# FAMILY LAW SECTION NEWSLETTER

*The Family Law Section of the Desert Bar Association!*

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**FLS Newsletter FEBRUARY 2017**



## SAVE THE DATES 2017!

| FEBRUARY | MARCH | APRIL AND BEYOND |
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| **FEBRUARY 17, 2017**<br>DBA Cocktail Mixer - LET YOUR HAIR DOWN! 4:00 p.m., Cork Tree California Cuisine, Palm Desert. PLEASE RSVP now @ www.desertbar.com! | **MARCH 24 - 26, 2017**<br>ACFLS 25th Annual Springs Seminar: Complex Issues re Assets and Debts. Starts 8:00 a.m. Friday, Rancho Las Palmas Resort, Rancho Mirage. Register @ www.acfls.org | **MAY 26 - 28; JUNE 9 - 11, 2017**<br>CFLS 2019 Advanced Family Law Course: Comprehensive/Intensive Program. Starts 8:00 a.m. Friday, 5/26/17 to 5/28/17 and continues 8 a.m. Friday 6/9/17 to 6/11/17. Register @ www.cflr.com. Become a Certified Specialist! |
| **FEBRUARY 23, 2017**<br>Brown Bag Lunch with Dale Wells at noon. Dept. 2J, Larson Justice Center. Topic to be discussed: PROPERLY Submitting Family Law Judgments | **MARCH, 2017**<br>FLS Dinner on Date TBA; Speaker TBA | |
| **FEBRUARY 25, 2017**<br>CFLRs 2017 Refresher Course. 8:00 a.m. Saturday, Marriott Hotel, Marina Del Rey. Register @ www.cflr.com | | **GOT AN EVENT OR ANYTHING ELSE?**<br>**EMAIL JORDYN GIBBS @ jordynygibbs@verizon.net!** |

# Legal Analysis and Commentary

## The Case of the Zero-Calorie Sugar Daddy

*By: Mark D. Gershenson, Esq.*

Dictionary.com defines "sugar daddy" as "a wealthy, middle-aged man who spends freely on a young woman in return for her companionship or intimacy." (With a "sugar mama," the genders are reversed.) In common usage, some level of romantic or sexual connection between the two parties is assumed. In other words, in exchange for the benefactor's financial largess, the recipient is providing something, typically love, or the appearance of love, physical affection, and time.

There is a price to pay for consuming too much sugar—be it weight gain, diabetes, or other adverse health effects.

Now imagine a situation where a wealthy man supports a younger woman and her daughter (of whom he is not the father) to the tune of approximately $30,000 per month (including a cash component of about $12,000 per month), yet there is no romantic connection between them. That strikes me as having a zero-calorie sugar daddy–all of the benefits with none of the detriment.

How does such an arrangement play out when the woman seeks child support from her daughter's father? Great for the woman; not so good for the guy. At least that was the holding in *Anna M. v. Jeffrey E.* (Jan. 11, 2017, B267004 ) Cal.App.5th [2017 DJDAR 213], Second Appellate District, Division Eight (certified for publication) ("*Anna M.*").

*Anna M.*, in addition to having an interesting fact pattern and being hugely instructive on how gifts are treated in the adjudication of child support, illustrates the extremely broad range of discretion vested in the trial judge, and the need to make a good record in the trial court if one is to have any hope of success when appealing an adverse ruling.

Anna does not work. (Why should she bother? Would you?) Her child's godfather, a guy named Davis, supports her. Her expenses are $33,000 per month. Jeffrey, who chose to reproduce with Anna, shares joint legal custody of their child, and has 50-50 physical custody. Jeffrey earns $33,100 per month as an investment manager.

Anna lives in a house in Beverly Hills. Davis has a room at that house and spends about two weeks there each month (and the rest of the time at his house in Sherman Oaks). He pays all of the expenses of the B.H. house, including a housekeeper and a nanny. Anna gets to drive two vehicles owned or leased by Davis. Anna gets to use a credit card on which Davis makes the payments. In addition, Davis gives Anna an average of $12,000 per month in cash.

But wait–there's more. Davis "loaned" Anna more than $1 million for her attorney fees, not knowing how (or, presumably, if) she could repay the loan.

