TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, November 1, 2024, 9:30 a.m.
Courtroom 20 –Hon. Paul J. Lozada
3055 Cleveland Avenue, Santa Rosa

TO JOIN "ZOOM" ONLINE:
Meeting ID: 161-646-8743
Passcode: 026215
https://sonomacourt-org.zoomgov.com/j/1616468743

TO JOIN "ZOOM" BY PHONE:
By Phone (same meeting ID and password as listed above):
(669) 254-5252

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, it will be necessary for you to contact the department's Judicial Assistant by telephone at (707) 521 -6732 by 4:00 p.m. on the day before the hearing. Any party requesting an appearance must notify all other opposing parties of their intent to appear.

1. **24FL01771 Petition of Hamilton**

Motion for Disqualification of Counsel and Firm Anderson Ziegler and Dismiss Action and Sanctions Under Family Code Section 271 DENIED.

Facts

Petitioners, the grandmother and grandfather of Respondent's minor children (the "Children"), filed this petition in order to obtain an order allowing them to have visitation rights with the Children. Petitioners' Declaration Under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") states that the other parent, Ryan Hamilton ("Ryan"), is deceased.

Motion

In her Request for Order ("RFO") and Motion for Disqualification of Counsel and Firm Anderson Ziegler and Dismiss Action and Sanctions Under Family Code Section 271, Respondent moves the court to disqualify Petitioners' attorney and dismiss the action. Respondent fails to cite or in any way discuss any authority for the motion or legal grounds for the requested relief. She simply provides her own declaration (the "Skolnik Dec.") attached to her RFO. In this, she states that the court should disqualify Petitioner's current attorney, Kathleeen Mullins Henderson

("Henderson") and Henderson's law firm, Anderson Ziegler (the "Firm") because Henderson represented Ryan, Petitioner's son, Respondent's former husband, and the Children's father, in the marital dissolution action between Respondent and Ryan (the "Dissolution Action"). She also notes that Henderson and the Firm are representing Petitioner Douglas Hamilton ("Doug") in the probate proceedings (the "Probate Action") regarding Ryan's estate (the "Estate"). She claims that she is the personal representative of the Estate in the Probate Action and that she claims the attorney-client privilege on behalf of Ryan as to confidential matters which Ryan may have disclosed to Henderson. She adds that Doug personally financed Ryan's litigation in the Dissolution Action and that Ryan's litigation in that action was part of a pattern of harassment, with this instant action simply being a continuation of that conduct by Ryan's parents now that Ryan is deceased.

Petitioners oppose the motion. They argue that disqualification is improper because Respondent lacks standing since she never had an attorney-client relationship with either Henderson or the Firm, disqualification is only appropriate where it will have a "continuing effect" on the proceedings, and there is no conflict between the representation of Ryan in the Dissolution Action and the representation of Petitioners now. They further note that even if Henderson had access to Ryan's confidential financial records, medical records, or estate plans, such access is immaterial because it is not Respondent's confidential information. They further add that it is not grounds for disqualification because it could have no effect on this litigation because it has no bearing on Petitioners' efforts in this action to seek visitation rights.

General Applicability of Rules and Provisions Governing Civil Actions

According to the Family Law Rules of the California Rules of Court ("CRC") 5.2(d), and Family Code ("Fam.Code") section 210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the Code of Civil Procedure ("CCP"). See, e.g., *In re Marriage of Boblitt* (2014) 223 Cal.App. 4th 1004, at 1022; *In re Marriage of Zimmerman* (2 Dist. 2010) 183 Cal.App.4th 900, at 910-911.

Respondent's Failure to Provide Points and Authorities or Analysis

Respondent provides no point and authorities, makes no mention of the legal authority for this motion or the standards which the court is to apply, and also provides no analysis of any sort, aside from the request for attorneys' fees pursuant to Fam. Code section 271.

According to California Rule of Court ("CRC") 3.1113, a moving party must provide a memorandum of points and authorities, which "must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." The court "may construe the absence of a memorandum as an admission that the motion… is not meritorious and cause for its denial…."

