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# NEWcases

of BUSINESS LITIGATION INTEREST

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## S T A T E

### Appeal—Adequate Record— Entry of Default—Pending Writ Petition

A recent family law case provides guidance in two areas that cross over into general civil litigation. *In re Marriage of Obrecht*, 245 Cal.App.4th 1, 199 Cal.Rptr.3d 438 (2016). First, the opinion emphasizes the need for a reporter's transcript to preserve issues for appeal. There, the dispute was whether a party had made a general or special appearance in the trial court. No reporter was present and the minute order did not mention a claim of a special appearance. Invoking the presumption of correctness, the court held that the absence of an adequate record—a reporter's transcript or settled statement—precluded the argument. In this day and age of scarce court reporters, it is important to recognize that factual issues may come up requiring a transcript to preserve claims of error. Second, the court of appeal held that the trial court erred in entering the party's default and default judgment while a writ petition challenging the denial of a motion to quash was pending. The winning party had argued that the petition was untimely under CCP § 418.10(c) and therefore did not prevent the taking of the default, but the court of appeal disagreed.

### Appeal—Appealability—Order Lifting Stay

Plaintiff sued two defendants and both moved to compel arbitration. The trial court granted D1's motion and denied D2's. The trial court also entered a stay of all litigation pending completion of the arbitration between Plaintiff and D1. The arbitration never proceeded because

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D1 refused to pay the arbitration fees. As a consequence, the arbitration provider dismissed the arbitration. Plaintiff then asked the trial court to lift the litigation stay, which it did. D1 and D2 appealed from the order, but was it appealable? No. *Gastelum v. Remax International, Inc.*, 244 Cal.App.4th 1016, 198 Cal.Rptr.3d 234 (2016). Under CCP § 1294(a), a party may appeal from an order dismissing or denying a motion to compel arbitration. Defendants argued that the order lifting the stay was equivalent of an order dismissing or denying a petition to compel arbitration. The court of appeal was not persuaded. It explained that there was no pending arbitration and that an order lifting a stay under section 1281.4 is appealable “but only when there is another appealable order or judgment.” Since the order granting D1’s motion to compel arbitration was not appealable, and D2 did not appeal from the order denying his motion to compel arbitration, the court of appeal dismissed the appeal.

**Arbitration—Arbitrator’s  
Authority—Interpreting or  
Modifying an Agreement**

Arbitrators have broad powers to interpret contracts, even when their interpretation contradicts the express terms of the writing. That is the lesson from *Epic Medical Management, LLC v. Paquette*, 244 Cal.App.4th 504, 198 Cal.Rptr.3d 28 (2015). There, a doctor sought to vacate an arbitration award on the ground that the arbitrator exceeded her powers by modifying an agreement between the doctor and a management company to require payment of fees that were inconsistent with the express terms of the parties’ agreement. The court of appeal disagreed, holding that “the arbitrator did not modify the agreement; she concluded that, by their practice, the parties had done so.” This was well within the arbitrator’s powers, even though the parties’ contract provided that all modifications were required to be in writing. Although the parties could choose to limit the arbitrator’s powers to interpret the contract, that limitation would have to be “express and unambiguous” and a general provision limiting *the parties’* ability to modify the contract was insufficient to limit *the arbitrator’s* powers.

Litigation—Default Judgment—  
Vacatur for Attorney Mistake or  
Neglect

Under CCP § 473(b), a trial court is required to vacate a default, default judgment, or dismissal that is caused by an attorney’s mistake, inadvertence, surprise, or neglect if the attorney files a declaration to that effect. In *Martin Potts and Associates, Inc. v. Corsair, LLC*, 244 Cal.App.4th 432, 197 Cal.Rptr.3d 856 (2016), the court held that the attorney’s affidavit need not disclose the reasons for the mistake, inadvertence, surprise, or neglect. The court noted that the statutory text did not require an explanation of reasons. Further, the purposes of the statute—to relieve innocent clients of the consequences of the attorney’s fault and forestall malpractice litigation—“is achieved by focusing on *who* is to blame, not *why*.” The court noted that providing the attorney’s reasons was still good practice as those reasons would, in some cases, be relevant to determining whether the default was actually caused by the attorney’s conduct. But in many cases the attorney’s reasons are simply irrelevant and, therefore, not required.

Litigation—Dismissal—Vacatur  
for Attorney Mistake or Neglect

The decision in *Younessi v. Woolf*, 244 Cal.App.4th 1137, 198 Cal.Rptr.3d 763 (2016), illustrates the differences between the discretionary and mandatory prongs of CCP § 473(b). There, plaintiff’s counsel failed to file any opposition to a demurrer and then failed to file an amended complaint after the demurrer was granted with leave to amend. Dismissal was entered, but the trial court granted relief under section 473(b)’s “discretionary” provision based on an affidavit from plaintiff’s new attorney—who substituted into the case after its dismissal, but was apparently retained much earlier—attesting that, among other things, he “got distracted” and “just assumed” he had more time to file the amended complaint. The court of appeal held that the trial court abused its discretion in granting discretionary relief because the attorney’s affidavit did not show “excusable” mistake, inadvertence, or neglect and did not show that plaintiff was diligent in seeking relief. The court “reluctantly” affirmed the trial court’s order vacating the dismissal, however, because plaintiff was entitled to mandatory relief under section 473(b), which did not require a mistake to be excusable and did not require a showing of diligence. Because the dismissal for failure to

file an amended complaint was the procedural equivalent of a default judgment and resulted from plaintiff's attorneys' inexcusable conduct, plaintiff was entitled to mandatory relief.

**Litigation—Five-Year Period for Prosecuting Case—Tolling for Stays of Trial or Prosecution**

Under CCP § 583.310, a case not brought to trial within five years it must be dismissed. The statute provides that certain events toll the five year period, including the period when “[p]rosecution of the action was stayed or enjoined” and when it is “impossible, impracticable, or futile” to bring the case to trial. In *Gaines v. Fidelity National Title Ins. Co.*, 62 Cal.4th 1081, 199 Cal.Rptr.3d 137 (2016), the parties stipulated to vacate a trial date and to participate in a mediation, but not to stay responses to pending discovery requests. The issue before the Supreme Court was whether this stipulation stayed the running of the five year period. The Supreme Court held it did not. The court explained that section 583.310 recognizes two kinds stays, a “complete” stay, which toll the five year period and a “partial” stay, which will toll the period only if it “results in a circumstance of impossibility, impracticability, or futility.” The court held that the stay here was partial and did not result in any of the conditions that would toll the five year statute.

**Litigation—Judgment—Amend Judgment to Add Alter Ego As Judgment Debtor**

Courts have the authority to amend a judgment to add a nonparty as a judgment debtor under an alter ego theory. In *Highland Springs Conference and Training Center v. City of Banning*, 244 Cal.App.4th 267, 199 Cal.Rptr.3d 226 (2016), the court of appeal held that laches may be asserted as an affirmative defense to a motion to amend to add a judgment debtor, but mere delay in filing the motion is insufficient even if unreasonable. There, the trial court denied a motion to add a judgment debtor because the moving party unreasonably delayed in filing the motion and the trial court found that movant “should have discovered the relevant facts long ago.” The court of appeal reversed, holding that laches requires both unreasonable delay and prejudice, and that prejudice “may not be presumed based solely on an unreasonable delay in asserting the right.” In so holding, the court explicitly disapproved of at least one previous court of appeal decision that had refused to apply the alter ego doctrine based solely on plaintiff's unreasonable delay.