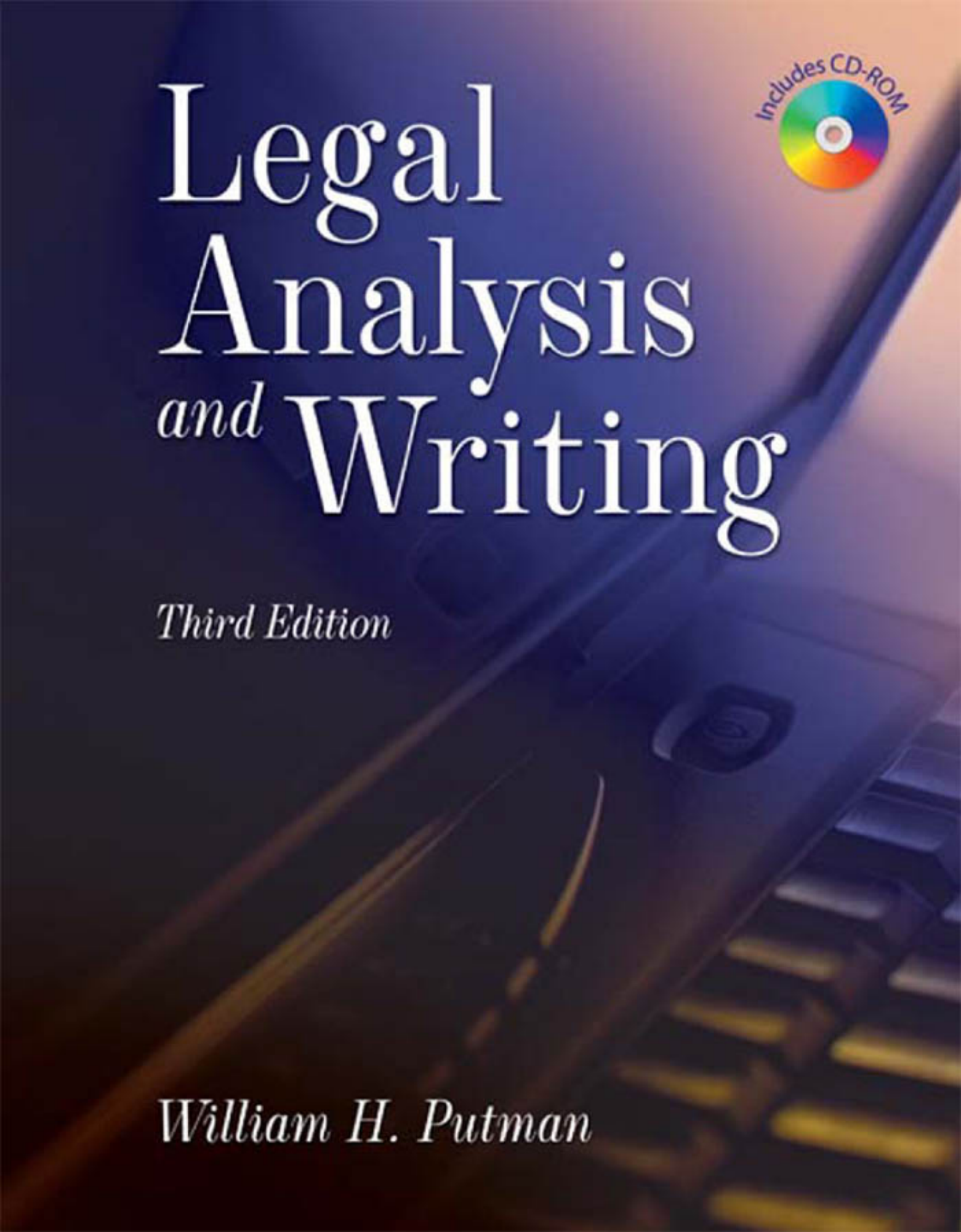

Legal Analysis and Writing

Third Edition

William H. Putman

APPENDIX A

Court Opinions Referred to in the Text

INTRODUCTION

The court opinions in this appendix are presented in alphabetical order rather than in the order in which they are referred to in the text. In order to save space, portions of some cases that are not relevant to specific assignments or the discussion presented in the text have been omitted. A series of asterisks indicates that a portion of the opinion has been omitted.

Stephen Craig BEAM and Lori A. Beam,
husband and wife, Respondents,

v.

John C. CULLETT, Appellant.

No. 77–1732; CA 15733.

Court of Appeals of Oregon.

Argued and Submitted June 18, 1980.
Decided Sept. 2, 1980.
Reconsideration Denied Oct. 7, 1980.

48 Or. App. 47, 615 P.2d 1196 (1980)

JOSEPH, Presiding Judge.

Plaintiff brought this action for fraud and breach of an implied warranty of fitness for a particular purpose. Plaintiff was in the business of hauling scrap automobile bodies from southern Oregon to a steel plant in McMinnville. He bought a 1969 Ford Diesel truck from defendant to haul the scrap auto bodies. The truck had been used by defendant for approximately two and one-half years until the engine "blew up." Defendant had the engine rebuilt by a diesel engine mechanic. Plaintiff purchased the truck with the rebuilt engine for $10,000; there were no written warranties. After the truck was used for a brief period of time, the engine lost a rod bearing and the intake manifold was broken. This action followed.

The trial court, sitting without a jury, found in favor of defendant on the fraud claim; a judgment was entered against defendant for breach of an implied warranty of fitness for a particular purpose. Plaintiff was awarded damages of $7,000. Defendant appeals. He claims (1) that the court erred in entering judgment for plaintiff because an implied warranty of fitness for a particular purpose could not arise under the facts of this case and (2) that the court erred in assessing damages at $7,000.[1]

ORS 72.3150 provides for an implied warranty of fitness:

> "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under ORS 72.3160 an implied warranty that the goods shall be fit for such purpose."

An implied warranty of fitness for a particular purpose arises then when two conditions are met: (1) the buyer relies on the seller's skill and judgment to select or furnish suitable goods; and (2) the seller at the time of contracting has reason to know of the buyer's purpose and that the buyer is relying on his skill and judgment. *Controltek, Inc. v. Kwikee Enterprises, Inc.*, 284 Or. 123, 585 P.2d 670 (1978); *Valley Iron and Steel v. Thorin*, 278 Or. 103, 562 P.2d 1212 (1977).

1. The first assignment of error was preserved by defendant's motion for non-suit and motion for reconsideration. We need not reach the second assignment of error in light of our determination of the warranty issue.

The trial court found that defendant was advised that plaintiff intended to use the truck to haul scrap auto bodies. There was evidence to support that finding. No finding was made as to whether plaintiff–buyer relied on the defendant–seller's skill and judgment to select the truck or that defendant had reason to know of any reliance. The evidence was that plaintiff, who runs a junk yard, learned of defendant's truck being for sale from one of his employees. Plaintiff had had some experience with trucks, including driving, although usually not diesel trucks. He inspected the truck and drove it for a short distance. He was told by defendant that the engine had been rebuilt and was given the name of the mechanic who did the work. Defendant leases trucks, but does not drive them. He operates a well-drilling business and owns drilling rigs. He does not have any particular expertise concerning diesel trucks.

There was no evidence that plaintiff relied on defendant's judgment in selecting the truck he purchased. Defendant merely answered plaintiff's inquiries concerning the mechanic's work on the engine. While the needs of plaintiff were known to defendant, there was no showing that defendant offered to fulfill those needs, that plaintiff in fact relied on defendant's judgment or that defendant had reason to know of plaintiff's reliance, if any.

The existence of a warranty of fitness for a particular purpose depends in part on the comparative knowledge and skills of the parties. *Blockhead, Inc. v. Plastic Forming Company, Inc.*, 402 F.Supp. 1017, 1024 (D.Conn.1975); *Valley Iron and Steel v. Thorin, supra*. There can be no justifiable reliance by a buyer who has equal or superior knowledge and skill with respect to the product purchased by him. White and Summers, Uniform Commercial Code 298, § 9–9 (1972); *Valley Iron and Steel v. Thorin, supra*.

In the instant case, both parties had limited knowledge of diesel trucks. Absent evidence that plaintiff justifiably relied on defendant's judgment in selecting the truck to fulfill his hauling needs, there was no implied warranty of fitness for a particular purpose.

Reversed.

June F. BRITTON, Petitioner–Appellee,

v.

H.R. BRITTON, Respondent–Appellant.
No. 14577.

Supreme Court of New Mexico.
Oct. 17, 1983.
100 N.M. 424, 671 P.2d 1135 (1983)

OPINION

SOSA, Senior Justice.

Petitioner–Appellee, June Britton (Petitioner) filed a petition in the Bernalillo County District Court to reduce accrued and unpaid child support arrearages to judgment. The district court concluded that the divorce decree mandating child support was enforceable and that no statute of limitations period bars action on the arrearages. It did not allow H.R. Britton, Respondent, any offset. The court issued an order setting arrearages and a final judgment in the amount of $7,900.00 without interest and did not award attorney's fees. Respondent appeals from the district court's determination awarding arrearages. Petitioner cross-appeals on the failure of the district court to award her attorney's fees.

The questions presented here are (1) whether the amended final divorce decree was unambiguous and therefore enforceable; (2) whether accrued and unpaid child support installments are deemed final judgments, thereby rendering action on them subject to a statute of limitations period; (3) whether a Respondent should have been allowed an offset against the arrearage judgment; (4) whether laches bars any recovery of the accrued child support installments; and (5) whether Petitioner should have been awarded attorney's fees for her presentation at the district court level. We affirm on all issues except the second.

FACTS

The parties were married on September 4, 1952. Four children issued from the marriage, all requiring specialized care and treatment due to varying degrees of developmental disability. By 1964 both the youngest and oldest child had been made wards of the state and committed to Los Lunas Training School. These two children remained under the direct care and control of the Los Lunas facility at all times relevant to this case. The oldest child attained majority on June 27, 1971, the youngest on January 28, 1977.

The parties were divorced by final decree entered May 26, 1970 by Judge Edwin Swope of the Bernalillo County District Court. On June 28, 1971 a different judge entered an amended final decree which added the phrase "per month" after the one hundred dollar child support figure in the original final decree. The amendment was done *ex parte.* Respondent never moved the district court for a modification of the terms of either decree.

One of the twin children remained intermittently under Petitioner's direct care from the time of the divorce until the child was transferred to a group home in Albuquerque in January 1976. The other twin remained under the direct care of Petitioner through December 1972. Since that time he has voluntarily lived with Respondent.

ASSERTED AMBIGUITY

Respondent initially contends that the original final decree of May 26, 1970 was ambiguous and should not have been amended *ex parte*. The original final decree in relevant part awarded custody of all four children to Petitioner and also awarded her "one hundred dollars ($100)" in child support. The sole change made by the judge in the amended final decree was the addition of the phrase "per month" after the one hundred dollar child support figure.

The omission of the phrase "per month" was clearly a clerical mistake apparent on the face of the record. On Petitioner's timely motion this mistake was properly corrected without resort to extrinsic evidence pursuant to Rule 60(a) of the New Mexico Rules of Civil Procedure NMSA 1953, Section 21–1–1(60)(a) (Repl. Vol. 4, 1970), presently compiled as NMSA 1978, Civ.P.R. 60(a) (Repl. Pamp.1980). *Telephonic, Inc. v. Montgomery Plaza Co.*, 87 N.M. 407, 534 P.2d 1119 (Ct.App.1975); *see De Baca v. Sais*, 44 N.M. 105, 99 P.2d 106 (1940).

This simple amendment obviously did not purport to clear up any ambiguity that Respondent alleges existed regarding the exact amount of child support that was to apply to each minor child. Respondent asserts that he should have been afforded an opportunity to present parole evidence prior to modification so that the support terms could have been modified to apply to the twins only and to reflect the fact that another child had attained majority. In New Mexico, the duty of a parent to support a child continues until the child reaches the age of majority. NMSA 1978, §§ 28–6–1 and 28–6–6 (Repl.Pamp.1983); *Phelps v. Phelps*, 85 NM 62, 509 P.2d 254 (1973); *Coe's Estate*, 56 N.M. 578, 247 P.2d 162 (1952). The well-established general rule is that an undivided support award directed at more than one child is presumed to continue in force for the full amount until the youngest child reaches majority. Annot., 2 A.L.R.3d 596 (1965). We see no compelling reason to depart from this view.

Respondent's proper remedy, if indeed he though [sic] the final decree ambiguous and/or unjust, would have been to seek prospective modification of the decree on the basis of changed circumstances. We note as to the alleged ambiguity that Respondent at no time petitioned the district court for any modification of either decree. Respondent, having failed to timely petition for possible relief from this asserted ambiguity, cannot now seize upon the mere *ex parte* correction of a clerical error and expand this into an inquiry regarding his interpretation of his obligations under the final decree. We concluded that the decrees were not ambiguous in their terms, and thus were enforceable.

STATUTE OF LIMITATIONS

A hearing was held on Petitioner's December 15, 1981 motion to reduce accrued child support arrearages to judgment. Petitioner was awarded a judgment of $7,900.00. The district court found that Respondent had not made any of the monthly child support payments required by the amended final decree. The $7,900.00 figure was based on the calculation that the monthly payments should have been made during the seventy-nine months that elapsed between the entry of the original May 26, 1970 divorce decree and January 28, 1977, the date that the youngest child reached majority.

Respondent's central contention is that Petitioner's action to collect accrued arrearages at this late date is barred by the statute of limitations. He maintains that over eleven and one-half years had passed between May 1970 entry of the original final decree and Petitioner's December 1981 petition. Respondent primarily maintains that the seven year statute of limitations applicable to judgments in effect in December 1981 (formerly compiled as NMSA 1978, Section 37–1–2) should apply and bar any claim for arrearages that accrued seven years prior to the date Petitioner filed her petition.

Respondent's argument thus presents the question of whether accrued and unpaid periodic child support installments mandated in a New Mexico divorce decree are considered final judgments in New Mexico on the date they become due. This appears to be a case of first impression as the parties have not cited, and our research has not revealed, any New Mexico authority directly on point.

The applicability of any statute of limitations period will depend on the characterization of monthly child support installments as they become due. Both *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976), and *Slade v. Slade*, 81 N.M. 462, 468 P.2d 627 (1970), involved the characterization and enforcement of monthly child support provisions incorporated in *foreign* divorce decrees. In *Slade* this Court considered whether the New Mexico statute of limitations applicable to judgments applied to bar recovery of accrued child support arrearages under a Kansas divorce decree. Looking to Kansas law to determine the nature of a child support award, we concluded that the child support award

was a judgment in installments. We further concluded that the seven year New Mexico statute of limitations then applicable to judgments (formerly compiled as NMSA 1953, Section 23–1–2 (Supp.1969)) applied and began to run on each monthly installment on the date it became due and unpaid. Accordingly, all uncollected installments that accrued more than seven years prior to the initiation of the action to collect the arrearages were deemed subject to the seven year statute of limitations applicable to judgments generally.

In considering the enforceability of a Missouri divorce decree, this Court in *Corliss* looked to Missouri law to determine whether child support awarded by the decree was subject to retroactive modification. This Court concluded that since Missouri courts had no power to modify or forgive accrued child support arrearages under a Missouri decree, New Mexico Courts could not do so.

Both *Slade* and *Corliss* lend support to a characterization of each monthly installment as a final judgment. In both cases, once the installment had become due, the amount payable was essentially deemed liquidated and, as with final judgments, not subject to retroactive modification. *Corliss* in particular concluded that child support arrearages would not be modified once accrued. Although this conclusion arose out of an application of Missouri law to a Missouri decree, the same characterization has obtained regarding New Mexico decrees.

In *Gomez v. Gomez*, 92 N.M. 310, 587 P.2d 963 (1978), *overruled on other grounds, Montoya v. Montoya*, 95 N.M. 189, 619 P.2d 1234 (1980), this Court considered whether weekly child support installment payments mandated in a New Mexico decree were modifiable once accrued. The then controlling New Mexico statute, NMSA 1953, Section 22–7–6(C) (Supp.1975) was compared with the substantially identical Missouri statute construed in *Corliss*. This Court held that, as with accrued Missouri installments, past due child support payments mandated in a New Mexico divorce decree were deemed not subject to retroactive modification.

Neither the reasoning nor the holding of *Gomez* bear out Petitioner's assertion that applying a statute of limitations to bar recovery of support installments is inconsistent with the proposition that such installments cannot be modified. Retroactive modification of child support awards is an issue distinct from the issue concerning the applicability of a statute of limitations period. Application of a statute of limitations merely bars the remedy on a stale claim without determining the underlying validity of that claim or modifying it in any way. *See Davis v. Savage*, 50 N.M. 30, 168 P.2d 851 (1946).

The fact of *Gomez* presented the question of retroactive modification of child support payments. It did not address the issue of a statute of limitations period as it would apply to the collection of accrued child support installments. As such, the holding is not determinative of the instant statute of limitations question. Furthermore, *Gomez* cites *Catlett v. Catlett*, 412 P.2d 942 (Okl. 1966) for the crucial proposition that accrued child support arrearages cannot be modified. While passing judgment on this question, the *Catlett* court also considered the applicability of the Oklahoma statute of limitations to a collection action for delinquent child support payments.

In this regard the court stated:

> This apparently is a new question for the Oklahoma court but the rule appears to be well settled that where a divorce decree provides for the payment of alimony or support in installments the right to enforce payment accrues on each payment as it matures and the statute of limitations begins to run on each installment from the time fixed for its payment.

Id. at 946. The *Catlett* court thus properly viewed the application of a statute of limitations period as being compatible with its conclusion that accrued child support obligations were not modifiable.

Aside from Oklahoma, numerous other jurisdictions consider child support installments final judgments and hold that a statute of limitations begins to run on each installment as it becomes due. See 24 Am.Jur.2d *Divorce and Separation* § 863 (1966). In a number of decisions this construction has barred collection of child support installments accruing beyond the relevant limitations period. See, *e.g., Corbett v. Corbett*, 116 Ariz. 350, 569 P.2d 292 (App. 1977); *Bruce v. Froeb*, 15 Ariz.App. 306, 488 P.2d 662 (1971); *Hauck v. Schuck*, 143 Colo. 324, 353 P.2d 79 (1960); *Turinsky v. Turinsky*, 359 S.W.2d 114 (Tex.Civ.App.1962); *Seeley v. Park*, 532 P.2d 684 (Utah 1975). Indeed, rendering accrued child support installments individually subject to a limitations period appears to be the majority rule in the United States. Annot., 70 A.L.R.2d 1250 (1960); *cf.* 27B C.J.S. *Divorce* § 256 (1959) (outlining the analogous majority rule that as to judgments for alimony in installments, the pertinent statute of limitations begins to run on each installment as it falls due).