Without any explanation, analysis, or even reference to authority for the motion, it is impossible for the court to determine the exact bases for the requested relief. Even if the court were to determine the applicable standards for disqualification of an attorney, Respondent fails to inform the court of the basis for dismissing the action, or whether the dismissal is based on the disqualification or on another grounds. If Respondent contends that the court should dismiss the action due to disqualification of Petitioner's attorney, Respondent fails to indicate why this is appropriate or the authority for such a decision.

The court therefore reminds the counsel for moving party, Respondent, of the need to provide a memorandum of points and authorities with every motion, and to provide legal authority and analysis. These are required for two basic reasons: 1) to explain the bases for the motion and requested relief in order for the court to make a proper determination, and 2) to provide proper notice to other parties.

The court reminds Respondent's attorney that failure to provide a memorandum of points and authorities or legal authority and analysis is in of itself grounds for denying the motion and, at the least, impairs the moving party's position by failing to explain to the court why the court should grant the relief requested.

Motion Seeking Both Disqualification and Dismissal

As noted, Respondent appears to seek both disqualification of Petitioners' counsel and dismissal of this action. However, the papers are exceedingly unclear, in part because Respondent has provided no memorandum of points and authorities, cited to no legal authority, and provided no analysis.

The court reminds counsel for Respondent that a party should file separate motions when seeking entirely separate and unrelated relief. Accordingly, a motion for disqualifying counsel and a motion to dismiss should be filed as separate motions. This is important to ensure clarity, proper

notice to the opposing party, and advise the court of the need to consider separate matters, which may require more time. All of these issues are important to the efficient and thorough administration of justice, fairness for all parties, and a proper and complete consideration of matters before the court.

The court points out that the very problems which "combining" motions may cause have occurred in this very motion. It is wholly unclear exactly what Respondent is trying to do, and in particular in the possible, but very vague, request for dismissal. The moving papers barely mention dismissal and focus almost entirely on disqualification, while the court calendared this simply as a motion to disqualify. Petitioners' opposition underscores this problem for it is called "Opposition to Respondent's Motion to Disqualify Counsel" only and it presents no discussion whatsoever of the request to dismiss, evidently because it was not entirely evident that Respondent was adding a motion to dismiss to this matter.

Disqualification of Counsel

As explained above, Respondent fails to cite or in any way discuss any authority for the motion or legal grounds for the requested relief. She simply provides her own declaration (the "Skolnik Dec.") attached to her RFO. In this, she states that the court should disqualify Petitioner's current attorney, Kathleeen Mullins Henderson ("Henderson") and Henderson's law firm, Anderson Ziegler (the "Firm") because Henderson represented Ryan Hamilton ("Ryan"), Petitioner's son, Respondent's former husband, and the Children's father, in the marital dissolution action between Respondent and Ryan (the "Dissolution Action"). She also notes that Henderson and the Firm are representing Petitioner Douglas Hamilton ("Doug") in the probate proceedings (the "Probate Action") regarding Ryan's estate (the "Estate"). She claims that she is the personal representative of the Estate in the Probate Action and that she claims the attorney-client privilege on behalf of Ryan as to confidential matters which Ryan may have disclosed to Henderson. She adds that Doug personally financed Ryan's litigation in the Dissolution Action and that Ryan's litigation in that action was part of a pattern of harassment, with this instant action simply being a continuation of that conduct by Ryan's parents now that Ryan is deceased.

The court's power to disqualify counsel is based in the court's inherent power under CCP section 128(a)(5) to control the affairs and people before it in order to ensure justice. *Collins v.*

State of California (2004) 121 Cal.App.4th 1112, 1123; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145. As stated in *Collins, supra,* at 1124,

> [u]ltimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.

A party may only seek to disqualify an opponent's counsel if the party has standing to do so. *Great Lakes Const., Inc v. Burman* (2010) 186 Cal.App.4th 1347; *Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 485; *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1404; *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 352. As the court in *Blue Water Sunset* stated, discussing the general standing requirement for seeking disqualification,

> A complaining party who files a motion to disqualify is required to have standing. [Citation.] Some cases hold that the complaining party must prove a present or past attorney-client relationship with the attorney who is the target of the motion. [Citations.] Other courts permit disqualification on a different basis, holding that standing is established so long as the lawyer owed a duty of confidentiality to the complaining party and breached it. [Citation.]

