
In the
Court of Appeal
of the
State of California
SECOND APPELLATE DISTRICT
DIVISION THREE

B255704

IN RE THE MARRIAGE OF GILDA AND MURRAY LAPPE

GILDA LAPPE,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,

Respondent,

MURRAY LAPPE,

Real Party in Interest.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY, DEPARTMENT 79
HON. THOMAS T. LEWIS · PHONE NO. (213) 974-6219 · NO. BD539336

**OPPOSITION TO PETITION FOR WRIT OF MANDATE
AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF**

JAMES M. DONOVAN, ESQ. (64756)
*MICHAEL J. GLENN, ESQ. (89654)
LAW OFFICES OF JAMES M. DONOVAN
915 Wilshire Boulevard, Suite 1610
Los Angeles, California 90017
(213) 629-4861 Telephone
(213) 689-8784 Facsimile

*CHRISTOPHER MELCHER, ESQ. (170547)
ANTHONY D. STORM, ESQ. (270332)
WALZER & MELCHER LLP
5941 Variel Avenue
Woodland Hills, California 91367
(818) 591-3700 Telephone
(818) 591-3774 Facsimile

Attorneys for Real Party in Interest Murray Lappe



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I.

INTRODUCTION

The narrow issue presented is whether a family law Declaration of Disclosure, which was prepared in the course of mediation, is subject to discovery in light of California's mediation confidentiality doctrine. The trial court, constrained by clear and consistent "appellate and Supreme Court of California decisions applying the strongly confirmed mediation confidentiality provisions under the Evidence Code" correctly ruled that such documents are not discoverable.¹ In other words, what happens in mediation stays in mediation.

The Evidence Code prohibits the compelled production of any document prepared for the purpose of, in the course of, or pursuant to, a mediation. (Evid. Code, § 1119, subd. (b)). This

¹ Ruling on Submitted Matter and Order Thereon, filed April 3, 2014 [hereinafter, "Trial Court Decision"], IV Appendix of Documents [hereinafter, "App."], Ex. 32, 948:5-9.

rule is clear and absolute, and is not subject to judicially-crafted exceptions, even where competing public policies may be affected. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118.)

The trial court established, by Petitioner's own admission, that the Declaration of Disclosure was prepared in the course of mediation. That finding made the requested documents off-limits for discovery, as there is no exception to Evidence Code section 1119 which would permit discovery of a document prepared for mediation in this instance.² The trial court understood the issues and applied the law as it was required to do. "While the equities arguably support Petitioner's version of the case, the law clearly does not."³

² Trial Court Decision, *supra*, 957:3-11; *Cassel, supra*, at 118-19.

³ Trial Court Decision, *supra*, 947:19-20.

II.

STATEMENT OF FACTS

A. Procedural Background

The petitioner in this writ proceeding is Gilda Lappe [hereinafter, "Gilda"]. The real party in interest here is Murray Lappe [hereinafter, "Murray"], who is Gilda's former husband.

On August 2, 2011, a Judgment of Dissolution was entered, pursuant to stipulation by Gilda and Murray on June 20, 2011.⁴ Prior to making the stipulation for judgment, the parties exchanged Preliminary and Final Declarations of Disclosure on June 14, 2011.⁵

The Judgment contains the following acknowledgments by the parties, which were adopted as findings by the court, regarding the disclosure documents:

⁴ Judgment, I App., Ex. 4, pp. 4-76.

⁵ Declarations Regarding Service of Declaration of Disclosure and Income and Expense Declaration, I App., Exs. 1 and 2.

- That the parties exchanged their Preliminary and Final Declarations of Disclosure in the context of mediation;
- That the disclosure documents were covered by the mediation confidentiality provisions of Evidence Code section 1119; and,
- That the disclosure documents were inadmissible in a court of law and were protected from any sort of disclosure.⁶

The Judgment quoted Evidence Code section 1119 in its entirety, and cited the California Supreme Court opinion in *Foxgate Homeowners' Assn. V. Bramalea California, Inc.* (2001) 26 Cal.4th 1, to make it clear that "there are no exceptions to this public policy [of protecting documents prepared for mediation from discovery]."⁷

Almost a year after stipulating to the Judgment, and after receiving substantial payments

⁶ Judgment, I App., Ex. 4, 66:25-27.

