THE TROUBLE WITH *KIETURAKIS*

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Here's a quiz for the family law attorney: what happens when an irresistible force meets an immovable object? The answer, unfortunately, is found in *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56.

Family law's well-known irresistible force is the presumption of undue influence ("the presumption") that arises when an interspousal transaction unfairly[1] advantages a spouse. Its irresistibility is established in such authorities as Family Code section 721, subdivision (b); *In re Marriage of Haines* (1995) 33 Cal.App.4th 277 and *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991. Family law's well-known immovable object is the mediation privilege ("the privilege"). Its immovability is established by such authorities as Evidence Code §1119; *Foxgate Homeowners Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1; *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351; and *Rojas v. Superior Court* (2004) 33 Cal.4th 407.

In *Kieturakis*, almost two years after the parties' mediated MSA had been incorporated into their divorce judgment, Anna Kieturakis ("Set Asider") filed a motion against her husband Maciej Jan Kieturakis ("Enforcer") seeking to set aside the MSA. Set Asider accused Enforcer of having obtained the MSA by means of fraud, duress, and lack of disclosure. Enforcer denied those accusations and contended that the MSA was enforceable.

Pre-*Kieturakis* dialogue between Set Asider and Enforcer:

Set Asider: Our mediated MSA advantages you.

Enforcer: Yep, it sure does. If the MSA advantaged **you, I** would be Set Asider and **you** would be Enforcer. To bind a contracting party to a deal that she later regrets having made is an important reason underlying both the principle of res *judicata* and all of contract law. Who said life is fair?

Set Asider: The presumption applies to our MSA.

Enforcer: Perhaps, but no California authority discusses the issue of whether the presumption applies to mediated MSAs.

Set Asider: Because no California authority holds that the presumption **doesn't** apply to mediated MSAs, the presumption **does** apply to mediated MSAs.

Enforcer: Okay then, but so what?

Set Asider: Here's what: you bear the burden of proving that our MSA was not obtained through undue influence. The presumption was created to protect me, and I invoke its protection.

Enforcer: Not a problem. I can easily rebut the presumption by proving that you were treated fairly in mediation.

Set Asider: You can't do that, because what happened in mediation is privileged. The privilege was created to protect me, and I invoke its protection.

1. Authorities supporting the proposition that an interspousal advantage invokes the presumption include *Kieturakis*. Authorities supporting the proposition that only an unfair interspousal advantage invokes the presumption include *Marriage of Burkle* (2006) 139 Cal.App.4th 712, 743, 43 Cal.Rptr.3d 181.

Enforcer: Wait a minute here! Set Asiders can't invoke the presumption **and** the Privilege! If they could do that, every mediated MSA would be a sitting duck for set aside litigation, and every mediated MSA that advantaged a spouse - in other words, almost every mediated MSA - would be set aside.

Set Asider: Who said life is fair?

The *Kieturakis* court observed the unfairness that would result if both the presumption **and** the privilege applied to a set-aside motion. It said that the

> (a)pplication of [the presumption] would turn the shield of mediation confidentiality into a sword by which any unequal agreement could be invalidated. We do not believe that the Legislature could have intended that result when it provided for spousal fiduciary duties on the one hand and for mediation confidentiality on the other.
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> ...
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> Thus, in the case of a mediated marital settlement agreement to which the presumption of undue influence attached, the disadvantaged party could claim, for example, to have acted under duress, refuse to waive the privilege, and thereby prevent the other party from introducing the evidence required to carry the burden of proving that no duress occurred. [*See* Comment, *The Mediation Privilege and Its Limits* (2000) 5 Harv. Negot. L.Rev. 383, 395 [observing that "an iron-clad confidentiality rule could encourage unfounded claims of duress"].) All unequal mediated agreements would, in effect, be conclusively presumed to be invalid. *Kieturakis, supra, at pp.* 62-64.

The *Kieturakis* trial court solved the dilemma by holding that the presumption applies to mediated MSAs, but that the privilege does not. In this writer's opinion, the trial court was wrong on both counts. The *Kieturakis* court of appeal solved the dilemma in the opposite manner, holding that the privilege applies to mediated MSAs but that the presumption does not. The *Kieturakis* panel divided California MSAs into two groups: a) non-mediated agreements, to which the presumption applies, and b) mediated agreements, to which the presumption does not apply. It then reasoned as follows:

> First, we conclude that the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation. "Voluntary participation and self-determination are fundamental principles of mediation ...." [Advisory Com. com. to Cal. Rules of Court, rule 1620.3; *see also, e.g., Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1139 [24 Cal. Rptr. 3d 751] [concept of self-determination is critical to mediation process]; *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 270 [11 Cal. Rptr. 3d 610] [same].) It can thus be expected that most mediators would, as Lober said at the hearing on Anna's motion, consider it their duty to attempt to determine whether the parties are "acting under their own free will" in the mediation. "[P]ower imbalance[s] between spouses" are a recognized concern when family matters are mediated. (Knight et al., *Cal. Practice Guide: Alternative Dispute Resolution* (The Rutter Group 2004) P 3:516, p. 3-81 (rev. # 1, 1996, italics omitted) [spouse who is overbearing or dominates conversation may have advantage].) Therefore, "[d]ivorce mediators generally work to balance the negotiating power between the parties. This tends to produce agreements that are more fair and voluntary, rather than coerced." (Roth et al., *The Alternative Dispute Resolution Practice Guide* (Lawyers Cooperative 2005) § 31:5, p. 31-5.) Thus, while mediation is no guarantee against the exercise of undue influence, it should help to minimize unfairness in the process by which a marital settlement agreement is reached. (*Id.*, at pp. 61-62).