In the words of *Great Lakes Const*., at 1356, '[a] "standing" requirement is implicit in disqualification motions. Generally, before the disqualification of an attorney is proper, the complaining party [seeking disqualification] must have or must have had an attorney-client relationship with that attorney.'

California Rule of Professional Conduct 1.6, formerly 3-100, states that, with exception such as where it is necessary to prevent a criminal act, an attorney "shall not reveal" a *client's* confidential communications or "information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,1 or the disclosure is permitted by paragraph (b) of this rule." Business and Professions Code section

6068(e)(1) states that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Rule of Professional Conduct 1.7, formerly 3-310 and 3-320, forbids an attorney from accepting employment adverse to a current client or former client, or that attorney's duties to a "third person," without informed written consent of each one involved where, by reason of the representation, the attorney has obtained confidential information material to the employment. As the Supreme Court stated in *Flatt v. Superior Court* (1994) 9 Cal.4th 275, at 289, an attorney cannot take a position adverse to a client without "free and intelligent consent." According to Rule 1.0.1(g-1), "Person" has the meaning stated in Evidence Code section 175, i.e., "a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity."

"No formal contract or arrangement or attorney fee is necessary to create the relationship of attorney and client." *Farnham v. State Bar* (1976) 17 Cal.3d 605, 612. In fact, "[w]hen a party seeking legal advice consults an attorney... and secures that advice, the relation of attorney and client is established prima facie." *Perkins v. West Coast Lumber Co.* (1900)129 Cal.427, 429.

This rule applies to former clients. See *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1430-1431. When an attorney represents a client whose interests may clash with a former client, the court must disqualify the attorney if there is a "substantial relationship" between the subjects of the two lawsuits. *Id.* The court must focus not on the similarities of the litigation, but on the ensuring that the attorney can give the clients undivided loyalty. *Id.*

As the Supreme Court stated in *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, at 573-574, an attorney, after ending a relationship with a former client, "may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship. Under this standard, an attorney may do neither of the things listed. *City National Bank, supra,* 96 Cal.App.4th 324.

Disqualification of the entire firm is mandatory when an attorney who was actually involved in representing a client in a matter "switches sides" in the same case and no "ethical wall" can

remedy that. *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1139; *Henriksen v. Great American Sav. & Loan* (1992) 11 Cal.App.4th 109, 114-115.

In subsequent cases, vicarious disqualification of an entire law firm may also be required where an attorney has been "tainted" but it is not automatic. *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 801. In fact, "[a]s a general rule in California, where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well. [Citations.] This is especially true where the attorney's disqualification is due to his prior representation of the opposing side during the same lawsuit." *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th. 109, 114-115 (fn. omitted); *National Grange v. California Guild, et al.* (2019) 38 Cal.App.5th 706, 714 (quoting and relying on *Henriksen*). In such instances, the firm seeking to prevent disqualification may rebut the presumption of exposure to confidential information by demonstrating that the tainted attorney is not involved in the case and that there is an "ethical screen" preventing the tainted attorney from transmitting the confidential information to the other attorneys. *Kirk, supra*, 807-814. Once the side seeking disqualification had demonstrated that an attorney is tainted with confidential information, this creates a rebuttable presumption that the attorney shared that information with the new firm. *Kirk supra,* 809-810.

"Disqualification is only justified where the misconduct will have a 'continuing effect' on judicial proceedings." *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 744; *Sheller v. Sup.Ct*. (2008) 158 Cal.App.4th 1697, 1711.

In this instance, Respondent has neither cited authority for her motion or provided any analysis or explanation for the motion aside from asserting the facts noted above. Nothing indicates that she has standing in any way because she fails to show that she ever had an attorney-client relationship with Petitioners' attorney or the Firm, or that either of the latter ever owed her any duty of any sort. Even if there were standing, the facts demonstrate no indication that the representation could possibly have any material relationship to the other proceedings, that any of Respondent's confidential information could have been disclosed, or that the representation would have any continuing effect on this litigation in any way. There is, in short, no evident basis for disqualification whatsoever.

