April 2, 2025

Hon. Dorothy C. Kim, Associate Justice
Hon. Brian M. Hoffstadt, Presiding Justice
Hon. Carl H. Moor, Associate Justice

California Court of Appeal, Second District, Division Five
300 South Spring Street, B-228
Los Angeles, CA 90013

RE: In re Marriage of Hinton
Court of Appeal Case No. B329558

REQUEST FOR PUBLICATION OF DECISION

To the Honorable Justice Kim, the Honorable Presiding Justice Hoffstadt, and the Honorable Justice Moor:

I write on behalf of the Association of Certified Family Law Specialists (ACFLS) to request this Honorable Court publish its opinion in *In re Marriage of Hinton* under California Rules of Court, rule 8.1120, subdivision (b). This case meets the legal standards for publication as set forth in California Rules of Court, rule 8.1105, subdivision (c).

An *Ostler-Smith* order is "an additional award, over and above guideline support, expressed as a fraction or percentage of any discretionary bonus actually received." *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1387.

In *In re Marriage of Hinton*, this Honorable Court held funds cashed out from retirement and deferred compensation plans are not subject to an *Ostler-Smith* order for additional child and spousal support. The parties in *In re Marriage of Hinton* entered into a marital settlement agreement and incorporated judgment, in which the parties agreed:

- the husband's retirement and deferred compensation plans from his then-employer, The Hartford, would be confirmed to the husband as his sole and separate property,
- the husband would pay the wife spousal support comprised of fifteen (15%) percent of his gross income from all sources for a set number of years, and

- the husband would pay monthly child support plus "additional child support" in the amount of 7 percent "of all income, including, but not limited to, any wages, salary, commissions, bonuses, and investment income actually or constructively received by [him] in excess of $750,000 each year."

After entry of judgment, the husband left his job, cashed out his retirement and deferred compensation plans with The Hartford, and deposited the funds into new retirement accounts. The wife contended this "cash-out" of his retirement and deferred compensation accounts created additional income for support, from which she was entitled to an *Ostler-Smith* percentage for additional child and spousal support.

The trial court disagreed, and this Court affirmed. Relying in part on its interpretation of the parties' agreement, this Court explained an *Ostler-Smith* provision applies to fluctuating, discretionary, and prospective earnings. This Court clarified a single lump sum cash-out of retirement and deferred compensation funds, consisting of funds *previously* earned, even if not taxed at that time, do not meet that definition.

This point is of great import to family law litigants throughout our state because it clarifies the law on what funds are subject to an *Ostler-Smith* order, and affects the "double-dip" problem of having an asset and being charged with "income" from that asset in a support dispute. The absence of a case on this issue continues to feed litigation, which will be unnecessary if there is binding precedent.

Based on the experience of our members, ACFLS knows that it is common for litigants to disagree over which funds are subject to an *Ostler-Smith* order. See *In re Marriage of Minkin* (2017) 11 Cal.App.5th 939 [dispute over interpretation of *Ostler-Smith* provision]. And it is common for litigants to disagree over the treatment of retirement funds as they relate to child and spousal support. See *In re Marriage of White* (1987) 192 Cal.App.3d 1022.

The problem arises because (1) funds in a 401(k) plan account or defined contribution retirement account are funded with income earned by the contributing spouse (available for support purposes at the time it is earned), but (2) that income is not taxed until the year it is withdrawn. Thus, although the withdrawals are reported on the current year's tax return as taxable income, the funds withdrawn are *not* income,[1] but simply the receipt of *previously* earned income that has now become taxable. Child support and temporary spousal support computer calculation programs account for these contributions as tax-free income in the year the contributions are made.

This is a legal issue of continuing public interest because it will affect many family law litigants, attorneys, and judges in their interpretation of *Ostler-Smith* orders, who need to understand money cashed out from a retirement or deferred compensation account is not "new

[1] Though any *gain* on the investments is new, real income available for support.

income" or "additional income." Rather, it is previously earned income that is now an asset, irrespective of its being taxed later. ACFLS knows no other opinion where the Court of Appeal has held retirement accounts and deferred compensation accounts are not subject to *Ostler-Smith* orders. For these reasons, ACFLS requests publication of the decision in *In re Marriage of Hinton.*

ACFLS is an independent non-profit bar association, comprised of over 500 California certified family law specialists, and dedicated to promoting the high-quality practice of family law. ACFLS members routinely appear in family courts throughout the State of California, including handling many child and spousal support matters. ACFLS also has an active amicus committee which reviews cases and makes recommendations to the Board of Directors when we believe an opinion should be published or depublished, as well as writing letters supporting or opposing Supreme Court review and filing amicus briefs. The ACFLS amicus committee includes every known California attorney holding dual certification as both a certified family law specialist and a certified appellate law specialist.

Since its founding at the inception of family law specialist certification by the State Bar, ACFLS has played an active public policy role, including regularly weighing in when the Courts of Appeal, 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 Court of Appeal.

ACFLS has an active all-volunteer amicus committee currently with 24 members who review cases and make recommendations to the Executive Committee and Board of Directors regarding letters in support of publication or de-publication of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs. ACFLS's amicus committee includes all known California attorneys who hold dual certification as family law and appellate specialists, and other prominent members of 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.

Sincerely,
Association of Certified Family Law Specialists

Lisa R. McCall, CFLS, CALS[2]
Amicus Committee

[2] *Certified Legal Specialist – Appellate Law & Family Law, State Bar of California