⁷ Judgment, I App., Ex. 4, 67:1-28.

from Murray under the Judgment, Gilda filed an Order to Show Cause on April 4, 2012, seeking to set aside the Judgment.⁸ On August 22, 2012, Gilda served a Demand for Inspection of Documents, which included a general request for any and all documents referring to or relating to the preparation and/or negotiation of the stipulation for judgment, and a specific request for the "Declaration of Disclosure you served upon [Gilda] prior to execution by you of the Judgment of Dissolution."⁹ Murray's objections were based primarily on the mediation confidentiality doctrine.¹⁰ On December 14, 2012, Gilda filed a Motion to Compel.¹¹

⁸ OSC To Set Aside Judgment Entered 8/2/11 [hereinafter, "Set Aside Motion"], I App., Ex. 5, pp. 77-89.

⁹ See Petitioner's Separate Statement In Support of Petitioner's Motion to Compel Further Responses to Petitioner's Demand For Inspection And Further Documents, I App., Ex. 6, pp. 233-35.

¹⁰ *Ibid.*

¹¹ *Ibid.*

The motion to compel was thoroughly briefed and considered by the court. There was a stipulated reference to consider the issues raised by Gilda's motion to compel.¹² The trial court solicited the parties' views on the effect of *In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881, a decision filed during the pendency of the motion relating to mediation confidentiality. There were multiple memoranda of points and authorities submitted by Gilda¹³ and Murray¹⁴ on the motion to compel. The trial court held several hearings. After the submission of all briefs, the court held a final, lengthy hearing on March 14, 2014.¹⁵

¹² See Recommendations After Hearing by Referee (C.C.P. 639(A)(5), II App., Ex. 18, pp. 490-492.

¹³ II App., Ex. 7, pp. 278-92, Ex. 10, pp. 369-73, Ex. 17, pp. 486-88; III App., Ex. 23, pp. 704-30, Ex. 24, pp. 796-801; IV App., Ex. 26, pp. 827-30, Ex. 29, pp. 905-11.

¹⁴ II App., Ex. 8, pp. 357-63, Ex. 15, pp. 404-13; III App., Ex. 22, pp. 685-700; IV App., Ex. 25, pp. 803-22, Ex. 27, pp. 832-36, Ex. 28, pp. 896-902.

¹⁵ III App., Ex. 30, pp. 914-43.

B. The Trial Court Decision

A 22-page written decision was issued on April 3, 2014.¹⁶ In the decision, Judge Thomas Trent Lewis acknowledged the importance of full disclosure in family law, both as a matter of statute (e.g., Family Code, §§ 2104, 2106, and 2107, relating to mandatory disclosure requirements) and case law (citing *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 331).¹⁷ Among other things, Judge Lewis pointed out that the "commission of perjury on the preliminary declaration of disclosure may be grounds for setting aside the judgment, or any part or parts thereof, ... in addition to any and all other remedies, civil or criminal, that otherwise are available under law for the commission of perjury."¹⁸

¹⁶ Trial Court Decision, III App., Ex. 32, pp. 947-68.

¹⁷ *Id.*, pp. 949-51.

¹⁸ *Id.*, pp. 949, n.5, 11:24-28.

But Judge Lewis noted that the parties to a dissolution can waive or alter the formalities of the disclosure process by electing alternative dispute procedures.¹⁹ And Judge Lewis noted that mediated agreements are given an extra layer of protection against a motion to set aside because of the unique work of divorce mediators in balancing the negotiating power between the parties, thus producing agreements that are presumed to be fair and voluntary.²⁰

Judge Lewis made a factual finding that the Declaration of Disclosure fits squarely within the definition of the type of "writing" protected from compelled disclosure under Evidence Code section 1119, and concluded that there is no statutory

¹⁹ *Id.*, p. 959, citing *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497 (arbitration) and *In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881 (mediation).

²⁰ *Id.*, pp. 963-67, citing *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 61, 86-88.

exception that allows for the production of that document.²¹

Gilda admitted that the Declaration of Disclosure she received from Murray was exchanged in the course of, and pursuant to, mediation.²² The Judgment contains an acknowledgment by the parties, and finding by the court, that the Declarations of Disclosure are protected against discovery by Evidence Code section 1119.²³ Evidence Code section 1119 applies to documents prepared (1) for the purpose of mediation, (2) in the course of mediation, or (3) pursuant to a mediation. (Evid. Code, § 1119, subd. (b).)