The *Kieturakis* panel cited *In re Marriage of Bonds* (2000) 24 Cal.4th 1 for the proposition that the presumption generally applies to MSAs. It said that

> (o)ur Supreme Court indicated in *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 27 [99 Cal.Rptr. 2d 252, 5 P.3d 815], that the presumption of undue influence applies to marital settlement agreements. At issue in that case was the enforceability of a premarital agreement, and an argument that such agreements are to be enforced under the standards applicable to marital settlement agreements. The court explained that this argument was untenable in part because the presumption of undue influence that arises with respect to unequal agreements between spouses does not attach to premarital agreements, however one-sided. (*Ibid.*) In thus distinguishing between unequal premarital agreements and unequal marital settlement agreements, the court confirmed that the pre-

> sumption would attach to the latter, a conclusion consistent with applicable statutes. (Fam. Code, §§1100, subd. (e), 2102, subds. (a), (b) [fiduciary duties continue until assets are divided and distributed].) *Kieturakis*, at pp. 60-61.)

It is this writer's view that the presumption does not apply to *any* MSA and that the First District panel made a serious legal error in *Kieturakis* when it cited *Bonds* for the proposition that it does. The above-quoted passage from *Bonds* is dicta, because *Bonds* concerned a premarital agreement, not an MSA. It is unfortunate that the *Kieturakis* court elevated mediated MSAs above non-mediated MSAs, allowing the court to rule that the presumption applies to the latter but not to the former. It could have avoided drawing such a distinction if it had recognized that **the presumption does not apply to any MSA!**

The *Kieturakis* panel failed to recognize the distinction between spouses' fiduciary relationship (i.e., spouses' mutual duties of full disclosure, which duties continue until their marital assets have been distributed pursuant to Family Code section 2102, subdivision (b)) and spouses' confidential relationship (i.e., the duty of a negotiator to disclose his or her "bottom line," which should never exist between parties negotiating a contract). Stephen James Wagner properly observed the distinction between confidential and fiduciary relationships in his comment at 1-24 California Family Law Prac & Proc 2d ed. §24.04:

> The distinction between a confidential relationship and fiduciary relationship is crucial. The confidential relationship presumptively ends upon the commencement of legal proceedings to enable the parties to take adversarial positions in the dissolution of the marriage. [Citation omitted.] Unlike the confidential relationship, the fiduciary relationship does not cease "until the asset or liability has actually been distributed..." (Family Code § 2102(b).) Commentary by Stephen James Wagner.

As the California Supreme Court stated in *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 600-601,

> Wife further contends that husband owed her a separate fiduciary duty arising from the marital relationship. We are unable to accept the argument. From the time that wife filed her petition seeking dissolution of the marriage in 1973 her relationship with her husband was an adversary one. Any obligation of trust between them was terminated. They were locked in litigation. They maintained separate residences. Each was represented by his or her own counsel. They pursued their individual and separate legal interests with enthusiasm. The trial court characterized the case as "an extremely well tried case with high but controlled emotions and a difficult legal problem." [¶] We have repeatedly held that parties may elect to deal with each other at arms' length, and when they do so any fiduciary obligation otherwise owing is thereby terminated. (*Boeseke v. Boeseke, supra,* 10 Cal.3d 844, 849; *Collins v. Collins* (1957) 48 Cal.2d 325, 330-331 [309 P.2d 420]; *Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 23 [193 P.2d 728]; see also *In re Marriage of Carter, supra,* 19 Cal.App.3d 479, 491.) The actions of the parties in the present case establish that husband and wife chose to deal with each other as legal adversaries and that at all times during the negotiations relative to the Amdahl stock wife never relied on any relationship of confidentiality or mutual trust.

Although the *Connolly* court should have used the term "confidential relationship" instead of the term "fiduciary relationship," the court properly described the relevant legal principles. **When parties deal with each other at arm's length, they are no longer in a confidential relationship, and the presumption does not apply.**

The legal dilemma in which the *Kieturakis* court felt trapped was actually no dilemma at all. Although there was an immovable object (the privilege), there was no irresistible force (the presumption). If the *Kieturakis* panel had been familiar with the principles explained in such cases as the above-cited *Connolly*, as well as *Jorgensen, Collins, Carter, Boeseke,* it would have understood that **the presumption does not apply to any MSA.** This is how the dialogue between Set Asider and Enforcer should go:

Set Asider: Our mediated MSA advantages you.

Enforcer: Yep, it sure does. Who said life is fair?

Set Asider: The privilege applies to our MSA.

Enforcer: Yep, it sure does.

Set Asider: The presumption applies to our MSA.

Enforcer: Nope, it doesn't.

Set Asider: Oh, darn. It looks like I'll have some difficulty setting aside our MSA.

Enforcer: You got it. ■

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