Since the installment obligations were clearly embodied in a final decree, they were a product of a precise judicial determination of Respondent's obligations. The authority is extensive and well-established that each monthly child support installment mandated in the final decree was a final judgment, not subject to retroactive modification.

Having determined that each installment was a final judgment, we turn to the question of which statute of limitations period should apply. We note at the outset that there is no special statute of limitations specified under child support or the enforcement provisions, respectively, of NMSA 1978, Section 40–4–7 or 40–4–19 (Repl.Pamp.1983).

In *Coe's Estate*, 56 N.M. 578, 247 P.2d 162 the ex-wife sought a judgment for arrearages pursuant to a divorce decree mandating undivided child support for the minor children under her custody. This Court first held that the child support order was a judgment in monthly installments granted only during the minority of the children, thereby precluding any accrual of liability after the youngest child reached majority. The next holding applied the general judgment statute of limitations then obtaining under former NMSA 1941, Section 27–102 to bar recovery since the claim was filed more than seven years after the youngest child reached majority.

Similarly, in *Slade* this Court considered the applicability of a statute of limitations period to an action on a Kansas decree mandating periodic child support payments. Having concluded, as we do here, that the mandated installments were judgments, we there applied the seven year judgment statute of limitations under former NMSA 1953, Section 23–1–2 (Supp.1969). *Slade* and *Coe's Estate* together provide clear authority for our application of the judgment statute of limitation. In addition, virtually all of the out-of-state decisions we have cited regarding construction of accrued installments as judgments have applied their statute which limits executions on judgments. *Corbett v. Corbett*, 116 Ariz. 350, 569 P.2d 292 and *Bruce v. Froeb*, 15 Ariz. App. 306, 488 P.2d 662 (both applying the general five year Arizona statute of limitations applicable to execution on judgments); *Hauck v. Schuck*, 143 Colo. 324, 353 P.2d 79 (applying twenty year limitations period pertaining to execution on judgments rendered in Colorado); *Turinsky v. Turinsky*, 359 S.W.2d 114 (applying general ten year Texas statute limiting execution on judgments); *Seeley v. Park*, 532 P.2d 684 (eight year statute of limitations pertaining to actions on judgments applies to suit for collection of accrued child support arrearages).

The judgment statute here strikes a reasonable balance between the competing interests of enforcing the supporting parent's right to periodic payments on the one hand and protecting the obligor parent from stale claims on the other.

The determination that accrued child support installments are final judgments of record results in the application of the longest possible statute of limitations period available to a collection action by the supporting parent. Application of the catchall four year limitations statute of NMSA 1978 Section 37–1–4 would provide for an inordinately short period in which a custodial parent could assert the child support claim. This would be clearly inimical to the best interests of the child, would place an undue burden on the custodial parent, and might encourage dilatory tactics on the part of obligor parents intent on avoiding their child support duties.

Accordingly, we hold that the judgment statute of limitations that was in effect at the time Petitioner filed her December 15, 1981 petition applies. This was the seven year statute codified at NMSA 1978, Section 37–1–2 (Orig.Pamp.). We note, however, that the judgment statute has since been amended and now provides for a fourteen year limitations period. NMSA 1978, § 37–1–2 (Cum. Supp.1983).

Applying the relevant seven year judgment statute of the facts of the instant case, we conclude that Petitioner is barred from recovering the installment arrearages that accrued more than seven years prior to her December 15, 1981 petition. The trial court was incorrect in awarding judgment based on a seventy-nine month arrearage period. The only installments which Petitioner may properly collect are those falling due between December 15, 1974, the last payment not barred by the judgment statute, and January 28, 1977, the date that the youngest child attained majority—a period of twenty-five months. The trial court should have awarded judgment to Petitioner in the amount of $2,500.00.

OFFSET

Respondent also asserts that he is entitled to an offset against any arrearages not barred by the statute of limitations. This offset claim is based in large part on the fact that Respondent has made substantial expenditures connected with the care and support of the son that has been living with him since December 1972. While it is entirely commendable that Respondent voluntarily undertook the responsibilities associated with the direct care and treatment of his son, we nevertheless cannot agree that Respondent's actions merit an offset under the circumstances of this case.

As we have previously concluded, the amended final decree clearly set forth Respondent's child support obligations and was fully enforceable at all time relevant herein. Respondent, as the obligor parent, cannot by his actions unilaterally alter the support obligations set forth in the decree. As we stated in our discussion concerning the asserted ambiguity of the decree, Respondent properly should have petitioned to modify the child support terms of the decree

in light of this asserted change in circumstances. Modification of support obligations is strictly a matter to be determined by the courts. Not having pursued this avenue, Respondent cannot now claim an offset for his self-imposed expenditures, substantial though they may have been. *See Baures v. Baures*, 13 Ariz.App. 515, 478 P.2d 130 (1970) and authorities cited therein. As stated in *Baures:*

> A father who is required to make periodic payments for the support of minor children has an opportunity to relieve himself of that liability by a petition to modify the decree *in futuro* but he cannot remain silent while the installments accrue and then claim credit for his voluntary acts. In view of the mandatory requirements of the divorce decree as to payments of the monthly support installments to appellant, although it is to appellee's credit that he cared for his [child], he was a volunteer and is not thereby relieved from the obligations of the decree.

Id. at 519, 478 P.2d at 134. The district court in the instant case properly disallowed any and all of Respondent's offset claims.

LACHES

Respondent next maintains that he has been prejudiced by Petitioner's delay in pursuing her action and that laches should therefore bar any claim for arrearages not barred by the statute of limitations. We find this contention without merit.

There is sufficient evidence to support the district court's determination that Respondent would not be unduly prejudiced by the judgment for arrearages. The standard review on appeal is whether substantial evidence reasonably supports the factual determinations of the trial court. *Toltec International, Inc. v. Village of Ruidoso*, 95 N.M. 82, 619 P.2d 186 (1980). Resolving all disputes and reasonable inferences in favor of the successful party below and refusing to reweigh the evidence, we conclude that the trial court properly determined that laches does not apply in this case.

ATTORNEY'S FEES

Petitioner contends that she should be awarded attorney's fees related to the instant appeal, and for her presentation at the district court level. The district court in its final order of August 30, 1982 did not include an award of attorney's fees at the level as Petitioner had requested but noted that all findings and awards not specifically included were denied. This should properly be interpreted as a finding against Petitioner on the attorney's fees issue. *See Maynard v. Western Bank*, 99 N.M 135, 654 P.2d 1035 (1982). We have carefully reviewed the record and conclude that substantial evidence supports the district court's denial of attorney's fees. *Toltec International, Inc. v. Village of Ruidoso*, 95 N.M. 82, 619 P.2d 186; *Cave v. Cave*, 81 N.M. 797, 474 P.2d 480 (1970). Furthermore, we conclude that Petitioner does not merit attorney's fees for her instant cross-appeal.

The trial court is affirmed on all issues except that regarding the application of a statute of limitations period to an action on unpaid child support installments. The cause is remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

RIORDAN and STOWERS, JJ., concur.

Dwonna Gayle Gwaltney
CARDWELL Appellant,
v.
Kenneth Wayne GWALTNEY,
Appellee.

No. 87A01–9002–CV–80.
Court of Appeals of Indiana,
First District.
July 17, 1990.
556 N.E.2d 953 (Ind. Ct. App. 1990)

ROBERTSON, Judge.

The sole issue raised in this appeal is whether an individual should be absolved from paying child support because of his incarceration.

The underlying material facts show that the appellant Cardwell and the appellee Gwaltney were divorced with Gwaltney ordered to pay child support. About a year and one-half later, Gwaltney filed a petition to modify the support order based upon the reason that he had spent a year in jail. Gwaltney sought to be absolved from the support which had accrued during that year and to have future support reduced. Cardwell and Gwaltney reached an agreement that, among other things, excused Gwaltney from paying support for the year he was imprisoned. The trial court approved the agreement; however, that agreement was challenged when the county prosecuting attorney appeared in the matter and sought to set aside the agreement because Cardwell had been a recipient of AFDC funds through the State and had assigned her

support rights. The trial court refused to set aside the earlier agreements with this appeal resulting.

Even though the trial judge was prompted by equitable concerns when Gwaltney was excused from paying support the law is that any modification of a support order must act prospectively:

> In *Biedron v. Biedron* (1958), 128 Ind. App. 299, 148 N.E.2d 209, the Appellate Court of Indiana said, "in this state after support installments have accrued, the court is without power to reduce, annul or vacate such orders retrospectively, and therefore, the court committed error in attempting to do so." (Citations omitted). Therefore, payments must be made in the manner, amount, and at the times required by the support order embodied in the divorce decree until such order is modified or set aside. *Stitle v. Stitle* (1964), 245 Ind. 168, 197 N.E.2d 174, Indiana does permit cancellation or modification of support orders as to future payments; but, all modifications operate prospectively. *Kniffen v. Courtney* (1971), 148 Ind.App. 358, 266 N.E.2d 72; *Haycraft v. Haycraft* (1978), Ind.App. [176 Ind.App. 211], 375 N.E.2d 252.

Jahn v. Jahn (1979), 179 Ind.App. 368, 385 N.E.2d 488, 490. See also *O'Neil v. O'Neil* (1988), Ind.App., 517 N.E.2d 433 (transfer granted on other grounds).

Additionally, I.C. 31–2–11–12 provides:

> Modification of delinquent support payment.
>
> (a) Except as provided in subsection (b), *a court may not retroactively modify* an obligor's duty to pay a delinquent support payment.
>
> (b) A court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due:
>
> (1) After notice of a petition to modify the support order has been given to each obligee; and
>
> (2) Before a final order concerning the petition for modification is entered. (Emphasis added.)

Although the Indiana Child Support Guidelines, effective October 1, 1989, were not officially in use at the time of the trial court's decision in this appeal, we are of the opinion that a part of the commentary to Ind. Child Support Guideline 2 takes into consideration existing statutes and case law as heretofore cited.

That part of the commentary reads:

> Even in situations where the non-custodial parent has no income, Courts have routinely established a child support obligation at some minimum level. An obligor cannot be held in contempt for failure to pay support when he does not have the means to pay, but the obligation accrues and serves as a reimbursement to the custodial parent, or, more likely, to the welfare department if he later acquires the ability to meet his obligation.

We conclude that the trial court erred in retroactively excusing Gwaltney's support obligation for the time he was incarcerated.

Cause reversed and remanded for further action not inconsistent with this opinion.

Reversed and remanded.

RATLIFF, C.J., and CONOVER, J., concur.

COMMONWEALTH of Pennsylvania

v.

Adam DeMICHEL, Appellant.

Supreme Court of Pennsylvania.
April 22, 1971.
Rehearing Denied May 21, 1971.
442 Pa. 553, 277 A.2d 159 (1971)

OPINION OF THE COURT

ROBERTS, Justice.

Upon the basis of various lottery paraphernalia seized pursuant to a search warrant and introduced into evidence at trial, appellant Adam DeMichel was convicted of setting up and maintaining an illegal lottery and sentenced to undergo imprisonment for three to twelve months and to pay a fine of five hundred dollars plus costs. In this appeal from the judgment of sentence, appellant asserts that the evidence that led to his conviction was the fruit of an illegally executed search warrant. Upon reviewing the record we must agree.

Appellant was arrested on January 14, 1967, during a police search of his home at 707 Sears Street in Philadelphia. Also present at the time were appellant's wife and daughter. Upon initial entry into the house, the police observed appellant at a kitchen sink attempting to destroy

rice paper, and in the course of the ensuing search they found and seized other sheets of rice paper containing several thousand lottery bets, other blank sheets of rice paper, lists of names, adding machine tape, and other lottery paraphernalia.

Prior to trial appellant filed a timely motion to suppress these items, and an evidentiary hearing was held on March 4, 1968. From testimony elicited at that hearing it appeared that five police officers armed with a search warrant arrived at the front of appellant's two story row house at 12:40 p.m. on January 14, 1967. All were dressed in plain clothes, and one of their number, Officer Daniel Creden, approached the front door alone carrying a cardboard box in an attempt to create the false impression of a deliveryman.

Corporal Frank Hall, another member of the raiding party, testified as follows concerning the execution of the search warrant:

"Q. Did * * * [appellant] admit you to the premises?"
"A. No. We had to gain entrance."
"Q. How?"
"A. We broke the door down."
"Q. With or without prior warning?"
"A. With."

* * * * * *

"Q. What type of warning did you give to the occupants of the house before breaking in the door?"
"A. I told him we were police officers, we had a warrant."
"Q. How much time elapsed between the time you said that and when you broke in the door, approximately?"
"A. Approximately ten or fifteen seconds."

Upon cross-examination by appellant's counsel, Hall restated his version of the entry into the house but did not reaffirm that he *personally* gave any warnings to the occupants.[1]

At the conclusion of the hearing, appellant's counsel argued that the affidavit supporting the issuance of the search warrant was defective and that the police's method of entry into appellant's home was illegal. The hearing judge was unpersuaded and the motion for suppression denied.[2]

Appellant thereafter waived a jury, and his case proceeded to trial on May 16, 1968, before a different judge of the Philadelphia Court of Common Pleas. During the Commonwealth's case in chief, new and different evidence came to light concerning the execution of the search warrant. Corporal Hall again described the events surrounding the police's entry into appellant's house but failed to mention that he had given any warnings to the occupants, and Officer Creden, the policeman who actually knocked on appellant's door, gave the following testimony:

"Q. Now, sir, would you relate to the Court specifically in detail what occurred from the time you arrived at these premises until the time entry was made?"
"A. Well, I guess we arrived around 12:40 p.m., I walked west on Sears Street, at 7th Street, I went up and knocked on the door. A few seconds, the blind was lifted up, and I announced that we were police. The blinds dropped, and we proceeded to knock the door down."
"Q. Within what period of time, sir?"
"A. From the time that the blinds were dropped?"
"Q. Yes, sir."
"A. Ten, five, I don't know how many seconds."
"Q. Seconds, sir?"
"A. Well, as soon as the blinds dropped, I called the fellow officer who had the sledge hammer and knocked the door down."
"Q. Just to make the record perfectly clear, when you first knocked, you did not say anything at all, did you?"
"A. No. I just knocked."
"Q. And then, according to your testimony, someone lifted up the blinds?"
"A. Yes, sir."
"Q. Could you tell whether that was male or female, sir?"

1. Instead, Hall used the pronoun "we":

Q. "And would you describe specifically, sir, the manner in which you attempted to gain entrance to these premises?"

A. "We knocked on the door, and after hearing sound coming from inside the house *we* announced ourselves as police officers and that we had a warrant * * *."

Q. "What did you do?"

A. "*We* announced ourselves as police officers and we had a search warrant * * *."

2. The question of the sufficiency of the affidavit is not pressed on this appeal.

"A. I couldn't tell. I believe there were curtains behind the blinds. I couldn't see who it was.
"Q. Then the blinds dropped, sir, is that correct?
"A. That is correct.
"Q. And then you made an announcement that you were police officers, is that correct, sir?
"A. No, it is not. While the blinds were up, I said, 'Open up, it is the police.'
"Q. *And that is all you said, sir?*
"A. *Yes*." (Emphasis added.)

Appellant was adjudged guilty, but the trial judge granted his post-trial motion in arrest of judgment on the ground that the evidence at trial demonstrated that the officer who executed the search warrant had not announced their purpose before resorting to forcible entry.

* * * * * *

The Superior Court, reasoning that a trial judge has no power to overrule the decision of a suppression hearing judge, reversed the order granting arrest of judgment and remanded the case for sentencing, 214 Pa.Super. 392, 257 A.2d 608. Following the imposition of sentence, appellant again appealed to the Superior Court. That court affirmed the judgment of sentence, 216 Pa.Super. 804, 263 A.2d 480, and we granted allocatur.

Preliminarily we note our disagreement with the Superior Court's apparent categorical holding that a trial judge is powerless to overrule the decision of a suppression hearing judge. While "[w]e impliedly held in *Commonwealth v. Warfield,* 418 Pa. 301, 211 A.2d 452 (1965) that the trial judge cannot reverse *on the same record* at trial the decision made after the pretrial suppression hearing * * *," *Commonwealth v. Washington,* 428 Pa. 131, 133 n. 2, 236 A.2d 772, 773 n. 2 (1968) (emphasis added), the same does not hold true when the trial judge's different ruling is based upon new and different evidence. When information comes to light after the suppression hearing clearly demonstrating that the evidence sought to be introduced by the Commonwealth is constitutionally tainted, no considertion [sic] of justice or interest of sound judicial administration would be furthered by prohibiting the trial judge from ruling it inadmissible. Although a favorable ruling at the suppression hearing relieves the Commonwealth of the burden of proving a second time at trial that its evidence was constitutionally obtained, the trial judge must exclude evidence previously held admissible at the suppression hearing when the defendant proves by a preponderance of new evidence at trial that the evidence sought to be introduced by the Commonwealth was obtained by unconstitutional means.[3]

Although we thus disagree with the Superior Court, we believe that the trial judge in the instant case erred in granting appellant's motion in arrest of judgment upon the basis of a finding that the police officers executing the search warrant did not properly announce their purpose before entering appellant's house. Officer Creden testified unequivocally at trial that *he* had made no announcement of purpose, but he did not state that his fellow officers were similarly mute or contradict Corporal Hall's suppression hearing testimony that Hall had made such an announcement of purpose. That being so, the record at trial in no way proves the absence of a proper police announcement of purpose.