Judge Lewis noted the "equities" and "facially attractive" nature of Gilda's argument that a family law disclosure is a legally significant document which is a prerequisite for entry of

²¹ *Id.*, pp. 952-58.

²² *Id.*, 952:14-16 & 953:19-21; Judgment, *supra*, pp. 66-67.

²³ Judgment, *supra*, 66:25-27 & 67:9-12.

judgment.²⁴ The problem, however, is the California Supreme Court's express prohibition on judge-made exceptions.

In *Rojas v. Superior Court* (2004) 33 Cal.4th 407, the California Supreme Court observed that exceptions to Evidence Code section 1119 were established by the Legislature as codified in Evidence Code sections 1123 and 1124. The California Supreme Court then applied the statutory maxim: the expression of one is the exclusion of the other. (*Rojas, supra*, p. 424.) "[I]f exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Id.*)

Seven years later, the Supreme Court was even clearer. Except in rare circumstances, the mediation confidentiality doctrine must be strictly applied, and no "judicially crafted

²⁴ Trial Court Decision, *supra*, 947:1 & 957:13-17.

exceptions or limitations [are allowed], even where competing public policies may be affected." (Cassel, *supra*, 51 Cal.4th at p. 118.)

Accordingly, the trial court denied the motion to compel.²⁵

III.

LEGAL ARGUMENT

A. Standard of Review

Discovery orders are reviewed under the abuse of discretion standard. (*Crab Addison, Inc. V. Superior Court* (2008) 169 Cal.App.4th 958, 965.) A trial court's ruling on a discovery motion will be overturned upon a prerogative writ if there is no substantial basis for the manner in which trial court discretion was exercised or if the trial court applied a patently improper standard of decision. (*People ex rel. Lockyer v. Superior Court* (1988) 122 Cal.App.4th 1060, 1071.)

²⁵ Trial Court Decision, *supra*, 968:9-10.

The trial court's 22-page written decision demonstrates that there is a substantial basis for its factual findings and that it carefully considered and applied the correct legal standard to those facts. The decision is an example of how a trial court should follow the law, even when the judicial officer might have come to a different conclusion had he been given the authority to do so.

B. The Declaration of Disclosure was Prepared in the Course of Mediation

The Judgment contains an admission by the parties, and a finding by the court, that the Declarations of Disclosure by both parties are protected by the mediation confidentiality doctrine.²⁶ Gilda argues that such language is "invalid as contrary to public policy."²⁷ Gilda argues that parties may not "contract around" the

²⁶ Judgment, *supra*, pp. 66-67.

²⁷ Petitioner's Writ, p. 30.

disclosure requirements.²⁸ The problem with her argument is that the Judgment does not purport to be a waiver of the duty to disclose - the Judgment, instead, is an acknowledgment that the required disclosures were, in fact, exchanged.

Gilda gives short shrift to the effect of her stipulation to the Judgment. Evidence Code section 622 provides that the facts recited in a written instrument are conclusively presumed to be true as between the parties thereto. As a result, Gilda is not permitted to introduce any contrary evidence. Substantial evidence supports the trial court finding that the Declaration of Disclosure was prepared in the course of mediation.

²⁸ *Id.*, p. 31.

C. There is No Statutory Exception
Permitting Production of a Declaration of
Disclosure Prepared in Mediation

Exceptions to the mediation confidentiality doctrine are set forth in Evidence Code sections 1121, 1122, and 1123. Gilda makes no claim that such exceptions apply here. Instead, she asks this Court to do what the California Supreme Court has said cannot be done: craft a judicial exception.

Gilda argues that Evidence Code section 1120 implicitly provides an exception for documents of "independent legal significance" that have a legal value apart from their use in mediation.²⁹ Evidence Code section 1120 provides, in part, that evidence otherwise admissible is not made inadmissible or shielded from discovery simply by reason of its use in mediation. The claim is without merit because the Declaration of

²⁹ Petitioner's Writ, p. 22 & 24.

Disclosure was not merely used at mediation in this case; it was prepared in the course of mediation.

