

**FAMILY LAW PRACTITIONERS TAKE NOTICE  
OF THE NEW BRIGHT LINE RULE**

By Jason E. Fellner and Allen Kuo

Family law lawyers, who comprise of a group often most vulnerable to legal malpractice claims, should take notice of the most recent California Supreme Court decision setting a bright line rule demarcating the time in which separate property begins to accrue after formal separation. Keeping abreast of this new development in family law will help mitigate against potential malpractice exposure.

It is well known that California is a community property state. This general precept often leads to the misunderstanding that all property acquired during the marriage will be divided equally in divorce, when in fact, there are many instances where property acquired during the marriage will constitute one spouse's separate property. One such exception is found in Family Code section 771(a), which provides that "the earnings and accumulations of a spouse..., while living separate and apart from the other spouse, are the separate property of the spouse." Therefore, a spouse, whose marriage has not yet been legally dissolved may still accumulate separate property - as long as the spouse is living separate and apart from the other spouse.

At first glance, the term "living separate and apart" appears to have a commonly understood, plain meaning. Indeed, the colloquial understanding of what it means for someone to live "separate" and "apart" from someone else does not include persons living together in the same home. However, this exact issue of whether two spouses could be deemed "living separate and apart" while *living together in the same home* was raised and addressed in *In re Marriage of Sheryl Jones Davis and Keith Xavier Davis*, ("In re Marriage of Davis") Alameda County Superior Court, Case No, RF08428441, and argued before the California Supreme Court. The California Supreme Court was asked to consider whether a couple may be "living separate and apart," for purposes of section 771(a), when they *live together* in the same home. The Court concluded in its published July 20, 2015 decision that the answer is no.

In *In re Marriage of Davis*, the husband and wife were married on June 12, 1993, and had two children together. The wife filed for dissolution on December 30, 2008. At trial on the issue of the date of their separation, the wife described the couple's marriage as turbulent, and claims that by 2004 they were "living entirely separate lives. The couple spoke about divorce, but stayed together for the sake of the children. On June 1, 2006, the wife announced to the husband that she was "through" with the marriage. Each spouse maintained their own separate bank accounts and were responsible for their own respective personal expenses while contributing equally to running the home and funding the children's expenses. The parties continued to live in the marital home after June 1, 2006. Wife did not move out of the marital home until July 2011. When the wife filed the petition for dissolution of the marriage on December 30, 2008, she listed the date of their separation as June 1, 2006. Husband listed the

date of separation as July 1, 2011. After trial of the issue, the court found the date of separation to be June 1, 2006. The Court of Appeal affirmed. In relevant part, the First District Court of Appeal disagreed with the majority decision in *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152 (*Norviel*), which held that physically living apart is “an indispensable threshold requirement” for separation under section 771(a). (*Norviel, supra*, at p. 1162.) The California Supreme Court granted review to resolve the apparent conflict in interpretation the statute.

After considering the plain meaning of “living separate and apart,” the Court recognized that the phrase as used in section 771(a) is not without at least some ambiguity. The Court determined that the phrase “living separate and apart” could less likely, but still plausibly, be read to mean that the spouses are in effect “living separate lives” with the requisite intent to end the marital relationship. To consider whether the Legislature intended the language of section 771(a) to encompass this less likely, but still possible secondary meaning, the Court turned to extrinsic aids. After reviewing the statute’s long history, its prior judicial constructions, and the Legislature’s use of the phrase elsewhere in the Family Code, the Court found sufficient evidence to bolster the ordinary and common meaning of the language as requiring separate residences along with demonstrated intent to finally end the marital relationship before a spouse’s earnings are considered separate property. Accordingly, the California Supreme Court concluded that living in separate residences is an indispensable threshold requirement for finding that spouses are “living separate and apart” for purposes of section 771(a).

It is incumbent of Family law practitioners to keep up to date with this new and important development in California Family Law. Good practice and a thoughtful approach to protecting against malpractice exposure warrants sending written notification to existing clients of this significant development in the law. At a minimum, clients seeking guidance in protecting their separate assets after formal separation should be immediately advised of this bright line rule.

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