Despite the foregoing, we are nevertheless persuaded for other reasons that the search of appellant's home was illegally executed. It is settled in this Commonwealth that the Fourth Amendment prohibition against unreasonable searches and seizures demands that before a police officer enters upon private premises to conduct a search or to make an arrest he must, absent exigent circumstances, give notice of his identity and announce his purpose. *Commonwealth v. Newman*, 429 Pa. 441, 240 A.2d 795 (1968); *United States ex rel. Manduchi v. Tracy*, 350 F.2d 658 (3rd Cir.), cert. denied, 382 U.S. 943, 86 S.Ct. 390, 15 L.Ed.2d 353 (1965); *United States ex rel. Ametrane v. Gable*, 276 F.Supp. 555 (E.D. Pa.1967). The purpose of this announcement rule is that "* * * the dignity and privacy protected by the Fourth Amendment demand a certain propriety on the part of policemen even after they have been authorized to invade an individual's privacy. Regardless of how great the probable cause to believe a man guilty of a crime, *he must be given a reasonable opportunity to surrender his privacy voluntarily." United States ex rel. Ametrane v. Gable*, supra, 276 F.Supp. at 559 (emphasis added). Accordingly, even where the police duly announced

3. At the time of appellant's trial, the method of pretrial litigation of the legality of searches and seizures was governed by Pa.R.Crim.P. 2001, 19 P.S. Appendix, which did not expressly speak to the question whether a trial judge could overrule the decision of the suppression hearing judge. Rule 2001 was superseded by a 1969 amendment to Pa.R.Crim.P. 323, which consolidated and made uniform the procedures relating to pretrial suppression of any evidence alleged to have been obtained in violation of a defendant's constitutional rights. Even this new consolidated rule recognized that there are some circumstances in which the trial judge should be free to exclude evidence previously held admissible.

> "If the [suppression hearing] court determines that the evidence is admissible, such determination shall be final, conclusive and binding at trial, *except upon a showing of evidence which was theretofore unavailable. * * **"
>
> Pa.R.Crim.P. 323(j) (emphasis added).

their identity and purpose, forcible entry in still unreasonable and hence violative of the Fourth Amendment if the occupants of the premises sought to be entered and searched are not first given an opportunity to surrender the premises voluntarily. See *United States ex rel. Manduchi v. Tracy*, 350 F.2d at 662.

The Commonwealth appears to concede this proposition of constitutional law but argues that the occupants of appellant's house were in fact given an adequate opportunity to open the door voluntarily. Corporal Hall and Officer Creden testified that they and the other officers began to break down the front door of appellant's house five to fifteen seconds after announcing their presence and purpose. We cannot deem this a reasonable sufficient period of time. In *Newman*, supra, for example, this Court stated that "a mere twenty second delay in answering the door cannot constitute support for a belief that evidence was being destroyed * * *." 429 Pa. at 448, 240 A.2d at 798. And in *Ametrane*, supra, the United States District Court for the Eastern District of Pennsylvania noted that "[e]ven if * * [the occupant] had known the officers to be policemen, he might have had countless legitimate reasons for taking a minute to answer the door." 276 F.Supp. at 559.

In both of the above cases the occupants were known by the police to be on the second floor whereas here Corporal Hall and Officer Creden testified that they saw someone peering at them through the blinds of a first story window located very near the front door. Given the close proximity of this person to the door, we are urged to conclude that a mere five to fifteen second delay was reasonable. But even in these circumstances this might be entirely innocent "for countless legitimate reasons." Appellant's wife, for example, testified that it was she who peered through the window and that her delay in responding was occasioned by her being attired in a nightgown and having to go to the kitchen to put on a robe. Regardless of the truth of her testimony, it serves to illustrate that a five to fifteen second delay was insufficient for the police to have formed a reasonable belief that the occupants of appellant's house did not intend to permit peaceable entry.

Finally, we are not persuaded that this case presents "exigent circumstances" suspending the ordinary requirement that the occupants of premises sought to be searched be given a reasonable opportunity to open the door voluntarily. The police officers involved were seeking to execute a warrant authorizing them to enter, search for and seize lottery paraphernalia, and from their prior experience with this type of mission they reasonably believed that some of the paraphernalia would be in the form of almost instantaneously destructible rice paper. However, as we stated in *Newman*:

> "The fact that some lottery paraphernalia is easily destroyed does not justify the suspension of the Fourth Amendment in all lottery prosecutions. One of the prices we have to pay for the security which the Fourth Amendment bestows upon us is the risk that an occasional guilty party will escape."

429 Pa. at 448, 240 A.2d at 798 (citation omitted). To excuse the police's failure to announce their purpose and presence and thereafter to allow a reasonable time for the voluntary surrender of the premises, there " * * * must be more than the presumption that the evidence *would* be destroyed because it *could* be easily done." *State v. Mendoza*, 104 Ariz. 395, 399, 454 P.2d 140, 144 (1969).

The testimony that appellant was found standing by a kitchen sink attempting to destroy rice paper is without significance.

> "It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry. Johnson v. United States*, 333 U.S. 10, 17, 68 S.Ct. 367, 370–371, 92 L.Ed. 436 (1948). As the [Supreme] Court said in *United States v. Di Re*, 332 U.S. 581, 595, 68 S.Ct. 222, 229, 92 L.Ed. 210 (1948), "a search is not to be made legal by what it turns up. In law it is good *or bad* when it starts and does not change character from what is dug up subsequently. (Emphasis added.)"

Ker v. California, 374 U.S. 23, 40 n. 12, 83 S.Ct. 1623, 1633 n. 12, 10 L.Ed.2d 726 (1963).

We hold that forcible entry in the circumstances of this case violated the standards of the Fourth Amendment and that the fruits of the ensuing search were improperly admitted at appellant's trial. Accordingly, the order of the Superior Court is reversed. The judgment of sentence is vacated and the case remanded for a new trial.

BELL, C. J., did not participate in the consideration or decision of this case.

* * * * * *

COHEN, J., did not participate in the decision of this case.

* * * * * *

POMEROY, J., filed a dissenting opinion, in which JONES, J., joins.

* * * * * *

EAGEN, J., concurs in the result.

* * * * * *

POMEROY, Justice (dissenting).

* * * * * *

COMMONWEALTH

v.

John J. SHEA.
No. 93–P–1066.

Appeals Court of Massachusetts,
Plymouth.

Argued Sept. 12, 1994.
Decided Jan. 5, 1995.
Further Appellate Review
Denied Feb. 28, 1995.
38 Mass. App. Ct. 7, 644 N.E.2d 244 (1995)

PERRETTA, Justice.

On the afternoon of June 15, 1991, the defendant and his friend invited two women who were sun bathing on the banks of the Charles River to board the defendant's boat and go for a ride. Once the women were aboard, the defendant headed out to the open sea. An hour later and about five miles offshore from Boston, he stopped the boat, disrobed, and made sexual remarks and advances toward the women. He ignored all requests that he dress and stop his offensive behavior. When the women demanded that he return them to Boston, he threw them overboard and drove away without a backward glance. The women were rescued after managing to swim within shouting distance of a sailboat. On evidence of these acts, a jury found the defendant guilty, as to each woman, of kidnapping, attempted murder, assault and battery by means of a dangerous weapon (the ocean), and indecent assault and battery. The defendant argues on appeal that the trial judge erroneously denied (1) his request for a continuance of the trial; (2) his motion in limine by which he sought to preclude the Commonwealth's use of a videotape showing the ocean from the perspective of the women in the water and the defendant on his boat; and (3) his motion for required findings of not guilty on all the indictments. Although we conclude that the ocean is not a dangerous weapon within the meaning of G.L. c. 265, § 15A, we affirm the kidnapping and attempted murder convictions.[1]

1. *The motion for a continuance.* Trial counsel was appointed to represent the defendant on August 29, 1991.[2] On February 21, 1992, he filed a motion seeking funds for a psychiatric evaluation of the defendant. The motion was allowed that same day, and the case was continued to April 21, 1992, "for trial." One week before the scheduled trial date, counsel sought a continuance of at least two months. The Commonwealth opposed the motion on numerous grounds, not the least of which was the fact that the victims had been receiving threatening mail and telephone calls. The judge denied the request and the defendant claims error. "[A] motion for continuance . . . lies within the sound discretion of the judge, whose action will not be disturbed unless there is a patent abuse of that discretion, which is to be determined in the circumstances of each case." *Commonwealth v. Bettencourt*, 361 Mass. 515, 517–518, 281 N.E.2d 220 (1972). We relate the circumstances of the denial of the defendant's motion.

An affidavit and a letter from a psychiatrist, dated March 17, 1992, were attached to the motion for a continuance. It appears from these documents that the defendant's medical history indicated that he had suffered a series of head injuries from which he might have sustained brain trauma and that, according to the psychiatrist, the "charges now pending against him may reflect behavior caused by those head injuries." As further stated by the psychiatrist: "For a more conclusive answer to the question of the effect of Mr. Shea's head traumas to his alleged criminal acts, it would be necessary for him to undergo independent extensive neuropsychological testing and, in addition, have a BEAM study of the electrical activity of his brain."

As of April 14, 1992, the date of the hearing on the motion for a continuance, the BEAM study had been completed and the results reported to the psychiatrist. A copy of the report which had been submitted to the psychiatrist was also attached to the motion. The report recited the following conclusion of the BEAM study: "Overall this study is quite compatible with a history of multiple head injuries and suggests a generalized encephalopathy with

1. The defendant was also found guilty on two counts of indecent assault and battery. Because he assented to those convictions being placed on file, they are not before us. See *Commonwealth v. Delgado*, 367 Mass. 432, 438, 326 N.E.2d 716 (1975).

2. Appellate counsel was not trial counsel.

irritable qualities falling just short of being a seizure disorder. The latter diagnosis, of course, should be made on clinical grounds."

It was not until the psychiatrist was called to testify at trial that the defendant's theory of defense took on a clarity: on the afternoon of June 15, 1991, he was experiencing a temporal lobe seizure which prevented him from formulating the specific intent necessary for criminal liability for his actions. At the time of the hearing on the motion, however, the trial judge was informed only that a continuance of two months was necessary so that in addition to the psychiatrist, various other named medical professionals could also review the results of the BEAM study and conduct psychoneurological testing of the defendant. Even were we to conclude that an adequate case for granting the motion had been made at that time, but see *Commonwealth v. Bettencourt*, 361 Mass. at 517–518, 281 N.E.2d 220, the defendant has failed to show that his defense was prejudiced by the denial of his request.

Although the defendant argues that the denial of the continuance prevented psychoneurological testing which would have allowed the psychiatrist to opine whether, at the time in question, the defendant was experiencing a temporal lobe seizure, the psychiatrist's testimony does not support the claim. The psychiatrist testified on voir dire that had additional psychoneurological testing been available, he could be more "definitive" or "conclusive" in his opinion concerning the defendant's potential for temporal lobe seizures.[3] The psychiatrist nonetheless could, and did, relate to the jury that it was his opinion, to the requisite degree of medical certainty, that the defendant's "history, test results, and behavior is consistent with a temporal lobe disorder."

As for the more immediate question of whether the defendant was experiencing a seizure at the time of the incident, the psychiatrist testified, on voir dire, that he could not say "with [a] high degree of certainty that at that moment on that boat, that type of episode occurred." Rather, he could state only that "this individual, with his condition, has a high potential for things like that happening." At no time was the psychiatrist asked whether psychoneurological testing could reveal to a reasonable degree of medical certainty whether a person who suffered from temporal lobe disorder had in fact experienced a seizure at a specific time in the past.

In sum, the defendant's temporal lobe disorder was fully presented to the jury. Although the defendant's expert and the expert for the Commonwealth agreed that the defendant's BEAM study indicated a temporal lobe abnormality, they sharply disagreed on the issue of whether the defendant's actions were consistent or inconsistent with a temporal lobe seizure. However, any weaknesses that the jury might have found in the testimony of the defendant's psychiatrist cannot, on the record before us, be attributed to a lack of psychoneurological testing and the denial of the continuance.

2. *The videotapes.* At trial, the Commonwealth was allowed to use two chalks, that is, videotapes, to illustrate to the jury the victims' testimony concerning the condition of the ocean when the defendant threw them into the water and abandoned them. The first videotape depicted the victims' view from the water as they watched the defendant drive away, and the second showed how two people in the water would appear from the vantage point of the back of the boat as it drove away from them. The Commonwealth argued that the tapes were relevant to the defendant's murderous intent. After an *in camera* viewing of the tapes, the trial judge ruled that the videos could be used as chalks. Immediately before the jury viewed the tapes, the trial judge instructed: "This is not offered for your consideration as evidence in this case. It is offered in the nature of what we refer to as a chalk to the extent that it may be of assistance to you in understanding the evidence that you have heard in view of the similarities, if any, and it's for you to determine if there are any similarities in the circumstances of the events of June 15, 1991." See generally Liacos, Massachusetts Evidence § 11.13.2 (6th ed. 1994) ("Chalks are used to illustrate testimony . . . they are not evidence in the ordinary sense of the word").

The defendant complains that the tapes were a prejudicial recreation of the crime, that they were not based upon the evidence, and that they were inflammatory. We see no abuse of discretion or other error in the trial judge's decision to allow the Commonwealth to use the videotapes as chalks.

"Whether the conditions were sufficiently similar to make the observation [offered by the demonstration] of any value in aiding the jury to pass upon the issue submitted to them [is] primarily for the trial judge to determine as a

3. The psychiatrist had reviewed some psychoneurological test results which were in the defendant's medical records. When asked by defense counsel whether he could be more conclusive in his opinion had "more extensive psychoneurological testing" been done, the psychiatrist responded, "[Y]es, everything that enhances helps become more definitive until ultimately, hopefully, you can become almost conclusive about it. I'm only saying I can't be conclusive, I can only render an opinion at this time."

matter of discretion. [The judge's] decision in this respect will not be interfered with unless plainly wrong." *Commonwealth v. Chipman*, 418 Mass. 262, 270–271, 635 N.E.2d 1204 (1994), quoting from *Field v. Gowdy*, 199 Mass. 568, 574, 85 N.E. 884 (1908). See also *Terrio v. McDonough*, 16 Mass.App.Ct. 163, 173, 450 N.E.2d 190 (1983). To the extent the videotapes do not depict anyone being thrown from the boat into the ocean, they are not a recreation of the crime. The tapes otherwise essentially track the victims' testimony.

State police officers Earle S. Sterling and Leonard Coppengrath testified that at 9:30 a.m. on April 15, 1992, they and a number of their associates boarded a boat and proceeded to the point five miles offshore from Boston where the women had been pulled from the water. They described the weather conditions that day as well as the height of the waves and the temperature of the water. They had video cameras and other equipment with them. When they reached their destination, Sterling and another man, who was holding a camera, jumped overboard. Once in the water, the other man held the camera about two inches (the eye level of the victims) above the water, and filmed the boat as it drove off. Meanwhile, Coppengrath, who remained on the boat, focused a camera on the two men in the water as another one of the men slowly drove away.[4] After proceeding about one-half mile, the men in the water were no longer visible from the boat. Coppengrath then panned the "area from where we had come and to where we were heading and circled across the skyline of Boston towards the point in Hull which is the closest point of land to where we were."

There is no persuasive force to the defendant's argument that the Commonwealth's use of the videotapes was no more than a disguised inflammatory appeal to the jurors to put themselves in the place of the victims. See, *for example, Commonwealth v. Sevieri*, 21 Mass.App.Ct. 745, 753–754, 490 N.E.2d 481 (1986). The Commonwealth was entitled to dispel any notion that the defendant's actions were no more than a sunny-day prank gone too far and that he returned for the victims but again departed when he saw them being pulled aboard the sailboat. When the defendant first threw one of the women into the water, she screamed that she did not know how to swim. He then jumped overboard, held her head under the water, and reboarded the boat for the second woman. Before he threw her into the water, she too told him that she could not swim. Having experienced the frigid temperature of the water and the height of the waves and having been told that the victims could not swim, the defendant drove away leaving the women in great peril. The videotapes show what that defendant saw and experienced, and they were relevant to the issue of whether he "did an act designed to result in death with the specific intent that death result." *Commonwealth v. Beattie*, 409 Mass. 458, 459, 567 N.E.2d 206 (1991). See also *Commonwealth v. Hebert*, 373 Mass. 535, 537, 368 N.E.2d 1204 (1977) ("An attempt to commit a crime necessarily involves an intent to commit that crime").[5] We have viewed the videotapes and conclude that the trial judge neither abused his discretion nor committed other error of law in allowing them to be seen by the jury. See *Commonwealth v. Chipman*, 418 Mass. at 271, 635 N.E.2d 1204; *Terrio v. McDonough*, 16 Mass.App.Ct. at 173, 450 N.E.2d 190.

3. *Attempted murder and kidnapping.* It is the defendant's argument that the Commonwealth failed to prove that when he threw the women into the water and drove away, he specifically intended their death. Taking the evidence in the light most favorable to the Commonwealth, we see no error in the trial judge's denial of the defendant's motion for a required finding of not guilty on the indictments charging him with attempted murder by drowning. There was evidence to show that the defendant was five miles offshore with no boats in sight when he threw the women overboard. The water was fifty-two degrees, and the waves were one to two feet high. Because the defendant had jumped into the water to hold one of the woman under, he knew that it was cold and choppy. For all he knew, they could not swim.

This evidence of the defendant's conduct was sufficient to warrant the reasonable inference that he intended that the victims drown. See *Commonwealth v. Henson*, 394 Mass.

4. Although the victims testified that the defendant sped away in the boat, that testimony did not require preclusion of the use of the videotapes, see *Commonwealth v. Chipman*, 418 Mass. at 270–271, 635 N.E.2d 1204 (1994), especially in light of the trial judge's instructions to the jury prior to the viewing of the films.

We also think it inconsequential that there was no evidence to show that the defendant turned to watch the victims as he drove off. The information being illustrated pertained to the water conditions and surroundings, which remained the same irrespective of any particular vantage point, and the defendant's awareness of them.

5. As the videotapes were illustrative on the issue of the defendant's intent, we need not consider whether, as the Commonwealth argues, they were also helpful to an understanding of the victims' state of mind, an issue of questionable relevancy. See *Commonwealth v. Zagranski*, 408 Mass. 278, 282–283, 558 N.E.2d 933 (1990).

584, 591, 476 N.E.2d 947 (1985) ("[An] intent to kill may be inferred from the defendant's conduct"); *Commonwealth v. Dixon*, 34 Mass.App.Ct. 653, 656, 614 N.E.2d 1027 (1993) (attempted murder statute reaches act of throwing someone who cannot swim from a boat into water).[6]

In arguing that there was no evidence of kidnappings apart from the conduct incidental to the attempted murders, that is, picking the women up and throwing them into the water, the defendant ignores the testimony of the victims. Both women related that after the defendant disrobed and made sexual advances towards them, they demanded that he return them to shore. He refused, continued with his offensive behavior, became angry over their reaction, and then threw them overboard. Moreover, the conduct which the jury reasonably could find as the basis for kidnapping, forcing the women to remain at sea while the defendant committed an indecent assault and battery upon them (see note one, *supra*), would not necessarily be based on the acts that constituted the attempted murders. See *Commonwealth v. Rivera*, 397 Mass. 244, 253–254, 490 N.E.2d 1160 (1986); *Commonwealth v. Sumner*, 18 Mass.App.Ct. 349, 352–353, 465 N.E.2d 1213 (1984).