In *Rojas v. Superior Court* (2004) 33 Cal.4th 407, tenants in a construction defect lawsuit served a request for information regarding the mediation and a request for production of all photographs and videotapes taken or received during prior litigation regarding the complex. The Supreme Court distinguished between photographs, witness statements, or analyses of test samples that were prepared for the purpose of mediation, versus those that were not. (*Rojas, supra*, at p. 417.) The former category are writings protected by Evidence Code section 1119; the latter category are not per section 1120 because the writings were not prepared for the purpose of mediation. (*Id.*)

Once it is established that a particular writing fits within the definition of a "writing" in Evidence Code section 1119, that writing is

absolutely protected. The only documents described in Evidence Code section 1120, which are not protected, are writings which were not "prepared for the purpose of, in the course of, or pursuant to, a mediation." (Evid. Code, § 1119, subd. (b).)

Here, as the trial court recognized, Gilda's admission established that the Declaration of Disclosure falls within the definition of a "writing" in Evidence Code section 1119, so that section 1120 is inapplicable.³⁰

D. Judicial Exceptions are not Permitted

Mediation confidentiality enjoys the highest public policy protections; even if enforcing mediation confidentiality tramples other public policy. Such a result is consistent "with the overall purpose of the mediation confidentiality provisions" which acknowledge that "confidentiality is essential to effective mediation" and "to further the effective use of

³⁰

Trial Court Decision, *supra*, 953:9-22.

mediation by ensuring the candor that is crucial to its success." (*Rojas, supra*, at p. 422.) The California Supreme Court opinions dealing with the mediation confidentiality doctrine illustrates the point as clearly as can be written.

In *Foxgate Homeowners' Assn. V. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14-17, the California Supreme Court held inadmissible a mediator's proffered testimony of mediation communications or conduct by a party which the mediator believed constituted a failure to comply with an order to participate in good faith in the mediation process. In a sense this was an amazing result: mediation confidentiality trumped the requirement for good faith participation in mediation. The Supreme Court reasoned that its literal interpretation of the statutes neither undermined clear legislative policy nor produced absurd results. (*Id.* at 17.)

In *Rojas*, the California Supreme Court held that were a writing was prepared for the purpose

of mediation, the mediation confidentiality doctrine was *absolute*, even in the face of "prejudice" or "injustice" to the parties. (*Rojas, supra*, p. 414 & 417.)

In *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194, the California Supreme Court upheld the exclusion of evidence of an alleged mediated settlement agreement, where the agreement itself did not fall within the requirements of Evidence Code section 1123 for admission of agreements made in mediation. A similar result was reached in *Simmons v. Ghaderi* (2008) 44. Cal.4th 570, 580, where attempts to enforce an agreement allegedly reached in mediation foundered, even in the claims of estoppel, when the proffered "exception" evidence did not strictly comply with the Evidence Code section 1123.

Any doubts of the primacy of the mediation confidentiality doctrine were put to rest by *Cassel v. Superior Court* (2011) 51 Cal.4th 113.

In simplest terms, *Cassel* involved allegations of legal malpractice leveled against attorneys by their client, in the context of a mediation. (51 Cal.4th at p. 123.) The evidence at issue included discussions between the client and attorneys concerning plans and preparations for the mediation, private communications between the client and attorneys during the mediation (but outside of the formal mediation proceedings), even "communicative conduct" involved in the act of an attorney accompanying a tired and harassed client to the bathroom during the mediation. (*Id.*, p. 121.) The client argued, and the Court of Appeal agreed, that this mediation-related evidence was necessary for the client's malpractice suit, which would be unfairly hampered without it. (*Id.*, p. 122.)

The California Supreme Court reversed and held such evidence inadmissible, notwithstanding the devastating effect on the client's case by exclusion of that evidence. (*Id.* at 135.)

The fact that Gilda's case is hampered by the inadmissability of the Declaration of Disclosure does not lead to an absurd result. As the court explained in *Cassel*:

[W]hile we pass no judgment on the wisdom of the mediation confidentiality statutes, we cannot say that anything applying the plain terms of those statutes to the circumstances of this case produces a result that is either absurd or clearly contrary to legislative intent. The Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence. (*Id.* at 136.)