The trial judge (the Hon. Mark Juhas) declined to include any of Davis's largess as income to Anna, and ordered Jeffrey to pay guideline child support of $2,505 per month. Judge Juhas noted that "there is a legal preference that parents pay support for their children," yet for purposes of calculating such support he placed the burden solely on Jeffrey. Had he included $30,000 in nontaxable income to Anna, support would have been in the range of $1,000 per month, payable by Anna to Jeffrey.

The Court of Appeal affirmed the order, finding no abuse of discretion. While the Court quoted the provisions of Family Code section 4053 that a parent's first principal obligation being to support his or her child, that both parents are responsible for child support, and that each parent should pay for the support of the child according to his or her ability, by affirming the $2,505 order it effectively placed the obligation to support the couple's daughter entirely on Jeffrey.

The Court discussed at length a string of cases that deal with whether and to what extent gifts to a parent can be considered when calculating child support. Read the opinion for the full details, but here is a summary:

*In re Marriage of Scheppers* (2001) 86 Cal.App.4th 646: Life insurance proceeds received by the mother do not count as income for child support, but the interest that can be earned on the money does.

*In re Marriage of Loh* (2001) 93 Cal.App.4th 325: A parent's receipt of nontaxable, non-cash benefits (the father's mortgage-free or rent-free housing) does not count as income, but such benefits can be a basis for the court to adjust guideline support upward (although the trial court's determination not to do so was affirmed in this case).

*In re Marriage of Schlafy* (2007 149 Cal.App.4th, 747, 753: It is improper to treat the rental value of a mortgage-free house as income to the father, but okay to consider father's lack of any housing expense as a basis to deviate upward from guideline support.

*M.S. v. O.S.* (2009) 176 Cal.App. 4th 548: It is error to treat as income direct payment by Indian tribe of obligor father's attorney fees because "if the father incurred no fee he received no benefit." (The court seem to overlook the fact that while the money paid by the tribe to the lawyer was not cash available to father for the payment of support, clearly the father had the benefit of the representation provided by the lawyer.) In contrast, it was proper to include in the father's income the cash bonuses he received from the tribe.

These four cases suggest that only gifts that put cash in a parent's pocket can be considered income; non-cash gifts or benefits, in contrast, do not count in calculating guideline support but can be a basis for deviating from guideline.

And then came I*n re Marriage of Alter* (2009) 171 Cal.App.4th 718, in which the court confronted the issue of $6,000-per-month payments by the child's paternal grandmother to the child's father. The payments had continued for more than a decade. The Court held that recurring gifts could be treated as income to the recipient for child support purposes (even though not counted as income for federal income tax purposes), but did not have to be so treated. Yes, it's up to the trial judge. (Remember what I said about discretion earlier in this article?) The fact that there was no guarantee that the monthly gifts would continue was not a bar to treating them as income.

[Although not at issue in *Anna M.*, the court noted that it is also okay to consider recurring gifts from a parent to an adult child when assessing the adult child's ability to pay attorney fees., citing *Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633 and *In re Marriage of Smith* (2015) 242 Cal.App. 4th 529.]

Where parental gifts, although generous, had not been regular in amount or frequency, and had, in fact, ceased, it was within the court's discretion (there's the D word again) not to treat the gifts as income. *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1314-1315.

So how did the Court reach its decision in *Anna M.*? First, it rejected Anna's contention that Family Code section 4057.5 (the "new mate income" statute), governed since Davis was neither Anna's spouse or nonmarital partner. There was no evidence at trial of a spousal-like relationship between them. (Was this perhaps the result of inadequate pretrial discovery and investigation? Would a diligent, trash-rummaging P.I. had uncovered evidence of the horizontal boogie? What about interviews with neighbors? We'll never know, but this sort of factual issue seems to cry out for hiring a street-smart investigator.) Also, Anna had failed to raise Section 4057.5 at trial. Whoops.

Next, the Court distinguished *Anna M.* from *Alter*, noting that much of what Davis provided to Anna was not in the form of cash. As for the cash or "cash-equivalent" (presumably his payment of her credit cards) component of the support he provided, the Court noted that such was not derived from Anna's capital or labor, and did not count as income for federal tax purposes (a factor which the Alter court described as helpful in many cases but not controlling). (The opinion is silent on whether Davis filed a gift tax return with respect to the support he gave Anna. Did Jeffrey's lawyer even ask about that?)