The court DENIES the motion to disqualify for all of the reasons set forth above.

Dismissal

Again, as explained above, Respondent has provided absolutely no authority or analysis whatsoever for the apparent request to dismiss the action. Respondent cites no statute or other authority for dismissing this action. The moving party is not even clear about the factual reasons for the request, because she fails to provide any discussion. In part, the request appears to be based on the disqualification of the Petitioners' counsel. However, Respondent in her declaration also states, briefly and vaguely without further explanation, that Petitioners do not either demonstrate that she is an unfit parent or meet their "constitutional burden." She also makes factual assertions that she has in fact allowed Petitioners to see the Children. None of this provides an evident basis for dismissal.

Motions to dismiss are generally based on several CCP provisions, including CCP sections 583.110-583.430, governing involuntary dismissal for failure to prosecute; failure to amend after demurrer sustained in section 581(f); failure to pay transfer costs after change of venue in section 399(a); failure to comply with discovery orders in section 2023.030 and the related discovery provisions; failure to post bonds or security when required as in sections 391.3, 391.4, and 1030(d). The court finds no indication that any of these bases for dismissal applies here.

A nonstatutory motion to dismiss challenging a pleading is essentially the equivalent of a general demurrer, i.e., a demurrer on the ground that the pleading fails to state facts sufficient to constitute a cause of action or on the ground that the court lacks subject-matter jurisdiction. See *Citizens for Parental Rights v. San Mateo County Bd. of Ed*. (1975) 51 Cal.App.3d 1, 38. Respondent has not presented any basis or analysis supporting a general demurrer, as her discussion of extrinsic facts about actual visitation highlights.

The court DENIES the motion to dismiss for all of the reasons set forth above.

Conclusion

The court DENIES the motion in full. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The

preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

It is SO ORDERED.

2. SFL49915 County of Sonoma vs Fields

Motion for Change of Venue CONTINUED to the law and motion calendar of December 6, 2024, in Department 20 at 9:30 a.m. because, as explained further below, there is no proof of service showing notice of this hearing. Prior to the new hearing, the moving party must file timely proof of service in accord with California Rule of Court 3.1300, demonstrating service of notice of the hearing.

The court also notes, again as explained below, that the moving party provides no evidence demonstrating that, in addition to witnesses, Father and the Child reside in the County of Los Angeles. Although the court must look to the convenience of non-party witnesses, in the court's view, if the Father and Child do not reside in the County of Los Angeles, transfer to that county would not promote the ends of justice and there would be no basis for transferring venue. Mother must provide evidence supporting these determinations in order for the court to find it appropriate to transfer venue.

Facts

Plaintiff County of Sonoma ("County") filed this action regarding parental obligations for minor child Jaazzimir (the "Child") against Respondent Deangelo Desean Fields ("Respondent" or "Father") on February 19, 2010, naming Krystal Marie Cox Zavala ("Other Parent" or "Mother") as the other parent. Father failed to make a timely appearance so County obtained entry of default against him on April 27, 2010. The court subsequently entered judgment regarding parental obligations on April 30, 2010. Notice of entry of the judgment was served on Father on May 6, 2010, and filed on Mary 10, 2010. The judgment ordered Father to make payments for child

support and provide other related support, including a portion of reasonable health care costs for the Child.

Subsequent litigation in 2017 regarding support, custody, and visitation, resulted in a custody order of March 15, 2017 in which the court ordered that Father have legal and physical custody of the Child and that the Child live primarily with Father, while Mother was to have visitation rights. Further litigation resulted in a similar order on April 30, 2018. Similarly, litigation in 2019 resulted in the court ordering on September 16, 2019 that Father have legal and physical custody of the Child, while Mother was to be allowed one 4-hour, professionally supervised visit per month.

On June 6, 2023, Mother filed a motion for change of venue to the County of Los Angeles ("Los Angeles") on the basis that she was relocating to that county while the Child and Father were already living in that county. The court denied the motion on the basis that Mother failed to provide any evidence regarding the convenience of witnesses or the ends of justice to support the transfer.