4. *The dangerous weapon.* General Laws c. 265, § 15A, reads, in pertinent part: "Whoever commits assault and battery upon another by means of a dangerous weapon shall be punished . . . ." The sole argument made by the defendant in respect to the indictments charging him with assault and battery by means of a dangerous weapon is that the ocean is not a dangerous weapon within the meaning of § 15A.

We need not consider whether the specified weapon, the ocean, is dangerous per se or dangerous as used. See *Commonwealth v. Tarrant*, 367 Mass. 411, 416–417, 326 N.E.2d 710 (1975); *Commonwealth v. Appleby*, 380 Mass. 296, 303, 402 N.E.2d 1051 (1980). Although the ocean can be and often is dangerous, it cannot be regarded in its natural state as a weapon within the meaning of § 15A. See *Commonwealth v. Farrell*, 322 Mass. 606, 614–615, 78 N.E.2d 697 (1948), stating that the term "dangerous weapon" comprehends "any *instrument or instrumentality* so constructed or so used as to be likely to produce death or great bodily harm" (emphasis added) *Commonwealth v. Tarrant*, 367 Mass. at 417 n. 6, 326 N.E.2d 710, noting with approval the definition of dangerous weapon adopted in the Proposed Criminal Code of Massachusetts c. 263, § 3(i): "any firearm or other weapon, device, instrument, material or substance, *whether animate or inanimate*, which in the matter [in] which it is used *or is intended to be used* is capable of producing death or serious bodily injury" (emphasis added);[7] *Commonwealth v. Appleby*, 380 Mass. at 308, 402 N.E.2d 1051, concluding that the "offense of assault and battery by means of a dangerous weapon under G.L. c. 265, § 15A, requires that the elements of assault be present . . . that there be a touching, however slight . . . that the touching be by means of the weapon . . . and that the battery be accomplished by use of an inherently dangerous weapon, or by use of *some other object* as a weapon, with the intent to *use that object* in a dangerous or potentially dangerous fashion" (emphasis added).

All the cases collected and cited in the discussion of dangerous weapons, per se and as used, in *Commonwealth v. Appleby*, 380 Mass. at 303–304, 402 N.E.2d 1051, share a common fact that is consistent with the definitions of "dangerous weapons" which speak in terms of "objects" or "instrumentalities." The commonality found in those cases is that the object in issue, whether dangerous per se or as used, was an instrumentality which the batterer controlled, either through possession of or authority over it, for use of it in the intentional application of force. Because the ocean in its natural state cannot be possessed or controlled, it is not an object or instrumentality capable of use as a weapon for purposes of § 15A.

Our conclusion should not be construed to mean that there can never be criminal liability for causing physical harm to someone by subjecting them to a force of nature. We conclude only that for purposes of § 15A, the ocean, not being subject to human control, was not, in the instant case, an object or instrumentality which could be found by the jury to be a dangerous weapon. Accordingly, the defendant's motion for required findings of not guilty on the indictments charging him with assault and battery by means of a dangerous weapons should have been allowed.

6. In deciding this issue, we need not, contrary to the defendant's argument, consider the testimony of his friend, that he was "eventually" able to persuade the defendant to turn back for the women and that with the aid of binoculars they were able to see the women about three-quarters of a mile away being pulled aboard a sailboat. See *Commonwealth v. Lydon*, 413 Mass. 309 312, 597 N.E.2d 36 (1992).

7. This definition tracks that of "deadly weapon" set out in § 210 of the Model Penal Code (1980), which, as noted in comment 5, was "designed to take account of the ingenuity of those who desire to hurt their fellows without encompassing every use of an ordinary object that could cause death or serious injury."

5. *Conclusion.* It follows from what we have said that the judgments entered on the indictments charging kidnapping and attempted murder are affirmed. The judgments entered on the indictments charging assault and battery by means of a dangerous weapon are reversed, the verdicts are set aside and judgments for the defendant are to enter on those indictments.[8]

So ordered.

8. The Commonwealth has not argued that the defendant should, in any event, be resentenced on the lesser offense of assault and battery, presumably for the reason, if no other, that it would make no practical difference. The sentence imposed on the conviction for assault and battery by means of a dangerous weapon was to be served concurrently with that imposed on the attempted murder conviction.

Philip J. COOPER, Administrator Pendente Lite of the Estate of W.A. Bisson, Deceased, Plaintiff-Appellant,

v.

Charles AUSTIN, Defendant-Appellant.

Court of Appeals of Tennessee, Western Section, at Jackson.

Feb. 18, 1992.

Application for Permission to Appeal Denied by Supreme Court May 26, 1992.

837 S.W.2d 606 (Tenn. Ct. App. 1992)

CRAWFORD, Judge.

This is a will contest case involving a codicil to the Last Will and Testament of Wheelock A. Bisson, M.D., deceased. Phillip Cooper, Administrator *pendente lite* of the estate, is a nominal party only; the real parties in interest are the proponent of the codicil, Alois B. Greer, and the contestant, Charles Austin.

Dr. Bisson's will, which is not contested, was executed June 18, 1982. Dr. Bisson died in 1985, and shortly thereafter Greer filed a petition in probate court to admit the June 18, 1982 will and two codicils thereto dated August 20, 1984, and August 6, 1985, respectively, to probate as and for the Last Will and Testament of Wheelock A. Bisson, M.D. By order entered November 26, 1985, the probate court admitted the paper writings to probate as the Last Will and Testament of Dr. Bisson.

On May 20, 1986, Austin filed a petition in probate court to contest the two codicils,[1] and, after answer to the petition by Greer, the probate court certified the contest to circuit court by order entered August 13, 1986.

No action was taken in circuit court until the administrator pendente lite filed a "Complaint to Establish Will and Codicil" on November 9, 1988. Austin's answer to the complaint, *inter alia*, denied that either codicil had been properly executed by the decedent or properly witnessed and further denied that the codicils had any legal validity or effect.

Greer filed a motion for summary judgment in October, 1990, seeking to have Austin's case dismissed on the grounds that it was barred by T.C.A. § 32–4–108 (1986), because it was brought more than two years from the entry of the order admitting the will to probate. The trial court denied this motion.

On March 26, 1991, a jury trial was held on the issue of *devisavit vel non* as to the 1984 codicil. The 1982 will was introduced into evidence by stipulation, and Greer offered the 1984 codicil through the attesting witnesses.

In his 1982 will, Dr. Bisson left everything to his wife and if she predeceased him he left the majority of his estate to Austin. This disposition was changed by the 1984 codicil which provides:

CODICIL TO MY LAST WILL AND TESTAMENT

I, Wheelock Alexander Bisson, M.D., of 2312 Park Avenue, Memphis, Shelby County, Tennessee, this August 20th, 1984. Bequeath that my adopted daughter, Alois B. Greer, receive a child's share of my estate which will consist of all real property, personal property, household furniture and any and all savings which I might have at the time of my demise.

1. The codicil dated August 6, 1985, made no property disposition, but merely appointed Greer as executrix of the estate. During the course of the circuit court trial, the proponent withdrew this codicil from evidence. Since it is not involved in this appeal we will omit further reference to it in this Opinion.

/s/ Wheelock A. Bisson, M.D.
WHEELOCK ALEXANDER BISSON, M.D.

/s/ Michael E. Harrison
WITNESS

3907 Kerwin Dr. Memphis, Tenn. 38138
ADDRESS

/s/ Charles L. Harrison
WITNESS

4905 Sagewood, Mphs., TN. 38116
ADDRESS

Sworn to and subscribed before me this 20th day of August, 1984.

/s/ Lillie M. Thomas
NOTARY PUBLIC

My Commission Expires:
Jan. 5, 1987

On direct examination, Michael Harrison stated that he signed the codicil in the presence of Dr. Bisson. He then gave the following testimony regarding that signing:

Q. All right. When you got ready to sign did Dr. Bisson indicate to you what you were signing as a witness?
A. Yes. At the time I had no idea what a codicil was.
Q. All right.
A. But I did—I did witness it.

On cross examination, Michael Harrison gave the following testimony:

Q. All right. You didn't know what this document was now you've got in front of you at the time you signed it. Correct? This is one dated August, 1984.
A. I didn't understand your question.
Q. Well, Dr. Bisson didn't tell you what it was, he just said he needed a paper signed and notarized. Right?
A. He didn't tell me anything. I was asked to witness the document. He told Ms. Thomas. She notarized it, I was asked to witness it.
Q. At the time did you know what the document was—
A. No, sir.
Q. . . . that you were witnessing? Pardon me?
A. No, sir.
Q. And Dr. Bisson didn't tell you what it was?
A. No, sir.
Q. You didn't ask anybody what it was?
A. No, sir.

Charles Harrison, the other witness appearing on the 1984 codicil, testified on direct examination pertinent to the issue before us:

Q. All right. Do you recall the occasion when you signed this document?
A. Yes, sir.
Q. Okay. Will you give us the background as to how you came to be involved with this document at all?
A. On this particular day, the 20th of August, 1984, we were on our way back from Memorial Park—the rotunda at the Memorial Park Cemetery, and Dr. Bisson was seated on the front seat of the limousine with me.

And he said, "When you get back, you know, to my place"—which he referred that was his home—he said, when you get back to my place, he said, I have something I want you all to do for me. And so I said, well, okay, Doc. And that was that. And so the rest of the people that was in the limousine they were just carrying on casual conversation. So when we got back to his residence on Park Avenue we were letting them out of the limousines and he said, don't leave, come on in, I have something, you know, I want you to take care of for me. And so he asked me where was Ms. Thomas. I said, well, she's at the funeral home. He said, well, call her and tell her to come down here, I need her—you know, I need her here, you know, on this too. And so when we got inside—We came through the side entrance and we went up to his front office. And he said, I have this codicil that I want you all to notarize for me and witness, and that's how I came in contact with him.

Q. All right, sir. Now, at the time that this document was signed were you present?
A. Yes, sir.
Q. And did you see Dr. Bisson sign this document?
A. Yes, sir.
Q. Was your brother Michael also present?
A. Yes, sir.
Q. And all three of you were together at the time; is that correct?
A. Yes, sir.
Q. Ms. Thomas is on there as a notary. Was she also in the room or was she not?
A. No, she was in the room. Yes, sir.
Q. All right. And Dr. Bisson asked you all to sign this; is that correct?
A. Yes, sir.
Q. And all three of you signed it in each other's

presence?
A. That's correct.

* * * * * *

The pertinent testimony from Charles Harrison on cross examination is:

Q. Now, Dr. Bisson didn't tell you what was in the document that you were signing. Correct?
A. No, he did not.
Q. And he didn't tell you what the document was?
A. Yes, sir, he did.
Q. Well, let me ask you. Do you recall giving a deposition, meaning when you came to my conference room up at my office January 14, 1987 and you swore to tell the truth, and there was a court reporter—it wasn't this woman, but another woman with a machine like that that took down your testimony? Do you recall that?
A. January the 14th of '87?
Q. Yes, sir.
A. I remember coming to your office, yes, sir.
Q. All right.
A. I don't remember the exact date, but I do remember coming to your office.
Q. Have you had a chance to look over this document—this deposition transcript?
A. No, sir.
Q. I asked you on page 40 at that time when you were under oath, I said—At line 3 you said, I just glanced over it. I didn't stop, I just glanced over it.
Q. (Line 5) Did Dr. Bisson tell you what was in it?
A. No, sir.
Q. Did he tell you what it was?
A. No, sir.
Q. Was that your testimony at that time? Would you agree with me that your memory was probably better about this in January of 1987, which would be, what, four years ago?
A. I'm not playing with my memory, but I'd say that—well, you know, I—
Q. Would you accept that as the truth if that's what you said then?
A. Yes, sir.
Q. So Dr. Bisson didn't elaborate as to what the document was, he said I want you to witness a document. He had the document already. Right?
A. Right.
Q. You didn't give it to him?
A. No.
Q. Okay. And then he signed it and he said, okay, now you sign it, and that was it. Correct?
A. Yes, sir, basically. He didn't say sign it, he said witness it.
Q. Witness it. And then there wasn't any more conversation about it after you witnessed it, y'all got up and left. Correct?
A. Right.

On re-direct examination, Charles Harrison testified as follows:

Q. Mr. Harrison, be very careful now and think regarding both what you said previously and what you just said.

Are you absolutely certain that Dr. Bisson told you what it was he wanted you to witness?

A. MR. MITCHELL: Note my objection to the leading, Your Honor. He never testified he knew what it was.

THE COURT: He did testify, I believe, in his direct-examination. He said that Dr. Bisson said he had a codicil that he wanted witnessing.

MR. MITCHELL: Yes, sir, that's all he said.
Q. (BY MR. BEATY): Is that what you recall today as to what he said?
A. Yes, sir.

MR. BEATY: That's all I have.

Charles Harrison's re-cross examination is:

Q. But that was before you ever went in the room?
A. I beg your pardon.
Q. That was before you ever went into the room; that was when you were out in the car?
A. Right.
Q When you went in the room he didn't say what it was or what was in it, just like you testified four years ago. Right?
A. Right.

Lillie Thomas, who appears as a notary public on the 1984 codicil, testified that all Dr. Bisson said in her presence was that he had a paper that he wanted

her to notarize and that he said nothing in her presence about the paper being a will, a codicil or anything of that sort. We quote from the testimony:

Q. All right. And what did Dr. Bisson say about it in your presence?
A. He said I have a-he said a paper that I want you to notarize for me.
Q. All right. Did he use any language: will, codicil, anything of that sort?
A. No. He said a paper.
Q. All right. Did he sign it in your presence?
A. Yes, sir.
Q. Did he sign it in the presence of the other witnesses?
A. Yes, sir.
Q. Now Michael Harrison was present?
A. Yes, sir.
Q. And Charles Harrison, also; is that correct?
A. Yes, sir.

Following the testimony of these witnesses, counsel for Austin moved the court to disallow submission of the codicil to the jury on the grounds that the codicil's proponent, Mrs. Greer, had not met her burden of proof pursuant to T.C.A. § 32–1–104, regarding the manner in which a will must be executed.

The trial court granted Austin's motion and directed a verdict on the grounds that Ms. Greer had not proved the proper execution of the codicil. Accordingly, judgment was entered declaring that the Last Will and Testament of Wheelock A. Bisson dated June 18, 1982, be admitted to probate without any codicils.

Greer has appealed and presents two issues for review. The first issue is whether the trial court erred in denying Greer's motion for summary judgment on the grounds that Mr. Austin's will contest was barred by T.C.A. § 32–4–108 (Supp. 1991) which provides:

> All ***actions*** or ***proceedings*** to set aside the probate of any will or petitions to certify such will for an issue of **devisavit vel non**, must be brought within two (2) years from entry of the order admitting the will to probate, or be forever barred, saving, however, to persons under the age of eighteen (18) years or of unsound mind at the time the cause of action accrues, the rights conferred by § 28–1–106 (Emphasis added.)

Greer contends that this statute bars Austin's action, because the 1984 codicil was admitted to probate by order entered November 26, 1985, and Austin filed no pleading in circuit court until he filed an answer to the complaint on December 2, 1988. Greer argues that the filing of the complaint in circuit court was the commencement of the action pursuant to Rule 3, Tennessee Rules of Civil Procedure, and because it was filed more than two years from the order of probate court admitting the will to probate, the action is barred by the two year statute of limitations in T.C.A. § 32–4–108.

We must respectfully disagree with Greer for several reasons. The statute itself is clear and unambiguous. It is confined to actions to set aside the probate of a will or to petitions to certify a will for an issue of devisavit vel non. Obviously, the proceedings contemplated by this statute are proceedings that take place in the probate court. It is equally clear that the proceeding in the circuit court on the issue of *devisavit vel non* after the case is certified from the probate court to the circuit court is in substance an original proceeding to probate the will, separate and distinct from any proceedings held in probate court. *Bearman v. Camatsos*, 215 Tenn. 231, 385 S.W.2d 91 (1964); *Arnold v. Marcom*, 49 Tenn.App. 161, 352 S.W.2d 936 (1961). In a proceeding of this nature, no particular form of pleading is required. All that is required is that the proponent shall offer it as a will and the contesting party shall deny it. See *Bowman v. Helton*, 7 Tenn.App. 325 (1928).

Finally, it has long been held in this state that the right of a contestant to resist the probate of a will is a preliminary matter and presents a separate and distinct issue from the issue of *devisavit vel non*, and that the order of the probate court sustaining or denying the right to contest the will in an appealable order. See *Winters v. American Trust Co.*, 158 Tenn. 479, 14 S.W.2d 740 (1929). T.C.A. § 32–4–108 clearly applies only to this separate action.

We hold that the statute of limitations set out in T.C.A. § 32–4–108 applies only to the proceeding filed in the probate court seeking to set aside the probate of a will or a certification for a will contest.

The second issue for review is whether the trial court erred in directing a verdict for the contestant Austin by refusing to allow the 1984 codicil to be submitted to the jury.

The rule for determining a motion for directed verdict requires the trial judge and the reviewing court on appeal to look to all of the evidence, taking the strongest legitimate view of it in favor of the opponent of the motion and allowing all reasonable inferences from it in his favor. The court must discard all countervailing evidence, and

if there is then any dispute as to any material determinative evidence or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied. *Tennessee Farmers Mut. Ins. Co. v. Hinson*, 651 S.W.2d 235 (Tenn. App. 1983).

The court should not direct a verdict if there is any material evidence in the record that would support a verdict for the plaintiff under any of the theories he had advanced. *See Wharton Transport Corp. v. Bridges*, 606 S.W.2d 521 (Tenn.1980).

The formal requirements for the execution of a will are set out in T.C.A. § 32–1–104 (1984), which provides:

Will other than holographic or nuncupative—The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator shall signify to the attesting witnesses that the instrument is his will and either:

(A) Himself sign;

(B) Acknowledge his signature already made; or

(C) At his direction and in his presence have someone else sign his name for him; and

(D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses

(2) The attesting witness must sign:

(A) In the presence of the testator; and

(B) In the presence of each other.

Austin contended, and the trial court agreed, that Greer's proof failed to established that Dr. Bisson did "signify to the attesting witnesses that the [1984 codicil] is his will . . ." as required by the statute. Greer argues that the testimony of the attesting witnesses was sufficient to create an issue of fact for the jury as to whether Dr. Bisson so signified.