Gilda argues that there was no statutory right or doctrine at issue in *Cassel*. She asserts that

none of the California Supreme Court cases involved a codified legislative policy, such as the Family Code disclosure laws, that conflicted with the "*mediation privilege [sic]*."³¹

On the one hand, Gilda's argument ignores the fact that an attorney malpractice action, whether based on negligence (see Civ. Code, § 1708) or outright fraud (see Civ. Code, § 1710) are based on two of the oldest laws on the books. It also ignores the fact that, in *Cassel*, both the client and the Court of Appeal asserted that the mediation confidentiality doctrine conflicted directly with the statutory waiver of the attorney-client privilege that occurs by operation of law when a client sues a lawyer for malpractice. (See *Cassel, supra*, at 122; Evid. Code, § 958.) The California Supreme Court gave primacy to the mediation confidentiality doctrine.

Neither the language nor the purpose of

³¹ Petitioner's Writ Petition, p. 26 (emphasis in original).

the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client. [footnote omitted.] The instant Court of Appeal's contrary conclusion is nothing more or less than a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing policy concern—here, protection of a client's right to sue his or her attorney. We and the Courts of Appeal have consistently disallowed such exceptions, even where the equities appeared to favor them.

(*Cassel, supra*, at p. 133.)

The "independent legal significance" argument for excepting family law declarations of disclosure from the mediation confidentiality

doctrine is nothing more than an invitation to create a "judicially crafted exception."

Just as significant, Gilda was advised of the impact of the mediation confidentiality doctrine on the very document she now seeks to set aside. None of the cases construing the mediation confidentiality doctrine have actually imposed a disclosure requirement on parties entering mediation of its far reaching effects. Nothing in *Cassel*, for example, suggests that Mr. Cassel was advised by anyone, before he signed the mediated settlement agreement at issue, that the fact of mediation would severely hamper any litigation he might subsequently bring arising out of misrepresentations made to him by his attorneys.

Gilda knew. It is there in black and white. The mediation confidentiality doctrine absolutely protects the Declaration of Disclosure from discovery.

IV.

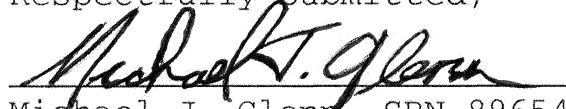
CONCLUSION

As Gilda previously acknowledged, Murray's Declaration of Disclosure is protected by the mediation confidentiality doctrine. There is no applicable statutory exception allowing for production of the writing, and the trial court did not have the power to create one. Thus, the trial court acted properly in denying the motion to compel.

Gilda's Petition for a Writ is without merit and should be denied.

Dated: June 15, 2014

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael J. Glenn", is written over a horizontal line.

Michael J. Glenn, SBN 89654

James M. Donovan, SBN 64756

Law Offices of James M. Donovan

Christopher Melcher, SBN 170547

Anthony D. Storm, SBN 270332

Walzer & Melcher LLP

Attorneys for Real Party in
Interest, Murray Lappe

VERIFICATION

I, Michael J. Glenn, declare as follows:

1. I am an attorney with the Law Offices of James M. Donovan, counsel for the Real Party in Interest Murray Lappe.

2. I am verifying this Opposition because I, as counsel in the trial court, can swear to the authenticity of the documents filed in the trial court and am familiar with the proceedings below.

3. I have read the foregoing Opposition, and all the facts alleged therein, not otherwise supported by reference to the record or other documents, are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this verification is executed on June 16m 2014, at Los Angeles, California.

A handwritten signature in black ink, appearing to read "Michael J. Glenn", written over a horizontal line.


Michael J. Glenn

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 3,669 words as counted by the Corel WordPerfect X3 word-processing program used to generate the Opposition Brief.

Dated: June 15, 2014


Michael J. Glenn
James M. Donovan
Attorneys for Real Party in
Interest, Murray Lappe

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Claudia Ribet, Esq. (SBN: 156512)
Daniel R. Barbakow, Esq. (SBN: 56501)
BARBAKOW & RIBET
301 North Canon Drive, Suite 300
Beverly Hills, California 90210
Telephone No.: (310) 860-9162
Attorney for Petitioner,
Gilda Lappe

1 Copies FedEx ✓ USPS

Clerk for the Hon. Thomas T. Lewis
SUPERIOR COURT OF CALIFORNIA
County of Los Angeles (Central District)
Stanley Mosk Courthouse
111 North Hill Street, Department 79
Los Angeles, California 90012
Telephone No.: (213) 974-6219
Trial Court Judge

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