Mother filed another Motion for Change of Venue to Los Angeles. At the original hearing on September 6, 2024, the court continued the motion because there was no proof of service showing notice of the hearing and directed the moving party to cure that defect. The court also noted that the moving party failed to provide evidence demonstrating that, in addition to witnesses, Father and the Child reside in the County of Los Angeles. It stated that the moving party would need to provide evidence supporting these determinations in order for the court to find it appropriate to transfer venue.

Motion

This matter has once again come on calendar for Mother's Motion for Change of Venue, which this court continued from September 6, 2024. Mother moves the court to transfer venue to Los Angeles on the basis that all witness reside in Los Angeles. She contends that it will promote the convenience of these witnesses and justice as a result.

There is no opposition.

Service and Notice

Mother has still filed no proof of service for this motion and no party has filed anything in this action since this court's last ruling. Therefore, the court will CONTINUE the motion one more time to allow Mother to cure this defect. Mother must file timely and complete proof of service showing service of this motion and request for order, along with notice of the hearing information, on all parties, including Father.

Applicable Authority

According to the Family Law Rules of the California Rules of Court, at CRC 5.2(d), and Family Code section 210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the Code of Civil Procedure ("CCP"). See also, *In re Marriage of Boblitt* (2014) 223 Cal.App. 4th 1004, at 1022.

CCP sections 395 and 396 thus generally apply to actions under the Family Code, specifically actions for marital dissolution, nullity or marriage, legal separation, and support obligations. CCP section 395(a). For actions regarding support obligations under Fam.Code section 3900, venue is proper in the county where the child resides.

Fam. Code section 7620, however, specifically governs both venue and jurisdiction in California regarding actions to determine parentage and child support under the Uniform Parentage Act. Fam. Code section 7602 states, "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parent. Subdivision (c) sets forth the specific bases for venue and states, in pertinent part,

An action under this part shall be brought in one of the following:

(1) The county in which the child resides or is found.

Proper venue may also be determined based on the "convenience of witnesses and ends of justice." CCP section 397(c). This is discretionary. Ibid. The convenience which the court must consider is that of the nonparty witnesses and the court should consider the parties' convenience only in extraordinary circumstances. *Wrin v. Ohlandt* (1931) 213 Cal. 158, 160. Circumstances

which might warrant considering the parties' convenience include cases where a party is unable to travel without endangering his or her life due to health or related reasons. See *Simonian v. Simonian* (1950) 97 Cal.App.2d 68, 69.

With respect to proceedings under the Family Code, two specific provisions apply to allow the court to make a venue determination based on issues of convenience and justice, but neither is directly applicable to this case. CCP section 397(e) and CCP section 397.5 apply to actions for dissolution or nullity of marriage or legal separation of the parties. The record demonstrates that Mother and Father were not married and the County filed this action to determine the parties' parental responsibilities, including support.

Mother has still not cured the evidentiary defect which this court noted in the prior order continuing this motion from September 6, 2024. As explained, the Request for Order includes a statement under penalty of perjury that "All witnesses now reside in LA jurisdiction for the past 6 months." If this is true, and if not only she but also Father and the Child, reside in Los Angeles, Mother will have provided sufficient basis for transferring venue to Los Angeles. However, Mother does not this time specifically provide evidence demonstrating that, in addition to witnesses, Father and the Child reside in Los Angeles. Although the court must look to the convenience of non-party witnesses, in the court's view, if the Father and Child do not reside in Los Angeles, this would not promote the ends of justice and there would be no basis for transferring venue on any grounds to Los Angeles. The court is aware of records indicating that Father does, or did, reside in Los Angeles but at this time, this is not clear.

Mother must provide evidence supporting these determinations in order for the court to find it appropriate to transfer venue to Los Angeles.

Conclusion

The court CONTINUES the motion as explained above, one more time, in order to allow Mother to cure the defects explained above. At the new hearing, should the defects remain uncured and without sufficient explanation, the court will not continue the motion again and will instead drop the motion.

It is SO ORDERED.