Austin relies primarily upon the case of *Lawrence v. Lawrence*, 35 Tenn.App. 648, 250 S.W.2d 781 (1951) which involved a will without an attestation clause and where the only surviving attesting witness testified both that the testatrix informed her that the instrument to be witnessed was the testatrix's will and also testified to the contrary by stating that she did not know that the instrument was a will. The Court of Appeals, in directing a verdict against the will, said:

> The meaning of this statute is clear, plain and unambiguous. When a testator calls upon persons to witness his will, "the testator shall signify to the attesting witnesses that the instrument in [sic] his will." Surely it cannot be contended that this provision of the statute is doubtful of meaning. It simply means that the testator must state to the witnesses in substance that the paper writing is his will and that he wants them to sign it as witnesses. By the uncontradicted evidence before us that essential requisite of the execution of a valid will is lacking. The testatrix did not signify to the attesting witnesses that the instrument was the will of testatrix.
>
> 250 S.W.2d at 784.

Austin contends that the cases relied upon by Greer—*Whitlow v. Weaver*, 63 Tenn.App. 651, 478 S.W.2d 57 (Tenn. App. 1970); *Needham v. Doyle*, 39 Tenn.App. 597, 286 S.W.2d 601 (1955); and *Miller v. Thrasher*, 38 Tenn.App. 88, 251 S.W.2d 446 (1952), and *In re Estate of Bradley*, 817 S.W.2d 320 (Tenn.App.1991)—all involve wills which contained an attestation clause. He concedes that an attestation clause raises a strong presumption that the recitals therein contained are true and that contrary evidence raises a question for the jury. *Needham*, 286 S.W.2d at 601. We agree that these cases are distinguishable on their facts.

Greer also relies upon *Leathers v. Binkley*, 196 Tenn. 80, 264 S.W.2d 561 (1954). In *Leathers*, the will did not contain an attestation clause and the two attesting witnesses testified that they had signed the will in the presence of the testatrix and in the presence of each other. Neither witness testified specifically that the will had been declared by the testatrix to be her will at the time of the signing. In holding in favor of the will, the Court said:

> While it is true that neither Mr. Morrison nor Mrs. Gilmer remembered every detail of the signature and attestation of the will, the important fact in the record is that there was neither from Morrison, Mrs. Gilmer, nor the Notary Public, *a line of positive affirmative testimony that would support the allegations of the petition of contest, nor the verdict of the jury, that the will had not been regularly and legally executed in strict accordance with the requirements of Code, sec. 8089.4.*
>
> "Where, for instance, the subscribing witnesses testify that they do not recollect the circumstances, but do recognize their signatures, and declare that they would not have placed them to the instrument unless they had seen the testator sign it, or heard him acknowledge his signature, the due execution may be presumed." Sizer's Pritchard on Wills, § 336, p. 380.
>
> "In establishing the facts essential to the validity of

the will by a preponderance of the evidence, proponents are, however, not obliged in all cases to prove each fact by direct evidence; but they may rely upon presumptions. There is, at the outset, no presumption that the alleged testator executed the will in question or any will; but when a paper propounded as a will is shown to have been signed by the alleged testator and the requisite number of witnesses, ***in the absence of any satisfactory evidence to the contrary*** the presumption is that all the formalities have been complied with" (Our Emphasis). Page on Wills, Vol. 2, § 755, p. 462.

The forgoing statement is supported by cases from many jurisdictions, including Georgia, Illinois, Iowa, Missouri, Montana, New Jersey, New Mexico and South Carolina. Compare: Annotations, 47 L.R.A., N.S., 722; 76 A.L.R. 604; 14 L.R.A., N.S., 255; Ann. Cas. 426.
264 S.W.2d at 563 (Emphasis added).

Austin asserts that *Leathers* is not controlling authority for the case at bar because in *Leathers* there was no positive affirmative testimony that the will had not been regularly and legally executed. We agree with Austin the *Leathers* turned on that point, so we must examine the testimony in the case at bar to determine if there is uncontroverted positive testimony that Dr. Bisson did not "signify to the attesting witnesses" that the 1984 instrument was his will or codicil.

In examining the testimony of the witnesses, we must look at the testimony in the best light and afford to it all legitimate inferences. With that direction in mind, we will examine the testimony.

Charles Harrison's testimony is to the effect that prior to the gathering of attesting witnesses, notary public and testator, testator told him that he, the testator, had "this codicil that I want you all to notarize for me and witness." He specifically pointed out that this statement by Dr. Bisson was made before the gathering for the signing of the instrument.

Michael Harrison's testimony indicates both that he was told by Dr. Bisson that it was a codicil to be witnessed and that Dr. Bisson did not tell him what it was that he was witnessing. He specifically testified that he did not know what the document was. These contradictory statements effectively eliminate any testimony from this witness on that fact. *Taylor v. Nashville Banner Pub. Co.*, 573 S.W.2d 476 (Tenn.App.1978) cert. den. 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 396 (1979); *Donaho v. Large*, 25 Tenn.App. 433, 158 S.W.2d 447 (1941).

Lillie Thomas, the notary public, testified that Dr. Bisson said he had a paper to be witnessed and he did not use any language such as will, codicil or anything of that sort. Dr. Bisson's statement was made at the time the parties gathered for the signing.

An examination of the witness' testimony indicates that there is uncontroverted affirmative proof that Dr. Bisson did not signify to at least one attesting witness that the instrument to be witnessed was his will or a codicil thereto. Therefore, the trial court correctly directed a verdict against the admission of the will.

The judgment of the trial court is affirmed and this case is remanded to the trial court for such further proceedings as may be necessary.

Costs of the appeal are assessed against the appellant.

TOMLIN, P.J. (W.S.), and HIGHERS, J., concur.

Supreme Court of New Mexico.

Michael Anthony CORDOVA,

Plaintiff–Appellant,

v.

Frederick WOLFEL, Jr., David Abeyta,

James Abeyta, Priscilla Abeyta, and

National Car Rentals Systems, Inc.,

Defendants–Appellees.

120 N.M. 557, 903 P.2d 1390 (1995)

MINZNER, Justice.

Cordova appeals from a decision granting summary judgment in favor of National Car Rentals Systems (National). This case raises the issue of whether the Mandatory Financial Responsibility Act (the MFRA), NMSA 1978, §§ 66-5-201 to -239 (Repl.Pamp.1994), imposes liability upon a self-insured rental car company for the negligence of an unauthorized driver, despite a contrary rental contract provision. We conclude that the MFRA does not impose such liability, and we affirm summary judgment.

I. FACTS

On January 26, 1990, Priscilla Abeyta rented a car from National at the Albuquerque Airport. Her purpose was to drive her son David and his two friends to Reno, Nevada. At the time of renting, she intended to drive the vehicle exclusively herself. There is a factual dispute between the parties about what rental documents Abeyta read and consented to at the time that she entered into the lease. It is clear, however, that Abeyta signed a standard National form wherein she acknowledged that only she had an "additional authorized driver may drive vehicle." A space for the designation of an additional authorized driver appeared next to Abeyta's signature, and that space was blank. Abeyta declined to purchase optional personal accident insurance.

Shortly after picking up the vehicle, Abeyta became ill, and she decided not to make the trip. She gave permission to her son David to drive. There appears to be a factual dispute about whether she also gave David's friends Wolfel and Cordova permission to drive. After the three men started on their trip, they began to drink, and Wolfel took over the driving. There is a factual dispute about whether Wolfel had had anything to drink and whether he was intoxicated at the time of the accident, which occurred on an interstate highway in Arizona.[1] The accident resulted, at least in part, from Wolfel's negligence, and there were no other vehicles involved.

Cordova claims to have sustained injuries in the amount of $650,000. This figure includes medical expenses exceeding $69,000, lost wages, and permanent loss of the sense of smell. Cordova brought suit against Wolfel, National, Mr. and Mrs. Abeyta, their son David, and Travelers Insurance Company, the Abeytas' personal liability insurer. Cordova has settled his claims against the Abeytas and Wolfel. The trial court granted summary judgment in favor of Travelers after it determined that the insurance contract between Travelers and the Abeytas did not extend coverage to the rental car. National is the sole remaining defendant.

II. DISCUSSION

A. Summary Judgment

Along with its motion for summary judgment, National submitted the car rental agreement wherein Abeyta acknowledged that she was the only authorized driver of the vehicle. National asserted that because the agreement provided liability coverage only to authorized drivers, National had no obligation to indemnify Wolfel for liability resulting from his negligent operation of the vehicle. National maintains that as the self-insured owner of the rental car, it is not an insurer, and there was no insurance contract between it and Abeyta. National further contends that the MFRA specifically exempts self-insurers from its provisions.

Cordova argues that National's "Certificate of Self-Insurance [issued by the State Superintendent of Insurance] provides liability coverage on [the] vehicle driven by Frederick Wolfel." Cordova does not dispute National's contention that Wolfel was not an authorized driver. Rather, Cordova argues that Wolfel was a permissive driver because he operated the vehicle with Abeyta's express or implied permission. *See United Servs. Auto. Ass'n v. National Farmers Union Property & Casualty*, 119 N.M. 397, 891 P.2d 538 (1995). This contention rests upon the premise that National, as a self-insurer, provided insurance coverage under which Abeyta was the "named insured." Cordova asserts that because the MFRA mandates that liability coverage must extend to persons using the vehicle with the express or implied permission of the named insured, coverage extends to Wolfel by operation of law. *See id.;* § 66-5-221(A)(2).

Cordova argues on appeal that the trial court erred when it determined that, as a matter of law, National is not liable for Wolfel's negligence. We agree with the trial court's interpretation of the rental agreement and its resolution of the purely legal issues presented by this case. Resolving all disputed facts in favor of Cordova, we conclude that National is entitled to judgment, and we affirm. *See Tapia v. Springer Transfer Co:*, 106 N.M. 461, 462-63, 744 P.2d 1264, 1265-66 (Ct.App.), *cert. quashed*, 106 N.M. 405, 744 P.2d 180 (1987).

B. Self-Insurance

[1][2][3] Most authorities agree that self-insurance is not insurance. Insurance is a contract whereby for consideration one party agrees to indemnify or guarantee another party against specified risks. *See New Mexico Life Ins. Guar. Ass'n v. Moore*, 93 N.M. 47, 50, 596 P.2d 260, 263 (1979); NMSA 1978, § 59A-1-5 (Repl.Pamp.1992). In contrast, self-insurance is a process of risk retention whereby an entity "set[s] aside assets to meet foreseeable future losses." Robert E. Keeton & Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices* § 1.3, at 14 (1988); *see also Levi Strauss & Co. v. New Mexico Property & Casualty Ins. Guar. Ass'n (In re Mission Ins. Co.)*, 112 N.M. 433, 437, 816 P.2d 502, 506 (1991) (holding that a certificate of self-insurance "cannot be equated with an insurance contract or policy").

1. We assume that New Mexico's substantive law applies to this appeal because neither party asserts otherwise.

A self-insurer protects itself from liability; it does not assume the risk of another. *See Levi Strauss & Co.*, 112 N.M. at 436-37, 816 P.2d at 505-06; *Consolidated Enters., Inc. v. Schwindt*, 172 Ariz. 35, 833 P.2d 706, 709 (1992) (en banc). We note that self-insurance and insurance serve similar purposes and that insurance principles may sometimes apply to self-insurance by way of analogy. Nonetheless, we reject as inaccurate Cordova's theory that self-insurance is a sub-set of insurance.

[4] The relationship between National and its lessees is one of bailment, and there generally is no common law basis for imposing upon a bailor liability for a bailee's negligent operation of a bailed vehicle. *See Stover v. Critchfield*; 510 N.W.2d 681, 683-84 (S.D.1994). The legislatures of a few states have altered this common law rule through legislation. *See* Ariz.Rev.Stat.Ann. § 28-324 (1994 Cum. Supp.) (requiring owner of rental vehicles to obtain public liability insurance protecting passengers and third parties against negligence of renter; however, owner not liable for damages beyond limits of insurance policy); Conn. Gen Stat. § 14-154a (1995) (owner of leased vehicle liable for damage caused by operation of leased vehicle to same extent as operator would be held liable if operator were owner); *cf.* Neb.Rev.Stat. § 25- 21,239 (1994 Cum.Supp.) (making owner of leased truck jointly and severally liable with lessee for lessee's negligence). Moreover, the court of at least one state has determined that, as a matter of public policy, a vehicle lessor will be liable for the negligence of a lessee, irrespective of contrary contractual language. *See Motor Vehicle Accident Indem. Corp. v. Continental Nat'l Am. Group Co.*, 35 N.Y.2d 260, 360 N.Y.S.2d 859, 861-63, 319 N.E.2d 182, 184-85 (1974). The New Mexico legislature has not enacted legislation that would make vehicle lessors generally liable for injuries that result when lessees negligently use their vehicles, and we decline to take that step in the absence of legislative action. We conclude that a vehicle lessor is liable for the negligence of a lessee or a lessee's permittee only to the extent that a statute, administrative regulation, or agreement of the parties imposes such liability.

[5] Cordova's arguments on appeal largely proceed from the premise that a self-insured entity such as National is subject to the requirements of the MFRA. However, the MFRA itself belies this contention. In unambiguous language, the MFRA exempts from its provisions "motor vehicle[s] approved as self-insured by the superintendent of insurance." Section 66-5-207(E). We recognize that there may be situations where it is appropriate to apply the provisions of the MFRA to self-insurers by analogy. Nonetheless, we cannot ignore the statute's plain language, *see V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 473 853 P.2d 722, 724, (1993), and a literal interpretation of Section 66-5-207(E) does not lead to an absurd result. *Cf. State v. Gutierrez*, 115 N.M. 551, 552, 854 P.2d 878, 879 (Ct.App.) (holding that where literal language of statute leads to absurd result, court may construe statute to avoid such result), *cert. denied*, 115 N.M. 545, 854 P.2d 872 (1993).

* * *

III. CONCLUSION

[8] We conclude that the trial court correctly determined that National is exempt from the MFRA, and that, in the absence of a contractual agreement, National is not vicariously liable for Wolfel's negligence. Summary judgment in favor of National is affirmed.

IT IS SO ORDERED.

BACA, C.J., and FROST, J., concur.

DEAN et al. v. DICKEY et al.
No. 4662.

Court of Civil Appeals of Texas. El Paso.
Sept. 28, 1949.

Rehearing Denied Oct. 26, 1949.
225 S.W.2d 999 (Tex. Civ. App. 1949)

MCGILL, Justice.

The sole question presented by this appeal is whether a typewritten instrument of testamentary character typed wholly by Trollis Dell Dickey on June 12, 1945, and intended by him to be his last will and testament, and signed by him and one witness in ink, is entitled to probate as the holographic will of the said Trollis Dell Dickey, Deceased. The trial court affirmed the order of the County Court denying probate of the instrument, and this appeal has been duly perfected.

The Statutes applicable on June 12, 1945, are the following: Vernon's Texas Civil Statutes:

Article 8283: "Every last will and testament except where otherwise provided by law, shall be in writing

and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in the presence of the testator."

Article 8284: "Where the will is wholly written by the testator the attestation of the subscribing witnesses may be dispensed with."

Article 3344, Section 4: "If the will was wholly written by the testator, by two witnesses to his handwriting, which may be made by affidavit taken in open court and subscribed to by the witnesses, or by deposition."

These Statutes construed together leave no room for doubt that the language employed in Article 8283 "if not wholly written by himself"; in Article 8284 "wholly written by the testator" and in Article 3344, Section 4 "if the will was wholly written by the testator, by two witnesses to his handwriting," require that the words "wholly written" used in these articles be construed to mean wholly written in the handwriting of the testator. Article 8283 prescribes the requisites of a holographic will. Article 8284 provides that when those requisites have been complied with, attestation by subscribing witnesses may be dispensed with, while Article 3344, Section 4 prescribes the character of proof necessary to prove such will. To give the identical language "wholly written" used in these Statutes the meaning for which appellants contend would render Articles 8283 and 3344, Section 4, inconsistent and repugnant, since such interpretation would make it impossible to prove a typewritten will in the manner prescribed by Article 3344, Section 4, that is, by two witnesses to the handwriting of the testator.

Appellants concede that this case is one of first impression in this State, and that the construction for which they contend is contrary to the overwhelming weight of authority in other jurisdictions where similar Statutes have been construed, citing 68 C.J., p. 719, Section 402, and 57 Am.Jur. p. 433, Section 634. The reason for the rule laid down by these authorities is ably stated in Re Dreyfus' Estate, 175 Cal. 417, 165 P. 941, L.R.A. 1917F, 391:

"From time immemorial, letters and words have been written with the hand by means of pen and ink or pencil of some description, and it has been a well-known fact that each individual who writes in this manner acquires a style of forming, placing, and spacing the letters and words which is peculiar to himself and which in most cases renders his writing easily distinguishable from that of others by those familiar with it or by experts in chirography who make a study of the subject and who are afforded an opportunity of comparing a disputed specimen with those admitted to be genuine. The provision that a will should be valid if entirely 'written, dated, and signed by the hand of the testator,' is the ancient rule on the subject. There can be no doubt that it owes its origin to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that therefore the requirement that it should be in the testator's handwriting would afford protection against a forgery of this character."

See also: *Adams' Ex'x v. Beaumont*, 226 Ky. 311, 10 S.W.2d 1106; and *McNeill v. McNeill*, 261 Ky. 240, 87 S.W.2d 367, where the statutory language "wholly written" under construction is identical with that of ours. However, appellants contend that a different interpretation should be given to Articles 8283 and 8284, supra, for two reasons: First, because of Section 3, Article 23:

"Definitions" of Title 1: "General Provisions" R.C.S., which provides:

"'Written' or 'in writing' includes any representation of words, letters or figures, 'whether *by writing, printing or otherwise*'" (Our Emphasis).

Secondly: Because of the emergency clause of S.B. 328, enacted by the 50th Legislature, Acts of 1947, 50th Leg., Reg. Sess., Ch. 170, p. 275, which amended Articles 8283 and 8284 by substituting for the words "wholly written by himself" in Article 8283, the words "wholly in the handwriting of the testator" and for the words "wholly written by the testator" in Article 8284, the words "wholly written in the handwriting of the testator." The relevant portion of the emergency clause is "that under the present interpretation of the statute any form of writing including *typewriting, or printing or otherwise* (our emphasis) is sufficient to constitute a will which leaves a dangerous and unsafe condition not properly protecting widows and orphans of this state" Section 3.

