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June 13, 2023

Hon. Terry B. O'Rourke
Hon. Richard D. Huffman, Acting P.J.
Hon. Joan Irion
Court of Appeal of California
District Four, Division One

Via TrueFiling Only

Re: Publication Request—*D'Arcy v. Andrews* (D080300, Opn. Issued 6/2/23)

Dear Justices:

I write on behalf of the Association of Certified Family Law Specialists (ACFLS) to request publication of the opinion issued 6/2/23 in *D'Arcy v. Andrews* (G080300) under California Rules of Court, rule 8.1120(a). The ACFLS Board of Directors has adopted the unanimous recommendation of the amicus committee to seek publication.

The case involves the disposition of life insurance proceeds pursuant to a beneficiary designation which was the subject of a negotiated marital settlement agreement. The Court held that the trial court erred in not honoring the plain language of the agreement. The Court explained that based on well-established authority, the husband had effectively waived his right to change the beneficiary designation (as he did following his remarriage) in the MSA and that, in doing so, the minor children automatically became the beneficiaries of the policy in equal shares pursuant to the express terms of the MSA. (Opn., at p. 13.)

The "standards for certification" authorize publication when an opinion "[i]nvolves a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision." (California Rule of Court, rule 8.1105(c)(8).)

D’Arcy explained that it followed five opinions in support of its conclusion. (Opn., at pp. 10-13.) The most recent was published more than 30 years ago, the same year that the Family Code was enacted. (*In re Marriage of O’Connell* (1992) 8 Cal.App.4th 565.) In fact, *O’Connell* was decided within the context of the former provisions of the Civil Code comprising the “Family Law Act.” (*O’Connell, supra*, at 571.) Thus, *D’Arcy* would be the first opinion published on this subject under the auspices of the Family Code.

Also, *D’Arcy* is principally reliant upon *Shoudy v. Shoudy* (1921) 55 Cal. App. 344, an opinion over 100 years old. (Opn., at pp. 10-11.) *D’Arcy* notes that *Shoudy* was cited approvingly in *Mutual Life Ins. Co. of New York v. Henes* (1935) 8 Cal.App.2d 306 (Opn., at p. 12); *Chilwell v. Chilwell* (1940) 40 Cal.App.2d 550 (*Id.*); and *Waxman v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1954) 123 Cal.App.2d 145. (*Id.*) Although *Shoudy* was not explicitly cited in *O’Connell*, *O’Connell* did cite favorably to the passage in *Waxman* citing *Shoudy*. (*O’Connell, supra*, at 577; citing, *Waxman, supra*, at 148-149.) In turn, in addition to citing *Shoudy* directly, *Waxman* also cited to the passage of *Chilwell* in which *Shoudy* is quoted. (*Waxman, supra*, 149; citing, *Chilwell* at 554, quoting *Shoudy* (page number unattributed).)

But for the reference to *O’Connell*, *D’Arcy* is essentially reliant upon a rule stated 100 years ago and only most recently reaffirmed nearly 70 years ago in *Waxman*. That is not to say that the rule is not good law or outdated. To the contrary, the rule is applicable depending upon the intent of the parties to the contract as interpreted through their express language. When applicable, the rule is eminently valuable.

The reasonable inference for the standard of certification of opinions invoking overlooked rules or rules not applied in recently published opinions is to remind practitioners and the trial courts of their continued vitality. *D’Arcy* is an excellent example of this intent.

Certainly, the majority of family law practitioners (perhaps even the family law bench) were not in family law practice in 1992 when *O’Connell* was published as the last expression of the rules supported in *D’Arcy*. Publication will most importantly aid in obtaining uniformity of decisions and in the expectations of counsel and clients when these issues result in litigation. It may also cause practitioners to review existing beneficiary designations and make negotiated revisions, if necessary, based upon the parties’ expressed objectives. It should also serve as a blueprint for practitioners and trial courts in evaluating beneficiary designations when negotiating, drafting and evaluating them as a component of a judgment.

About ACFLS as Amicus

ACFLS is an independent non-profit bar association, composed of approximately 669

California certified family law specialists, and dedicated to promoting and preserving the practice of family law since 1980. ACFLS members actively practice family law in California family courts and appellate courts. Our members also serve as court-appointed minors' counsel, mediators, private judges, judges pro tempore, and expert witnesses in child custody proceedings.

Since its founding at the inception of the certification of family law specialists by the State Bar, ACFLS has played an active public policy role when the Appellate Courts, Legislature and Judicial Council consider matters of significance to family courts, family court populations or the family law bar. ACFLS has appeared as amicus in many family law appellate cases, including cases where the organization's participation was invited by the appellate court. ACFLS has an active all-volunteer amicus committee with 21 members who review cases, and makes recommendations to the Executive Committee and Board of Directors regarding letters in support of publication or depublishing of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs.

ACFLS's active, all-volunteer, amicus committee includes all eight California lawyers who hold dual certification as family law and appellate specialists, and other leaders in the family law community including Hon. Thomas Trent Lewis (ret.) and Garrett C. Dailey.

ACFLS's board of directors and amicus committee have no direct ties to or interest in the litigants or their attorneys in this matter – ACFLS is solely concerned with the development of the law for children and families in California. Committee members take turns reviewing the unpublished decisions on the California Courts website.

The *D'Arcy* opinion meets the publication criteria of Cal. Rules of Court, rule 8.1105(c)(8). ("Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision.") *D'Arcy* reaffirms a principle of law not applied in any reported family law decision since 1992. Prior to that, the rule seems to have been lost to history since 1954, nearly 40 years earlier. Given the 30 years since its last invocation, ACFLS believes it is time for a published reminder.

Respectfully submitted,

ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

Anthony J. Boucek

Anthony J. Boucek, CALS/CFLS
Amicus Committee