3. **SFL088408**

Motion for Reconsideration IAW CCP 1008; Appointment of Minor's Counsel for the elder child; Co-Parenting Counseling GRANTED with respect to the request to reconsider the order of September 9, 2024 only, as explained below. As also explained below, the court is not at this time actually reconsidering, or making a substantive determination on, the order of September 9, 2024, but is only finding that reconsideration is warranted and that it will reconsider the matter. The court sets the matter for hearing of December 17, 2024 at 1:30pm on the substantive issues of reconsideration of the order of September 9, 2024.

Facts

Petitioner filed this action to establish parental relationship on May 17, 2021 with respect to Petitioner's two minor children (the "Children"). Respondent filed his response on June 14, 2021, admitting that he is a parent of the Children. Both parties requested a determination that they are both the parents of the Children and determinations regarding custody, visitation, child support, and related issues. The involved Family Court Services ("FCS") and a child recommending counselor. The court entered a final judgment on December 9, 2022 finding that both partis are the Children's parents and entering an order regarding custody, visitation, and child support based on a stipulation which was entered as a court order. Up through that judgment, attorneys represented both parties.

No litigation occurred in this action following the judgment until July 23, 2024, when Respondent filed an attorney-substitution form, substituting out her attorney and making herself represented. Three days later, on July 26, 2024, Petitioner filed a Request for Order (the "Modification RFO") seeking a change in the judgment orders regarding custody, visitation, and child support. The court set the hearing on that RFO for September 9, 2024. She also filed an Income and Expense Declaration ("IED").

The same day, July 26, 2024, the court issued an FL-017 further orders to the parties to take part in an FCS custody recommending counseling session on August 22, 2024.

On July 29, 2024, Petitioner filed a proof of service ("POS") purporting to show personal service on that day of the RFO, IED, hearing notice, and further orders on the receptionist for Angelle Wertz ("Wertz") Respondent's former attorney at the attorney's office.

On July 30, 2024, Wertz filed a substitution of attorney, stating that she had substituted out, leaving Respondent self represented.

At the FCS session on August 22, 2024, Respondent failed to appear.

On September 4, 2024, Respondent filed an attorney substitution form naming Marianne Skipper ("Skipper") as his new attorney.

At the hearing on Petitioner's RFO on September 9, 2024, only Petitioner appeared. The court entered an order on the RFO regarding custody, visitation, and child support as Petitioner requested (the "September Order").

On September 13, 2024, the county Department of Child Support Services ("DCSS") filed a notice of intervention and substitution of payee, stating that it was providing support services and was substituting in as payee for Respondent's payment obligations.

Motion

Respondent in his Request for Order ("RFO") and Motion for Reconsideration IAW CCP 1008; Appointment of Minor's Counsel for the elder child; Co-Parenting Counseling, moves the court to reconsider the September Order. Relying on Code of Civil Procedure section 1008, he contends that Petitioner never served him with the RFO or other papers, aside from the IED, which someone dropped off. Therefore, he contends, he had no notice of the RFO or hearing and the service violated the personal-service requirements of Family Code section 215.

Petitioner opposes the motion. She contends that the orders on custody, visitation, and support are correct. With respect to service and notice of her RFO and the September hearing, she admits that she served Wertz and did not serve Respondent but claims that she "was told by the Sonoma County filing clerk" to do that. She also states that after Skipper substituted in, on September 8, 2024, Skipper sent a notice that she would be unavailable until September 16, 2024, and that she presented this at the September hearing.

Respondent replies, addressing the underlying issues of the September Order and stating that this is the first time that he has received notice of some of Petitioner's current concerns.

General Applicability of Rules and Provisions Governing Civil Actions

According to the Family Law Rules of the California Rules of Court ("CRC") 5.2(d), and Family Code ("Fam.Code") section 210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the Code of Civil Procedure ("CCP"). See, e.g., *In re Marriage of Boblitt* (2014) 223 Cal.App. 4th 1004, at 1022; *In re Marriage of Zimmerman* (2 Dist. 2010) 183 Cal.App.4th 900, at 910-911.