By the very terms of Article 23, the meaning given the words "written or in writing" by Section 3 has no application where "a different meaning is apparent from the context." As above pointed out, Articles 8283–8284 and 3344, Section 4, construed together leave no room for doubt as to the meaning of the words "wholly written" therein employed. Therefore, Article 23, Section 3 has no application. For like reason, without application is the rule enunciated in *Stanford et al v. Butler*, 142 Tex. 692, 181 S.W.2d 269, *loc. cit.* 274(8, 9), 153 A.L.R. 1054:

> "* * * where a later act implies a particular construction of an existing law, and particularly where the existing law is ambiguous or its meaning uncertain, interpretation of the prior act by the Legislature as contained in the later act is persuasive when a court is called upon to interpret the prior law."

Articles 8283 and 8284, when construed with Article 3344, Section 4, are not ambiguous, nor is their meaning uncertain. Furthermore, when S.B. 328 was enacted there had been no decision by any appellate court of this State construing Articles 8283 and 8284 as declared in the emergency clause. From the similarity of the language emphasized it is probable that the Legislature erroneously assumed that Article 23, Section 3 was applicable and controlling in its construction of Articles 8283 and 8284. For this additional reason, the above quoted rule is inapplicable.

The judgment of the trial court is affirmed.

In re ESTATE OF Clifford P. KUSZMAUL, Deceased. No. 85–647.

District Court of Appeal of Florida, Fourth District.

June 25, 1986.
491 So. 2d. 287 (Fla. Dist. Ct. App. 1986)

ON MOTION FOR REHEARING

LETTS, Judge.

The motion for rehearing is granted. The original opinion filed May 7, 1986, is withdrawn and we substitute the following: This case involves the disposition of certain estate assets. The distribution hinges on whether a conformed copy of a will, found together with an original executed codicil, will suffice to uphold the provisions of that will and its codicil, despite the absence of the original executed last will and testament. The trial judge denied the petition for administration. Under the facts here presented, we disagree and reverse.

When the testator died, the interested parties fruitlessly searched for the original executed will, supposedly last seen in the decedent's possession. There is a dispute over where the copy of that will and the codicil were first located. It is conceded, however, that shortly after the testator died, a conformed copy of the will and the original of the executed codicil thereto, were found together among the decedent's personal possessions. The codicil stated in its concluding paragraph:

> THIRD. I hereby ratify and confirm my said Last Will and Testament except insofar as any part thereof is modified by this Codicil.

We begin by reaffirming our conclusion in *In the Estate of Parson*, 416 So.2d. 513, 515 (Fla. 4th DCA 1982) that there is a "presumption that a will which was in the possession of the testator prior to death and which cannot be located subsequent to death was destroyed by the testator with the intention of revoking it." We further continue to align ourselves with the proposition, also set forth in *Parson*, that "the presumption may only be overcome by competent and substantial evidence." *Id.* at 515. Unlike the trial judge, however, we are of the opinion that the facts of the case now before us yield competent and substantial evidence to overcome the presumption.

The proponents of the view that the instant will was revoked point to another decision of this court with somewhat similar facts. *See In re Estate of Baird*, 343 So.2d. 41 (Fla. 4th DCA 1977). However, there are important distinctions. In *Baird* the discovered executed codicil was not, so far as we can determine, accompanied by a copy of the will, as it was in the matter now before us. Further, while Mr. Kuszmaul, like Mr. Baird, showed continuing affection for the beneficiaries under the will, the former also wrote a letter to one of the beneficiaries under the will, after its execution, stating that property devised in that will would "someday . . . be yours."

We are of the opinion that the instant cause is more closely allied to the facts in the New York decision of *Will of Herbert*, 89 Misc.2d 340, 391 N.Y.S.2d 351 (1977) where the court held that the presumption was overcome because a copy of the will and the original codicil "were carefully kept together among [the testator's] personal possessions" and because it would be "unlikely that the testator intentionally revoked his will while retaining the codicil and a copy of the original will." *Id.* at 352.

We would also point to two Florida statutes not considered in *Baird*. The first of these is section 732.5105, Florida Statutes (1983) wherein it is stated that "the execution of a codicil referring to a previous will has the effect of republishing the will as modified by the codicil." True, that

section does not set forth whether or not it is applicable if the executed original will cannot be found. However, the ensuing section 732.511, provides that even if a will has been revoked "it may be republished and made valid [by] . . . the execution of a codicil republishing it with the formalities required by this law for the execution of wills." The codicil before us now was executed with requisite formality.

In the sum of all that we have set forth above, we conclude that the presumption was overcome and the trial judge was in error.

REVERSED AND REMANDED IN ACCORDANCE HEREWITH.

DOWNEY and DELL, JJ., concur.

McCLAIN et al. v. ADAMS.

In re DOUGLASS' ESTATE.
No. 2340—7579.

Commission of Appeals of Texas, Section A.
Jan. 15, 1941.
146 S.W.2d 373 (Tex. Civ. App. 1941)

HICKMAN, Commissioner.

The subject matter of this litigation is an alleged nuncupative will. Annie Douglass, deceased, was the alleged testator; Willie Adams, defendant in error, was the proponent in the probate court; and Eliza McClain and others, plaintiffs in error, the next of kin of the deceased, were the contestants. The county court of Jefferson county sustained the contest and denied the probate. On appeal the district court of that county entered judgment admitting the alleged will to probate, which judgment was affirmed by the Court of Civil Appeals. 126 S.W.2d 61.

One of the requisites of a nuncupative will, as prescribed by article 3346, R.C.S., is that, "it be made in the time of the last sickness of the deceased." As we understand the position of plaintiffs in error, they concede that the trial court was warranted in finding that all other statutory requisites of a nuncupative will were met and complied with. Their sole contention here is that, as a matter of law, the words uttered by the deceased which are claimed to constitute her will were not uttered during her "last sickness" within the meaning of those words as used in the article above referred to. The case turns upon our decision of that single question and our statement will therefore be limited to such facts as are thought to be relevant thereto.

Annie Douglass, the alleged testator, died on September 8, 1934, at the age of more than sixty years. During the four years next preceding her death she had "spells." Dr. R. N. Miller, a witness for the proponent, began attending her professionally in June 1934. In his opinion the original cause of her condition was malaria, but the immediate cause of her death was "aortic insufficiency," which he explained to be a weakened condition of the heart and aorta. The "spells" about which the other witnesses testified were in the nature of fainting spells brought about, according to the evidence as we understand it, by the general weakened condition of her heart. The words claimed to constitute a nuncupative will were spoken by the deceased at about 4:30 p.m. on Thursday, September 6, 1934. The proponent and four other witnesses were present in her bedroom at that time. One of the witnesses, Berttrue McDaniel, went to the home of the deceased to pay her some rent. He testified that he stayed there about two hours, and that while he was there she said to him:

> "'Mr. McDaniels, I am feeling not very well at this time, and I know that I am going to die,' and says 'I want Willie Adams to have everything that I possess, and land and money.' She says 'She is the only one stood to me in my sick hour at my bedside.' Says, 'I haven't any relatives at all.'"

"She called your name and said that?"

"Yes, sir, said 'Mr. McDaniels.'"

Thereafter, on September 12, 1934, the witness committed the substance of the testimony to writing, his written memorandum being as follows:

> "Beaumont, Texas, Sept. 12, 1934.
>
> On the 6 day of September, 1934, I was at Annie duglas home and she told me and others beside that at her death she wanted Willie Adams to have all that she had land and money and every thing else that she new she was going to die that she had no kin and she was the only one that sat at her bed side and waited on her and she wanted her to have all her estate at her death
>
> 'Berttrue McDaniel.'"

He testified that when he went to the home of the deceased he found her in bed; that when he paid her the rent she handed him a receipt therefor which she had

theretofore written. His testimony with regard to what occurred on the occasion is, in the main, corroborated by the other witnesses who were present at that time. There is practically no testimony concerning the condition of the deceased from Thursday afternoon until about noon on Saturday. The proponent testified that "she had taken the bed on a Thursday. Friday she was in and Thursday she had taken the bed and stayed in bed from Thursday up to Friday." That testimony probably means that deceased did not leave her home on Friday but was in bed at least a part of that day. Shortly before noon on Saturday morning the deceased went to the home of a neighbor, Julia Keegans, to get Julia to pay a water bill for her which amounted to $1. Deceased had only a $5 bill with her and Julia was unable to change it. Deceased next went to a grocery store near by and purchased some bacon and a small sack of flour. She then returned to Julia's home and gave her $1 with which to pay the water bill. At that time she discovered that she had failed to bring the bill with her, whereupon Julia accompanied her home to get it. The deceased carried the bacon and Julia carried the flour. Shortly after reaching home the deceased became sick. Dr. Miller was later called and he came to see her about six o'clock that evening. She died some two hours or more thereafter.

All text-writers and opinions on the subject of what constitutes "last sickness" within the meaning of statutes relating to nuncupative wills seem to agree that the leading authority upon the question is *Prince v. Hazleton*, 20 Johns., N.Y., 502, 11 Am.Dec. 307. Of that case the author of Redfield, *On the Law of Wills, 4th Ed.*, in Vol. 1, ch. VI, Section 17a wrote: "* * * This subject came before the Court of Errors in New York, at an early day, * * * and is most exhaustively discussed by Chancellor Kent, and by Mr. Justice Woodworth. These opinions contain the substance of all the learning upon the subject of nuncupative wills, from the earliest days to that date and very little has occurred since, which could add much to the very full discussion which the subject there receives."

Our investigation has lead [sic] us to the conclusion that the foregoing is still an accurate statement of the situation. Nothing has been written to date, within our knowledge, which adds materially to the discussion contained in the majority and minority opinions in that case. In fact, there have been relatively few cases before the appellate courts in this generation in which a nuncupative will was offered for probate.

In the majority opinion Chancellor Kent announced this conclusion: "Upon the strength of so much authority, I feel myself warranted in concluding, that a nuncupative will is not good, unless it be made by a testator when he is in extremis, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will."

That has become known generally as the in extremis rule. The minority opinion in that case announced a somewhat more liberal rule of construction. From that decision two lines of decisions have emerged, one based upon the doctrine that the testator must be in extremis, as announced by Chancellor Kent in the majority opinion, and the other based upon the more liberal rule announced by Justice Woodworth in the dissenting opinion, that the testator need not actually be in extremis.

The majority of the courts have adopted the Chancellor Kent doctrine. *Schmitz v. Summers*, 179 Miss. 260, 174 So. 569; *O'Neill v. Smith*, 33 Md. 569; *Bellamy v. Peeler*, 96 Ga. 467, 23 S.E. 387; *Page v. Page*, 2 Rob., Va., 424; *Reese v. Hawthorn*, 10 Grat., Va., 548. Annotations: 20 Am.Dec. 45; 9 A.L.R. 464; 13 L.R.A., N.S., 1092; 67 Am.St.Rep. 572.

The Court of Civil Appeals in its opinion in this case recognized the existence of both the rules above referred to, but concluded that Texas had not adopted the majority rule, and upon the theory that the minority rule was the more reasonable, it adopted and applied that rule. We cannot agree with its conclusions.

In the first place, this court has approved the rule of strict construction. While the facts in the cases below cited were not like those before us, still they presented situations calling upon the court to declare the rule of construction which should govern in cases like the instant one, and the court declared it in very clear language.

In *Jones v. Norton*, 10 Tex. 120, will be found the following: "* * * Nuncupative wills had their origin in the suddenness and urgency of the occasion, where there were present no means of making a formal written will, and no time for delay. And, among all civilized nations, where the necessity has been apparent, nuncupative wills have, under some regulations, been allowed. But the danger of fraud, in setting up such wills, has always exacted full and satisfactory proof of the existence of the necessity; and, where we have a statute regulating such wills, there is the same reason why we should require its conditions and requisites to be satisfactorily made out. * * *"

In *Mitchell v. Vickers*, 20 Tex. 377, it is stated: "Nuncupative wills are not favorites of the law. But as they are authorized by the statute, they must, when duly proved, be allowed and established. They are hedged round with numerous restrictions, to guard against the frauds for which oral wills offer so many facilities; and it is a well established

rule, that strict proof is required of all the requisites prescribed by the law. ([*Parsons v. Parsons*] 2 Greenl. [Me.], 298; [In re Yarnall's Will] 4 Rawle [Pa.], 46 [26 Am.Dec. 115]; 20 Johns. 502; 1 Jarman on Wills, 89; Modern Probate of Wills, 304.) The provision of the statute (Hart.Dig. Art. 1113) is essentially a copy from the statute of frauds of the 29 Ch. 2, Sect. 19-21; and in substance the same provision is found in the codes of most of the other States; and everywhere a strict construction has been applied."

One of the authorities cited above, 20 Johns. 502, is the Prince-Hazleton case.

And in *Watts v. Holland*, 56 Tex. 54, Chancellor Kent's opinion in the Prince-Hazleton case, was cited in support of the following conclusion announced in the opinion: "* * * Wills of this kind, by the law, are allowed to exist, on its bare toleration, and under the shadow of its jealously; and the establishment of them is allowed, subject to exacting restrictions and conditions which correspond in degree with its fears of their dangerous qualities. * * *"

From the foregoing we conclude that early in the jurisprudence of this state the majority rule that the testator must be in extremis was approved by this court.

In the second place, we do not concur in the conclusion of the Court of Civil Appeals that the so-called liberal rule is the more reasonable. In Chancellor Kent's opinion, supra, written in 1822, reference was made to the fact that, in the ages of Henry the Eighth, Elizabeth and James reading and writing had become so widely diffused that nuncupative wills were confined to extreme cases. Under the view there expressed, which is the commonly accepted view, the more widely the ability to read and write becomes diffused, the less justification exists for recognizing nuncupative wills, except in cases of necessity. With the general diffusion of knowledge at this time, we can perceive of no reason why we should depart from or vary the terms of the rule of construction as heretofore pronounced by this court. The instant case appears to be free of the taint of fraud, but to adopt the rule pressed upon us would be to afford opportunity for fraud in many other cases.

Applying the approved rule to the facts of this case, it is obvious that Annie Douglass was not in extremis when she uttered the words claimed to constitute her will. Thereafter she had the time, ability and opportunity to prepare or have prepared a written will. About that there is no dispute in the record. Certain it is that she could have attended to that matter on Saturday morning when she was able to transact business and go in person to a store to purchase groceries. The probate court did not err in refusing to admit the alleged will to probate.

It is therefore ordered that the judgments of the district court and the Court of Civil Appeals both be reversed, and that judgment be here rendered that the alleged will be not admitted to probate. It is further ordered that upon receipt of the mandate of this court the district court certify this court's judgments to the county court for observance.

Opinion adopted by the Supreme Court.

The PEOPLE of the State
of Illinois, Appellant,

v.

Robert SANDERS, Appellee.
No. 57801.
Supreme Court of Illinois.
Dec. 16, 1983.
99 Ill. 2d 262, 457 N.E.2d 1241 (1983)

SIMON, Justice/

The principal issue raised by this appeal is the construction and application to be given to the Illinois statute which prohibits husband and wife from testifying in criminal trials as to any communication or admission made one to the other or as to any conversation between them (Ill.Rev.Stat. 1981, ch. 38, par. 155–1). More precisely, the question is whether the privilege established by the statute is destroyed when the communication, admission or conversation in question is in the presence of children of the spouses (including a child of one of the spouses who is not the child of defendant) who are old enough to understand the content of the conversation. A secondary issue is whether the plain error rule (87 Ill.2d R. 615) should be applied to the admission of testimony about two conversations between spouses which may not have occurred in the presence of children but where no objection was advanced when all that was said in them was repeated in a third conversation which took place a few hours later and concerning which testimony was admissible.

A murder conviction of the defendant, Robert Sanders, in a jury trial in the circuit court of Cook County based in part upon the testimony of his wife was reversed by the appellate court (111 Ill.App.3d 1, 66 Ill.Dec. 761, 443

N.E.2d 687). We allowed the State's petition for leave to appeal (87 Ill.2d R. 315(a)).

During pretrial discovery, the defense filed a motion *in limine* to prevent the defendant's wife, Beverly Sanders, from testifying about conversations she had with her husband, the defendant. Shortly after it was filed, the public defender's office, which had been representing the defendant, was replaced by other appointed counsel, who represented the defendant at trial. Defendant's new attorney did not seek a ruling on the motion *in limine*, and that motion was never ruled upon. Neither did defendant's attorney object at trial to the wife's testimony.

She testified to three conversations with her husband which implicated him in the murder of which he was convicted. In the first conversation, which occurred the day before the murder, she testified the defendant told her while one or more of her children was present that he was going to rob the murder victim. The second conversation occurred in their bedroom in the early morning hours of the next day. During this conversation, at which no one else was present, the defendant gave his wife a ring and a watch which the woman who lived with the murder victim identified at trial as the victim's. The third conversation took place later that day. The defendant told her, she testified, that he had robbed the murder victim after striking him with a brick and tying him up. He also told her that he got the watch and ring during the robbery. This conversation, she said, was in the presence of their children.

The State argues that communications between spouses are privileged only when intended to be confidential. In this case the State contends the confidentiality of the first and third conversations was destroyed by the presence of their children. It contends that the second conversation was not confidential because the defendant must have expected that his wife would display the watch and ring he gave her by wearing them in public, and that he did not therefore intend his act to be confidential. The defendant argues that the record does not clearly show that their children were in the immediate presence of his wife and himself in a position to hear their first and third conversations, and that during the second communication he acted in reliance upon the expectation that what transpired would be confidential.

The starting point for our decision is the interpretation given in *People v. Palumbo* (1955), 5 Ill.2d 409, 125 N.E.2d 518, to the statute relating to the admissibility of interspousal communications (Ill.Rev.Stat.1981, ch. 38, par. 155–1). This court, in *Palumbo*, rejected the argument advanced by the defendant there that the statute covered all conversations between spouses, holding instead that the statutory privilege, like the similar common law privilege, applied only to conversations which were of a confidential character. The problem is to determine under what circumstances conversations between spouses are to be regarded as confidential in character. This court, in *Palumbo*, adopted the standards announced by the Supreme Court in *Wolfle v. United States* (1934), 291 U.S. 7, 14, 54 S.Ct. 279, 280, 78 L.Ed. 617, 620, a holding which the court 41 years later in *Trammel v. United States* (1980), 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186, said remained undisturbed, by adopting language from *Wolfle* which teaches the following: There is a presumption that interspousal communications are intended to be confidential. But if, because of the circumstances under which the communication took place, it appears that confidentiality was not intended, the communication is not to be regarded as privileged. In this regard, communications made in the presence of third persons are usually not regarded as privileged because they are not made in confidence. In *Palumbo* the communication testified to by the wife was regarded as not privileged because the entire conversation took place in the presence of a third person who, according to the wife, was trying to purchase narcotics from the husband, who was the defendant in the case.