The Court characterized Davis and Anna as "legal strangers" to one-another, i.e., there was no familial relationship between them. It also noted that the evidence did not establish how long Davis had been fully supporting her. Although Davis estimated that the cash component of his support of Anna averaged about $12,000 per month, the Court found it reasonable for the trial court not to have characterized the cash gifts as income (*a la Williamson*), since they were not in fixed amount every month for over a decade (*a la Alter*).

We are back to the court's broad range of discretion:

It is reasonable for a court to conclude a grandparent's monthly gifts to a parent, in the same amount, not tied to a specific expense, and

continuing for years, are regular enough to be characterized as income to that parent and are funds available to pay child support. It is equally reasonable to conclude, in this case, that gifts from a legal and familial stranger, of less than specific amounts, that have taken place for an unestablished duration, do not bear enough of a reasonable relationship to the traditional meaning of income as a recurrent monetary benefit to be deemed income to that parent for purposes of calculating—and ultimately eliminating—the child support that would otherwise be payable.

"Equally reasonable" means the appellant (Jeffrey) loses, since his burden was to show that the trial court abused his discretion. At the risk of stating the obvious, when a court acts reasonably, it does not abuse its discretion.

The Court also rested on a few policy arguments. It asserted that treating Davis's support of Anna as income "does not increase the support award." No, it doesn't. Instead, it results in Anna paying Jeffrey about $1,000 per month if you treat the entire $30,000 package of benefits as income, and Jeffrey paying Anna about $850 per month if you only count the $12,000 cash component as income to Anna. Either way, Jeffrey's load is lightened.

The Court was concerned that treating Davis's support of Anna as income would "render [Anna's daughter] completely dependent on the largesse of a legal stranger when in her mother's care." Was the Court forgetting that child support orders are always modifiable? Although there was no evidence that Davis would stop supporting his "closest best friend," were that to happen Anna could file an RFO to modify.

Lastly, the Court held that the trial court could reasonably conclude that Jeffrey could afford to pay the $2,505 per month without it having any "significant detrimental impact on his financial situation," citing In re *Marriage of Cryer* (2011) 198 Cal.App. 4th 1039. In *Cryer*, the court affirmed a minor downward modification of substantially-above guideline child support award, in part because the affluent and very high-income father could well afford to pay the slightly-reduced amount. Curiously, courts only seem concerned about the affect of child support on an obligor's financial situation when he has a high income; every day courts order modest earners to pay child support in amounts which wreak havoc on their finances.

At the trial level, *Anna M*. could have gone either way:

Consistent with *Alte*r, the trial court had the discretion to characterize Davis's cash gifts to Anna as her income, but it was not required to do so if it concluded those gifts do not fairly represent income and are not funds available for child support.

In other words, if you are going to win on a gifts-as-income issue, you are probably going to have to do it in the trial court, not on appeal.

*Anna M*. leaves me with a few questions:

Does the Court's decision reflect some gender bias? Would the result have been different had the parties' genders been reversed? Or had the composition of the appellate panel been different? Why did Jeffrey appeal? The child support award was less than 10 percent of his monthly income. The chances of getting a reversal on appeal are low in any case, and especially low when you have to establish that the trial court abused its discretion.

Did the justices take a quick look at this, decide that Jeffrey was simply being cheap, and then construct a rationale for affirming the trial court?

Had the evidence shown a romantic connection between Anna and Davis, would the result have been different? If so, is that really fair? Isn't a house, credit cards, cars, and cash financial support of the same value to the recipient regardless of her relationship with her benefactor?

Did Jeffrey request in the trial court that Anna be ordered to look for work, or otherwise impute income to her based on minimum wage earning capacity? She had previously worked as a personal trainer, according footnote 13 in the opinion. Would the trial judge have granted such a request?

While I suspect that there aren't many guys like Davis in the world (assuming that he and Anna were indeed not romantically entwined), Anna M. instructs that cash gifts from a relative that are regular in amount and frequency, and that have been made over a long period of time, are more likely to be deemed income available for the payment of child support than non-cash gifts, gifts from a "legal stranger," cash gifts that vary in amount or frequency, or gifts that do not have a long history.

In short, it's better to be supported by your closest best friend than your lover. As to how to make that happen, the opinion is silent....