Authority Governing Reconsideration Pursuant to CCP §1008

Any party affected by an order may apply to the same judge or court that made the order to reconsider the matter and modify, amend, or revoke the prior order. CCP §1008(a).

The motion for reconsideration must be brought within 10 days of the service of notice of the entry of order. Code of Civil Procedure ("CCP") § 1008. The deadline is extended under the provisions of CCP section 1013. *Forrest v. State of California Dept. of Corporations* (2007) 150 Cal.App.4th 183, 203. CCP section 1013 extends the deadline by 5 calendar days where service is by mail or 2 calendar days where service is by express mail.

A party seeking reconsideration must first demonstrate new facts, law, or circumstances that were not previously considered. CCP §1008(a); *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 692. The moving party must also provide an adequate explanation why the new information was not provided earlier. *Garcia, supra; Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500. The need for an explanation is a requirement for due diligence. *Gilberd.*

Ordinarily, a motion for reconsideration must be heard by the "same judge or court" that made the original order. CCP § 1008. Although normally a trial judge may not reconsider and overturn another trial judge's order, "an exception to this rule applies where the judge who made the initial ruling is unavailable." *Williamson v. Mazda Motor of America, Inc.* (2012) 212 Cal.App.4th

449, 454-455; see also *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1362, and *International Ins. Co. v. Sup.Ct*. (1998) 62 Cal.App.4th 784, 786.

CCP § 1008 does not, however, limit the court's inherent power to reexamine its interim rulings on its own motion and enter a new and different order prior to entry of judgment. *LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1107; *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156-1157. The court must act sua sponte, but this can be on its own motion or as the result of a party's request. *LeFrancois, supra,* 1108. Such a request can be informal. *Ibid.* Technically, a party may request a court to reconsider a matter on its own but cannot bring a noticed motion requesting such reconsideration. *Ibid*. Instead, when a trial court believes that its ruling may be in error and will reconsider the ruling, it should notify the parties, request briefing on the point, and hold a hearing. *Ibid*.

Timeliness

The motion is timely. Petitioner filed proof of service for the September Order showing that she served it on Respondent by mail on September 12, 2024. Thus, the deadline for serving this motion was Friday, September 27, 2024. Respondent filed this motion on October 3, 2024. However, the motion papers are dated September 23, 2024 and the court record shows that Respondent attempted to file the motion on September 25, 2024, but the papers were rejected due to a clerical issue, causing a short delay in actual filing.

Moreover, the court notes that Petitioner has not raised this issue and instead filed timely opposition on the merits without claiming that the motion is untimely.

Even if the motion were untimely, that would not prevent the court from considering and granting the ultimate relief requested and addressed in this ruling, revisiting the substantive issues in the September Order and Modification RFO. The court notes that it has the authority, as explained above, to reconsider the matter on its own, and such reconsideration is not subject to the deadline for a motion under §1008. The court also notes that this issue may be addressed by setting aside the September Order pursuant to CCP §473 based on Respondent's lack of notice to appear and oppose the Modification RFO. The 10-day deadline also does not apply to such relief. The court reiterates that Petitioner has had sufficient notice, has filed a complete opposition on the merits, and has also not claimed that the motion is untimely or that she lacked sufficient notice. She therefore has fully briefed this matter. Finally, the court in this order is simply addressing the merits of the

request to *reconsider* and is not making the actual reconsideration of the substantive issues in the September Order at this time. In the event that the court does grant reconsideration, the court will set the matter for a new hearing on the substantive issues sought in Petitioner's Modification RFO and addressed in the September Order. This would also be the appropriate procedure for a rehearing if the court were instead granting a motion to vacate pursuant to CCP §473. The court will therefore give both parties full notice and opportunity to brief and address the substantive issues of the September Order.

The result is that, for the reasons set forth above, the court considers this motion timely, finds that even if it were not timely, it would still consider the matter either by reconsideration on its own motion, and is giving the parties additional notice and opportunity to address the underlying substantive issues.

Same Judge

The court notes that the judicial officer who entered the September Order has retired and as of November 1, 2024 is no longer on the bench. He is therefore no longer available to hear this matter.