We agree with the appellate court's conclusion that the evidence establishes that the third conversation took place in the presence of her sons, Robert who was 13, and two others who were 10 and 8 at the time. On cross-examination the wife repeated her direct testimony, which is quoted at length in the appellate court opinion, that the three children were present during the third conversation when the following exchange took place:

"Q. Did you know anything about Curtiss Lovelace?
A. Only what my husband had told me.
Q. You say he was bragging when he told you this?
A. Yes.
Q. He wasn't nervous, was he?
A. Not until he found out the man was dead.
Q. When he first told you was he nervous or bragging?
A. Not nervous.
Q. Pacing around the room?
A. No, he wasn't.
Q. Excited?
A. No.
Q. Who was present when this conversation occurred?
A. Robert, Albert and Pee Wee.
Q. They were all there?
A. Yes."

Following this exchange there was another reference during her cross-examination to the presence of the wife's oldest son:

"Q. And that day of the events that you have testified to, October the 14th, that day you had just finished a fight with your husband, right?
A. Yes.
Q. Did he threaten your son, Robert, in any way at that time?
A. No.
Q. But during all of these conversations, Robert, your son, was present, right?
A. Yes, he was."

The question presented in this case is whether the communications fell outside the ambit of the statute's protection because of the presence of the children. We have found no Illinois case holding that the confidentiality of a conversation between a husband and wife is preserved when it takes place in the presence of children. The appellate court appears to have exhaustively researched the subject and concluded, as we do, that the great weight of authority is that the presence of children of the spouses destroys confidentiality unless they are too young to understand what is being said. (See, e.g., *Master v. Master* (1960), 223 Md. 618, 166 A.2d 251; *Freeman v. Freeman* (1921), 238 Mass. 150, 130 N.E. 220; *Fuller v. Fuller* (1925), 100 W.Va. 309, 130 S.E. 270; McCormick, *Evidence* sec. 80, at 166 (2d ed. 1972); 97 C.J.S. *Witnesses* sec. 271, at 777 (1957).) Nothing in the record indicates that Robert, then 13 years old, was not old enough or sufficiently bright to understand the conversation at which he was present, particularly inasmuch as the wife's testimony indicates that some of it was directed to him. In these circumstances, under the rule followed in this State, his presence rendered the conversation ineligible for the protection of the statutory privilege.

The defendant argues that this court should recognize a privilege, which he concedes does not presently exist in Illinois, between parents and children which would include conversations between spouses at which their children are present. Courts in a few other jurisdictions have cloaked communications between parent and child with a privilege. (*In re Agosto* (D.Nev.1983), 553 F.Supp. 1298; *People v. Fitzgerald* (1979), 101 Misc.2d 712, 422 N.Y.S.2d 309.) The source of all privileges currently applicable in Illinois, with the exception of the attorney–client privilege which has a long-standing common law existence, is statutory. (See Ill.Rev.Stat. 1981, ch. 51, par. 5.1, Ill.Rev.Stat.1981, ch. 38, par. 104–14 (physician–patient); Ill.Rev.Stat.1981, ch. 51, par. 48.1 (clergymen); Ill.Rev.Stat.1981, ch. 91fi, par. 810 (therapist–client); Ill.Rev.Stat.1981, ch. 111, par. 5533 (accountants); Ill.Rev.Stat.1981, ch. 51, par. 5.2 (rape crisis personnel–victims); Ill.Rev.Stat.1981, ch. 48, par. 640 (public officers, regarding unemployment compensation).) We decline, therefore, to introduce an additional privilege by judicial authority which would be applicable to communications between parents and children. Even if we were to initiate this type of privilege, to assist the defendant here we would have to extend it to children of only one spouse, for Robert, the oldest and presumably the most discerning of the children and who was privy at least to the third conversation, was the son of the wife and not the defendant. The statute by its terms does not contemplate such a stretch. Were we to recognize such a privilege under our judicial authority, it would be impossible to contain it logically from spreading to conversations with other relatives in whom a person might normally confide, or even to close friends.

Moreover, we are constrained not only by the legislature's lack of interest in extending an interspousal communications privilege to communications between parent and child, but also by the fact that evidentiary privileges of this sort exclude relevant evidence and thus work against the truthseeking function of legal proceedings. In this they are distinct from evidentiary rules, such as the prohibition against hearsay testimony, which promote this function by insuring the quality of the evidence which is presented. The privilege at issue here results not from a policy of safeguarding the quality of evidence at trial but from a policy of promoting family harmony independent of what might occur in a trial at some future date. The Supreme Court in *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195, has stated:

> "Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' *United States v. Bryan* [(1950), 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884, 891.] As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidences has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' *Elkins v. United States* [(1960), 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669, 1695] (Frankfurter, J., dissenting)."

See also 8 J. Wigmore, *Evidence* section 2285, at 527–28 (1961).

The expansion of existing testimonial privileges and acceptance of new ones involves a balancing of public policies which should be left to the legislature. A compelling reason is that while courts, as institutions, find it easy to perceive value in public policies such as those favoring the admission of all relevant and reliable evidence which directly assist the judicial function of ascertaining the truth, it is not their primary function to promote policies aimed at broader social goals more distantly related to the judiciary. This is primarily the responsibility of the legislature. To the extent that such policies conflict with truth seeking or other values central to the judicial task, the balance that courts draw might not reflect the choice the legislature would make.

The defendant argues, however, that inasmuch as the Federal courts have recognized the right of privacy to be of constitutional dimension in the context of certain functions which are intimately associated with the family, we should hold that communications of a confidential nature between a parent and his child enjoy an evidentiary privilege under the Constitution which did not exist under the common law. The defendant points out that in *In re Agosto* (D.Nev.1983), 553 F.Supp. 1298, and *People v. Fitzgerald* (1979), 101 Misc.2d 712, 422 N.Y.S.2d 309, courts have recognized the sort of constitutionally based privilege sought to be invoked here.

We need not decide here, and we do not decide, whether the decisions in *In re Agosto* or *People v. Fitzgerald* were sound, for the question in both of these cases was whether a parent or a child could be compelled against his will to testify against the other. (See also *In re A & M* (1978), 61 A.D.2d 426, 403 N.Y.S.2d 375 (same).) The testimony in the instant case, by contrast, was given by the defendant's wife, without protest and apparently of her own free will, after she was approached and requested to give it by an assistant State's Attorney.

We find this difference to be significant. Both *Agosto* and the New York courts, in holding that a constitutional privilege protected the communications there at issue, relied heavily on conjecture that a family member who is forced to testify against her will would face the unpleasant choice of aiding the criminal conviction of a loved one, perjuring herself on the stand, or risking a citation for contempt of court for refusing to testify, and the belief that the harshness of this choice has the effect of sundering the family relationship. (*In re Agosto* (D.Nev.1983), 553 F.Supp. 1298, 1309–10, 1326; *In re A & M* (1978), 61 A.D.2d 426, 432–33, 403 N.Y.S.2d 375, 380.) Such a fear is without foundation where, as in this case, the witness who is a family member volunteers her testimony; the voluntariness of the act is strong evidence that the choice the witness faced was an easy one for her to make. We conclude that even if the Constitution bestows a privilege on communications between a parent and a child, an issue which we do not decide here, that privilege may be waived by the testifying witness acting alone. Compare *United States v. Penn* (9th Cir. 1980), 647 F.2d 876, 882 (rejecting a challenge to a child's voluntary testimony based on due process, on which the right to privacy depends).

Although they were the subject of the motion *in limine* which was never ruled upon, no objection was advanced at trial when the wife testified about the first and second conversations. Under *Palumbo* the Illinois statute preventing testimony by either spouse concerning confidential communications between them creates only a privilege, and a privilege may be waived by the holder of it, in this case the husband. (See Comment, *Marital Privileges*, 46 Chi.-Kent L.Rev. 71, 82–83 (1969).) Therefore, in order to affirm the appellate court's reversal of the conviction, we would have to conclude that the court properly applied the plain error doctrine (87 Ill.2d R. 615) in holding that testimony regarding the first two conversations was improperly admitted. We believe the appellate court erred in reaching that conclusion.

The plain error doctrine is properly applied only when the question of guilt is close and the evidence in question might have significantly affected the outcome of the case (*People v. Jackson* (1981), 84 Ill.2d 350, 359, 49 Ill.Dec. 719, 418 N.E.2d 739; *People v. Pickett* (1973), 54 Ill.2d 280, 283, 296 N.E.2d 856), or where the error alleged is so substantial as to reflect on the fairness or impartiality of the trial regardless of how closely balanced the evidence is (*People v. Baynes* (1981), 88 Ill.2d 225, 233–34, 244, 58 Ill.Dec. 819, 430 N.E.2d 1070; *People v. Roberts* (1979), 75 Ill.2d 1, 14, 25 Ill.Dec. 675, 387 N.E.2d 331). The third conversation which we conclude, as the appellate court did, was properly admitted, incorporated substantially all of what was said in the first two conversations. The defendant, in the third conversation, discussed the robbery of the murder victim, said he hit him over the head with a brick, displayed several items of clothing taken from the victim, and referred to the watch and ring he had given his wife earlier that day. Thus, even conceding that no one overheard the first two conversations and that they were privileged and should have been excluded had timely objections been made, in practical effect they did no more than duplicate the incriminating content of the third conversation which was properly admitted. For that reason, the testimony

which narrated the defendant's conversation and conduct during the first two conversations was not prejudicial. It added nothing to the third conversation that was needed by the prosecutor to implicate the defendant, and after the third conversation was in evidence, the evidence as to the defendant's guilt was no longer closely balanced.

Nor do we regard any errors that might have been made concerning the admissibility of the first and second conversations as depriving the accused of the substantial means of enjoying a fair and impartial trial (*People v. Roberts* (1979), 75 Ill.2d 1, 14, 25 Ill.Dec. 675, 387 N.E.2d 331; citing *People v. Burson* (1957), 11 Ill.2d 360, 370–71, 143 N.E.2d 237, see *People v. Whitlow* (1982), 89 Ill.2d 322, 342, 60 Ill. Dec. 587, 433 N.E.2d 629), as the admission of polygraph evidence does (see *People v. Baynes* (1981), 88 Ill.2d 225, 244, 58 Ill.Dec. 819, 430 N.E.2d 1070). As we have noted, the husband–wife testimonial privilege operates not to purge a trial of unreliable evidence but to withhold relevant and often highly reliable evidence from the trier of fact. The decision whether to apply the plain error doctrine where the evidence is not close is one of grace. (*People v. Roberts* (1979), 75 Ill.2d 1, 14, 25 Ill.Dec. 675, 387 N.E.2d 331; *People v. Burson* (1957), 11 Ill.2d 360, 370–71.) We believe it should not have been applied here, for the fairness and impartiality of the *trial* was not substantially compromised by the errors, if any took place. See *People v. Roberts* (1979), 75 Ill.2d 1, 14–15, 25 Ill.Dec. 675, 387 N.E.2d 331.

The defendant has raised a number of other issues, none of which were considered by the appellate court because of its erroneous reversal of the conviction on the ground of improper use of privileged communications. The judgment of the appellate court is reversed and the cause is remanded to that court for disposition of the issues raised by the defendant but not reached by its original decision. See *People v. Simpson* (1977), 68 Ill.2d 276, 284, 12 Ill.Dec. 234, 369 N.E.2d 1248.

Reversed and remanded, with directions.

Peter STANLEY, Sr., Petitioner,

v.

State of ILLINOIS.
No. 70–5014.

Argued Oct. 19, 1971.
Decided April 3, 1972.
405 U.S. 645 (1972)

Mr. Justice WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. In re Stanley, 45 Ill.2d 132, 256 N.E.2d 814 (1970).

Stanley presses his equal protection claim here. The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children. We granted certiorari, 400 U.S. 1020, 91 S.Ct. 584, 27 L.Ed.2d 631 (1971), to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers—whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children.

I

At the outset we reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley

1. Uncontradicted testimony of Peter Stanley, App. 22.

2. Only two children are involved in this litigation.

has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. Cf. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

It is clear, moreover, that Stanley does not have the means at hand promptly to erase the adverse consequences of the proceeding in the course of which his children were declared wards of the State. It is first urged that Stanley could act to adopt his children. But under Illinois law, Stanley is treated not as a parent but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights. Insofar as we are informed, Illinois law affords him no priority in adoption proceedings. It would be his burden to establish not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children.

Neither can we ignore that in the proceedings from which this action developed, the "probation officer," see App. 17, the assistant state's attorney, see *id.*, at 29–30, and the judge charged with the case, see *id.*, at 16–18, 23, made it apparent that Stanley, unmarried and impecunious as he is, could not now expect to profit from adoption proceedings.[3] The Illinois Supreme Court apparently recognized some or all of these considerations, because it did not suggest that Stanley's case was undercut by his failure to petition for adoption.

Before us, the State focuses on Stanley's failure to petition for "custody and control"—the second route by which, it is urged, he might regain authority for his children. Passing the obvious issue whether it would be futile or burdensome for an unmarried father—without funds and already once presumed unfit—to petition for custody, this suggestion overlooks the fact that legal custody is not parenthood or adoption. A person appointed guardian in an action for custody and control is subject to removal at any time without such cause as must be shown in a neglect proceeding against a parent. Ill.Rev.Stat., c. 37, § 705–8. He may not take the children out of the jurisdiction without the court's approval. He may be required to report to the court as to his disposition of the children's affairs. Ill. Rev.Stat., c. 37, § 705–8. Obviously then, even if Stanley were a mere step away from "custody and control," to give an unwed father only "custody and control" would still be to leave him seriously prejudiced by reason of his status.

We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

II

Illinois has two principal methods of removing nondelinquent children from the homes of their parents. In a dependency proceeding it may demonstrate that the children are wards of the State because they have no surviving parent or guardian. Ill.Rev.Stat., c. 37, §§ 702–1, 702–5. In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care. Ill.Rev.Stat., c. 37, §§ 702–1, 702–4.

The State's right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. Rather, we are faced with a dependency statute that empowers state officials to circumvent neglect proceedings on the theory that an unwed father is not a "parent" whose existing relationship with his children must be considered.[4] "Parents," says the State, "means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent," Ill. Rev.Stat., c. 37, § 701–14, but the term does not include unwed fathers.

3. The Illinois Supreme Court's opinion is not at all contrary to this conclusion. That court said: "[T]he trial court's comments clearly indicate the court's willingness to consider a *future* request by the father for *custody and guardianship.*" 45 Ill.2d 132, 135, 256 N.E.2d 814, 816. (Italics added.) See also the comment of Stanley's counsel on oral argument: "If Peter Stanley could have adopted his children, we would not be here today." Tr. of Oral Arg. 7.

4. Even while refusing to label him a "legal parent," the State does not deny that Stanley has a special interest in the outcome of these proceedings. It is undisputed that he is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them.

Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as "irrelevant."

In considering this procedure under the Due Process Clause, we recognize, as we have in other cases, that due process of law does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria and Restaurant Workers Union etc. v. McElroy*, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). That case explained that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation" and firmly established that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.*, at 895, 81 S.Ct., at 1748; *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970).

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed.1655 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, 262 U.S. at 399, 43 S.Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, 316 U.S., at 541, 62 S.Ct., at 1113, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring).

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. *Levy v. Louisiana*, 391 U.S. 68, 71–72, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436 (1968). "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75–76, 88 S.Ct. 1515, 1516, 20 L.Ed.2d 441 (1968).

These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial.

For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . ." Ill.Rev.Stat., c. 37, § 701–2. These are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children.

But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the State interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites

its own articulated goals when it needlessly separates him from his family.

In *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme. Illinois would avoid the self-contradiction that rendered the Georgia license suspension system invalid by arguing that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children.[5]

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents.[6] It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category: some are wholly suited to have custody of their children.[7] That much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him.

Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), dealt with a similar situation. There we recognized that Texas had a powerful interest in restricting its electorate to bona fide residents. It was not disputed that most servicemen stationed in Texas had no intention of remaining in the State; most therefore could be deprived of a vote in state affairs. But we refused to tolerate a blanket exclusion depriving all servicemen of the vote, when some servicemen clearly were bona fide residents and when "more precise tests," *id.*, at 95, 85 S.Ct., at 779, were available to distinguish members of this latter group. "By forbidding a soldier ever to controvert the presumption of nonresidence," *id.*, at 96, 85 S.Ct., at 780, the State, we said, unjustifiably effected a substantial deprivation. It viewed people one-dimensionally (as servicemen) when a finer perception could readily have been achieved by assessing a serviceman's claim to residency on an individualized basis.

> "We recognize that special problems may be involved in determining whether servicemen have actually

5. Illinois says in its brief, at 21–23, "[T]he only relevant consideration in determining the propriety of governmental intervention in the raising of children is whether the best interests of the child are served by such intervention.

"In effect, Illinois has imposed a statutory presumption that the best interests of a particular group of children necessitates some governmental supervision in certain clearly defined situations. The group of children who are illegitimate are distinguishable from legitimate children not so much by their status at birth as by the factual differences in their upbringing. While a legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother . . . .

". . . The petitioner has premised his argument upon particular factual circumstances—a lengthy relationship with the mother . . . a familial relationship with the two children, and a general assumption that this relationship approximates that in which the natural parents are married to each other.

". . . Even if this characterization were accurate (the record is insufficient to support it) it would not affect the validity of the statutory definition of parent . . . . The petitioner does not deny that the children are illegitimate. The record reflects their natural mother's death. Given these two factors, grounds exist for the State's intervention to ensure adequate care and protection for these children. This is true whether or not this particular petitioner assimilates all or none of the normal characteristics common to the classification of fathers who are not married to the mothers of their children." See also Illinois' Brief 23 ("The comparison of married and putative fathers involves exclusively factual differences. The most significant of these are the presence or absence of the father from the home on a day-to-day basis and the responsibility imposed upon the relationship"), *id.*, at 24 (to the same effect), *id.*, at 31 (quoted below in n. 6), *id.*, at 24–26 (physiological and other studies are cited in support of the proposition that men are not naturally inclined to childrearing), and Tr. of Oral Arg. 31 ("We submit that both based on history or [sic] culture the very real differences . . . between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children, and the statute here fulfills the compelling governmental objective of protecting children . . . .").

