited to couples who have undergone a physical separation within the same residence that is qualitatively different than a physical separation they had experienced during the marriage, which is contemporaneous with a subjective intent to separate and communicated to the other spouse.

Dated: March 11, 2014

Respectfully submitted,



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BRIEF FORMAT CERTIFICATION
PURSUANT TO CRC RULE 8.520

Pursuant to California Rules of Court, Rule 8.520, I hereby certify that the Petitioner's Opening Brief on the Merits is proportionately spaced, has a typeface of 13 points or more, and contains no more than 6,512 words, including footnotes, as counted by the Microsoft Word processing system used to generate the brief.

Dated: March 11, 2014

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