Discussion of the Request for Reconsideration

As noted, Respondent bases the request for reconsideration on the fact that he was unable to present his evidence and arguments at the September hearing because Petitioner never served him as required and he lacked notice. Thus, he contends, this failure was not a result of a lack of diligence.

Fam. Code § 215 governs modification of a judgment or order and the service of notice of a request to modify a final judgment or order. It states, in pertinent part and with emphasis added,

> (a) Except as provided in subdivision (b) or (c), after entry of a judgment of dissolution of marriage, nullity of marriage, legal separation of the parties, or paternity, or after a permanent order in any other proceeding in which there was at issue the visitation, custody, or support of a child, *no modification of the judgment or order…* is valid *unless any prior notice* otherwise required to be given to a party to the proceeding *is served,* in the same manner as the notice is otherwise permitted by law to be served, *upon the party*. *For the purposes of this section, service upon the attorney of record is not sufficient.*

(b) A postjudgment motion to modify a custody, visitation, or child support order may be served on the other party or parties by first-class mail or airmail, postage prepaid, to the persons to be served. For any party served by mail, the proof of service shall include an address verification.

The court notes that in *In re Marriage of Gortner* (App. 2 Dist. 1976) 60 Cal.App.3d 996 the court ruled that if the other party had actual notice of the post-judgment proceedings, a technical failure to comply with notice requirement statute would not invalidate the order. However, other cases express concern about an "actual notice" exception but there is no law indicating that there can be no exception at based on actual notice and the courts expressing "reservations" have generally acknowledged the possibility of an exception based on actual notice without expressly rejecting it. See, e.g., *Marriage of Roden* (1987) 193 Cal.App. 3d 939, 944; *In re Marriage of Kreiss* (1990) 224 Cal.App.3d 1033, at 1038-1039; *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, at 1130, fn. 5.

This matter is clear from the record and the parties' papers, which are not in dispute over the central facts regarding service and notice. Unquestionably, Fam. Code §215 controls in this instance and governs the service of Petitioner's Modification RFO to modify the court's final judgment. Petitioner filed the Modification RFO to modify a final judgment regarding the issues set forth above and did so after a period of more than one year without any litigation activity by the parties. Petitioner therefore was required to serve Respondent himself with the Modification RFO and related papers.

Petitioner unequivocally failed to comply with the requirements of §215. She filed only one proof of service showing service on Respondent's prior attorney, Wertz, who had not been involved in this action since 2022. Wertz was still on record as Respondent's attorney of record, but that was immaterial given the service requirements. Nothing in the record shows that Petitioner served Respondent himself, or anyone else for that matter. Moreover, Respondent states in his declaration that he was never served with the documents other than the IED, and Petitioner in her opposition admits that she served only Wertz and not Respondent. The court stresses that the failure to comply with §215 is apparent and unequivocal on the face of the court's record, even without considering the moving and opposition papers.

The record clearly demonstrates neither waiver nor sufficient actual notice. Respondent did not appear at either the FCS session or the September hearing, and he took no action prior to the September hearing other than filing a form to substitute in his new attorney, clearly resulting from Wertz substituting out as soon as Petitioner served her. Nothing about Respondent's attorney substitution or the attorney's notice of unavailability indicates either acquiescence to taking part in the proceedings or, in fact, any notice of any proceedings whatsoever.

Respondent presents new evidence and arguments not presented at the September hearing and the record is clear that his failure to oppose the motion with this information was not a result of lack of diligence. Instead, it resulted from Petitioner's failure to give him actual notice or serve him in a manner required by statute.

The court finds that, because of the factual certainty that service was facially defective, Petitioner admits she did not serve Respondent as required, and it is evident that Respondent had no notice of the September hearing, the requested relief is not only warranted, but more that the circumstances are more than sufficient to justify the court reconsidering the matter on its own motion.

Conclusion

The court GRANTS the motion with respect to the request to reconsider the September Order. The court is not at this time actually reconsidering the September Order and is setting a new hearing on the substantive issues of the Modification RFO and September Order. Respondent shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

It is SO ORDERED.

END OF TENTATIVE RULINGS