6. The State speaks of "the general disinterest of putative fathers in their illegitimate children" (Brief 8) and opines that "[i]n most instances the natural father is a stranger to his children." Brief 31.

7. See In re T., 8 Mich.App. 122, 154 N.W. 2d 27 (1967).

There is a panel of the Michigan Court of Appeals in unanimously affirming a circuit court's determination that the father of an illegitimate son was best suited to raise the boy, said: "The appellants' presentation in this case proceeds on the assumption that placing Mark for adoption is inherently preferable to rearing by his father, that uprooting him from the family which he knew from birth until he was a year and a half old, secretly institutionalizing him and later transferring him to strangers is so incontrovertibly better that no court has the power even to consider the matter. Hardly anyone would even suggest such a proposition if we were talking about a child born in wedlock.

"We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father." *Id.*, at 146, 154 N.W.2d, at 39.

> acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But [the challenged] provision goes beyond such rules. '[T]he presumption here created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character.'" *Id.*, at 96, 85 S.Ct., at 780.

"All servicemen not residents of Texas before induction," we concluded, "come within the provision's sweep. Not one of them can ever vote in Texas, no matter" what their individual qualifications. *Ibid.* We found such a situation repugnant to the Equal Protection Clause.

Despite *Bell* and *Carrington*, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.[8] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[9]

Bell v. Burson held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered. That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof in specific cases before licenses were suspended.

We think that Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

III

The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect. Stanley's claim in the state courts and here is that failure to afford him a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws. We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley

8. Cf. *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy . . . . [But to] give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Carrington v. Rash*, 380 U.S. 89, 96, 85 S.Ct. 775, 780 (1965), teaches the same lesson. ". . . States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama v. [State of] California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249. By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment."

9. We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases. Ill.Rev.Stat., c. 37, § 704–1 et seq., provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "All whom it may Concern." Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.[10]

The judgment of the Supreme Court of Illinois is reversed and the case is remanded to that court for proceedings not inconsistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS joins in Parts I and II of this opinion.

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN concurs, dissenting.

10. Predicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated, is not contradictory to our holding in *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). In that case a due process, rather than an equal protection, claim was raised in the state courts. The federal courts were, in our opinion, barred from reversing the state conviction on grounds of contravention of the Equal Protection Clause when that clause had not been referred to for consideration by the state authorities. Here, in contrast, we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court.

For the same reason the strictures of *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), and *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), have been fully observed.

STATE of Maine

v.

David BENNER.

Supreme Judicial Court of Maine.

Submitted on Briefs Jan. 3, 1995.

Decided Feb. 10, 1995.

654 A.2d 435 (Me. 1995)

CLIFFORD, Justice.

David Benner appeals from a conviction for assault, 17–A M.R.S.A. § 207 (1983 & Supp.1994),[1] following a jury trial in Superior Court (Washington County, *Mills*, J.). On appeal Benner contends, *inter alia*, that the trial court erred in giving a cautionary instruction on how the jury should consider the hearsay testimony of the investigating state trooper, and that there was insufficient evidence to support the jury's verdict. Finding no error, we affirm the conviction.

The evidence at trial revealed the following. The victim testified that Benner is her boyfriend, and at the time of the alleged assault, she was living with him. On the night of September 11, 1993, she was home alone with Benner; they were arguing and she wanted him out of the house. The victim stated that she called the state police and complained that Benner had hit her. She also testified that she told the investigating trooper that Benner had struck her on the hand with either an ax handle or a broom stick. She testified that she had said that Benner had hit her only because she wanted him out of her house and not because he had actually hit her. She further testified that the injury to the back of her hand occurred because she was drunk and had fallen.

State Trooper Raymond Bessette testified that while on patrol on the night of September 11, 1993, he received a call from the dispatcher that the victim called to complain that Benner had struck her. When Bessette arrived at the home, he observed the victim to be visibly distraught, scared, and quite nervous, and that she had an injury to the back of her hand. She also had watery eyes. He did not, however, observe her to be under the influence.

In order to impeach her credibility, and without objection by the defendant,[2] Bessette further testified as to what the victim had told him that night. Before Bessette did so, however, Benner requested the jury be instructed that the statements "can be used for impeachment value, but not as substantive evidence." The court cautioned the jury as follows:

1. 17–A M.R.S.A. § 207(1) (1983) provides that "[a] person is guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another."

2. Benner did not argue for the exclusion of the statements because the probative value of Bessette's testimony as to the victim's statement was substantially outweighed by the danger of unfair prejudice. *See* M.R.Evid. 403.

> [T]he Trooper is now going to testify about statements that were made to him by [the victim], and that testimony is offered to impeach her testimony, the statements that she has testified about. It is not offered for the truth of the matter asserted.

The defendant did not object to the instruction. The jury returned a verdict of guilty and the court accordingly entered a judgment of conviction.

I

Benner contends that the trial court's cautionary instruction to the jury prior to Trooper Bessette's testimony was inadequate. Although he concedes that the court's instruction is a correct statement of the law, and that he failed to object, he avers that the trial court committed reversible error by failing to give a full explanation of the instructions. We disagree.

Because Benner did not object to the instruction when it was given, we review the charge only for obvious error affecting his substantial rights. *State v. McCluskie*, 611 A.2d 975, 978 (Me.1992); *see* M.R.Crim.P. 30(b). Giving an instruction that is a correct statement of the law does not rise to the level of obvious error. Jurors are presumed to understand the instruction. *See State v. Naoum*, 548 A.2d 120, 123 (Me.1988). While it would have been more helpful for the trial court to have given a more detailed instruction on the limited purposes for which the hearsay testimony was admitted, *see* D. Alexander, *Maine Jury Instruction Manual* § 6-24 (2d ed. 1990), the cautionary instruction actually given was not obvious error.

II

Benner further contends that the evidence presented at trial was insufficient to support a judgment of conviction. The standard to determine if evidence at trial was sufficient to support the jury's verdict is "whether, based on the evidence viewed in the light most favorable to the prosecution, any trier of fact rationally could find beyond a reasonable doubt every element of the offense charged." *State v. Barry*, 495 A.2d 825, 826 (Me.1985).

The affirmative evidence supporting a guilty verdict includes the following. The victim was home alone with Benner; the two were having an argument; the victim made a complaint; when the trooper arrived, the victim was distraught, scared, and nervous; the trooper observed the back of the victim's hand to be swollen; Benner was intoxicated; the trooper testified that the victim was sober.

Although the victim testified at the trial that Benner had not hit her and that she sustained her injuries while drunk by falling into a wall, her testimony was substantially impeached by her own testimony[3] and that of Trooper Bessette. It was reasonable for the jury to disregard her denials. As we have previously stated, "the weight of the evidence and the determination of witness credibility are the exclusive province of the jury." *State v. Glover*, 594 A.2d 1086, 1088 (Me.1991). Therefore, her testimony alone does not mandate a conclusion that the evidence was insufficient.

Although the conviction in this case was based substantially on circumstantial evidence, a conviction may be grounded on such evidence. *State v. Ingalls*, 554 A.2d 1272, 1276 (Me.1988). Indeed, a conviction based solely on circumstantial evidence is not for that reason less conclusive. *State v. LeClair*, 425 A.2d 182, 184 (Me.1981). The factfinder is allowed to draw all reasonable inferences from the circumstantial evidence. *State v. Crosby*, 456 A.2d 369, 370 (Me.1983). Viewing the evidence in the light most favorable to the State, the jury could have rationally inferred that Benner had assaulted the victim.[4]

The entry is:

Judgment affirmed.

All concurring.

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3. The victim's trial testimony that she told police that Benner hit her was hearsay. It normally would not be admissible for the truth of the matter asserted, but would be admissible to impeach the victim's trial testimony that Benner did not strike her. M.R.Evid. 801, 802. In this case, however, because there was no objection to the victim's statement that she told the police that Benner had hit her, there was no instruction that the testimony could be considered for impeachment only. It is not wholly unreliable and its admission was not obvious error.

4. Benner also contends that the court's instruction on the elements of assault constituted error. Our review of the instructions, to which Benner did not object, reveals no error. See *State v. Griffin*, 459 A.2d 1086, 1091–92 (Me.1983); 17–A M.R.S.A. § 2(5) (1983).

UNITED STATES of America,

Plaintiff–Appellee,

v.

Carless JONES and Eugene Harvey,

Defendants–Appellants.

707 F.2d 1169 (l0th Cir.1983)

SEYMOUR, CIRCUIT JUDGE.

On December 31, 1981, three armed men robbed a Denver area savings and loan branch. Lisa Dalke, a teller, and Marilyn Gates, the branch manager, were bound and forced to lie on the floor. The robbers removed money orders, traveler's checks, and $2,024 in cash, triggering a bank surveillance camera. The robbers were seen leaving the bank and walking towards an automobile by a bank customer, Christine Christensen, who had just driven up to the front of the bank. Because the men appeared suspicious, Christensen wrote down the license number of their car. One of the robbers ordered Christensen into the bank, and the men left.

On January 4, 1982, members of the Denver Police Department responded to a family disturbance call at or near 3434 High Street in Denver. While there, the officers saw a car bearing the license number observed by Christensen at the robbery. Denver Police Officer Andrade saw a man carrying a brown satchel emerge from the back of number 3434. Andrade ordered him to halt, and the man ran. The officers found the man, later identified by Andrade as defendant Jones, hiding in the rear of another building. He no longer had the brown satchel. When questioned about the satchel, Jones replied, "I don't know what you are talking about." Rec., vol. II, at 27.

The police arrested Jones and took him into the residence from which he had fled. He was questioned several times about the location of the brown satchel. Finally, Jones directed a woman who was present, "Show 'em where I put it," pointing towards a closet. *Id.* at 29. The officers searched the closet, but found nothing. Shortly thereafter, however, other police officers found a satchel lying outside the building where Jones had been found hiding, near the spot where he was apprehended. Officer Andrade identified the satchel as the one Jones had been carrying, and opened it. Inside was a handgun, traffic tickets written out in Jones' name, and a small knapsack. The officers asked Jones if the satchel was his, and he again denied owning it.

Appellants Harvey and Jones were jointly indicted and charged with armed robbery of a savings and loan in violation of 18 U.S.C. § 2113(a), (d) (1976). Both defendants filed motions for severance. Jones also filed a motion to suppress the fruits of the search of the satchel. After a lengthy pretrial hearing, these and other motions were denied. Jones and Harvey were tried and found guilty. Both filed motions for a new trial, alleging that adverse prior contact between the jury forewoman and Jones had denied them a fair trial. The trial court denied the motions.

On appeal, Harvey argues that the trial court erred in denying his motion to sever. Jones argues that the warrantless search of the satchel violated his Fourth Amendment rights. Both defendants argue that their Sixth Amendment rights to a fair trial were violated by juror misconduct. For the reasons discussed below, we affirm defendants' convictions.

***

II

ABANDONMENT

Jones argues that the warrantless search of the satchel violated his Fourth Amendment rights. The trial court held that the search was permissible on two grounds: that Jones had abandoned the satchel and therefore had no legitimate expectation of privacy in it entitling him to Fourth Amendment protection; and that the search was permissible as incident to a lawful arrest. Because of our resolution of the first ground, we need not address the court's alternative holding that the search was incident to Jones' arrest, and we offer no opinion as to the correctness of that holding.

[2][3] In *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960), the Supreme Court declared that the Government's warrantless seizure of abandoned property did not violate the Fourth Amendment. *Id.* at 241, 80 S.Ct. at 698. Since *Abel*, the circuit courts have examined the issue, and the following guidelines to the "abandoned property" exception to the Fourth Amendment's warrant requirement have emerged. When individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had. *United States v. Berd*, 634 F.2d 979, 987 (5th Cir.1981). Therefore, a warrantless search or seizure of abandoned property is not unreasonable under the Fourth Amendment. *For example, United States v. Diggs*, 649 F.2d 731, 735 (9th Cir.), *cert. denied*, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed.2d 387 (1981); *Berd*, 634 F.2d at 987; *United States v. D'Avanzo*, 443 F.2d 1224, 1225-26 (2d Cir.), *cert. denied*, 404 U.S. 850, 92 S.Ct.

86, 30 L.Ed.2d 89 (1971). The existence of police pursuit or investigation at the time of abandonment does not of itself render the abandonment involuntary. *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir.1973); *see generally, for example, Berd*, 634 F.2d at 987; *United States v. Canady*, 615 F.2d 694 (5th Cir.), *cert. denied*, 449 U.S. 862, 101 S.Ct. 165, 66 L.Ed.2d 78 (1980); *United States v. Williams*, 569 F.2d 823 (5th Cir.1978); *D'Avanzo*, 443 F.2d 1224.

[4][5] The test for abandonment is whether an individual has retained any reasonable expectation of privacy in the object. *Diggs*, 649 F.2d at 735. This determination is to be made by objective standards. *United States v. Kendall*, 655 F.2d 199, 201 (9th Cir.1981), *cert. denied*, 455 U.S. 941, 102 S.Ct. 1434, 71 L.Ed.2d 652 (1982). An expectation of privacy is a question of intent, which "may be inferred from words spoken, acts done, and other objective facts." *Kendall*, 655 F.2d at 202 (quoting *Williams*, 569 F.2d at 826). "A finding of abandonment is reviewed under the clearly erroneous standard." *Diggs*, 649 F.2d at 735.

[6] When Jones discarded the satchel, he may have hoped that the police would not find it and that he could later retrieve it. However, his ability to recover the satchel depended entirely upon fate and the absence of inquisitive (and acquisitive) passersby. When questioned by the police, he repeatedly disavowed any knowledge of the satchel. His comment to the woman in the residence to "[s]how 'em where I put it" appears at most to have been a mere ruse to deceive the police as to the existence of a satchel, rather than "words which acknowledged ownership," Brief of Appellants, at 17. Here, the "words spoken" and, more significantly, the "acts done" objectively manifested Jones' clear intent to relinquish his expectation of privacy and abandon the satchel. This is not a case like *United States v. Burnette*, 698 F.2d 1038 (9th Cir.1983), where, after an initial disclaimer of ownership, the defendant's subsequent conduct "strongly indicated her intent to retain a 'reasonable expectation of privacy in the purse.'" *Id.* at 1048.

We hold that Jones voluntarily abandoned the satchel. Accordingly, the subsequent warrantless search by the police did not violate his Fourth Amendment rights.

***

Affirmed.

UNITED STATES, Petitioner
v.

Alberto Antonio LEON et al.

No. 82–1771.

Argued Jan. 17, 1984.
Decided July 5, 1984.
Rehearing Denied Sept. 18, 1984.
468 U.S. 897 (1984)

Justice WHITE delivered the opinion of the Court.

This case presents the question whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. To resolve this question, we must consider once again the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are "acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman v. United States*, 394 U.S. 165, 175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1969).

I

In August 1981, a confidential informant of unproven reliability informed an officer of the Burbank Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone from their residence at 620 Price Drive in Burbank, Cal. The informant also indicated that he had witnessed a sale of methaqualone by "Patsy" at the residence approximately five months earlier and had observed at that time a shoebox containing a large amount of cash that belonged to "Patsy." He further declared that "Armando" and "Patsy" generally kept only small quantities of drugs at their residence and stored the remainder at another location in Burbank.

On the basis of this information, the Burbank police initiated an extensive investigation focusing first on the Price Drive residence and later on two other residences as well. Cars parked at the Price Drive residence were determined to belong to respondents Armando Sanchez, who had previously been arrested for possession

of marihuana, and Patsy Stewart, who had no criminal record. During the course of the investigation, officers observed an automobile belonging to respondent Richardo Del Castillo, who had previously been arrested for possession of fifty pounds of marihuana, arrive at the Price Drive residence.

The driver of that car entered the house, exited shortly thereafter carrying a small paper sack, and drove away. A check of Del Castillo's probation records led the officers to respondent Alberto Leon, whose telephone number Del Castillo had listed as his employer's. Leon had been arrested in 1980 on drug charges, and a companion had informed the police at the time that Leon was heavily involved in the importation of drugs into this country. Before the current investigation began, the Burbank officers had learned that an informant had told a Glendale police officer that Leon stored a large quantity of methaqualone at his residence in Glendale. During the course of this investigation, the Burbank officers learned that Leon was living at 716 South Sunset Canyon in Burbank.

Subsequently, the officers observed several persons, at least one of whom had prior drug involvement, arriving at the Price Drive residence and leaving with small packages; observed a variety of other material activity at the two residences as well as at a condominium at 7902 Via Magdalena; and witnessed a variety of relevant activity involving respondents' automobiles. The officers also observed respondents Sanchez and Stewart board separate flights for Miami. The pair later returned to Los Angeles together, consented to a search of their luggage that revealed only a small amount of marihuana, and left the airport. Based on these and other observations summarized in the affidavit, App. 34, Officer Cyril Rombach of the Burbank Police Department, an experienced and well-trained narcotics investigator, prepared an application for a warrant to search 620 Price Drive, 716 South Sunset Canyon, 7902 Via Magdalena, and automobiles registered to each of the respondents for an extensive list of items believed to be related to respondents' drug-trafficking activities. Officer Rombach's extensive application was reviewed by several Deputy District Attorneys.

A facially valid search warrant was issued in September 1981 by a State Superior Court Judge. The ensuing searches produced large quantities of drugs at the Via Magdalena and Sunset Canyon addresses and a small quantity at the Price Drive residence. Other evidence was discovered at each of the residences and in Stewart's and Del Castillo's automobiles. Respondents were indicted by a grand jury in the District Court for the Central District of California and charged with conspiracy to possess and distribute cocaine and a variety of substantive counts.

The respondents then filed motions to suppress the evidence seized pursuant to the warrant.[1] The District Court held an evidentiary hearing and, while recognizing that the case was a close one, see *id.*, at 131, granted the motions to suppress in part. It concluded that the affidavit was insufficient to establish probable cause,[2] but did not suppress all of the evidence as to all of the respondents because none of the respondents had standing to challenge all of the searches.[3] In response to a request from the Government, the court made clear that Officer Rombach had acted in good faith, but it rejected the Government's

1. Respondent Leon moved to suppress the evidence found on his person at the time of his arrest and the evidence seized from his residence at 716 South Sunset Canyon. Respondent Stewart's motion covered the fruits of searches of her residence at 620 Price Drive and the condominium at 7902 Via Magdalena and statements she made during the search of her residence. Respondent Sanchez sought to suppress the evidence discovered during the search of his residence at 620 Price Drive and statements he made shortly thereafter. He also joined Stewart's motion to suppress evidence seized from the condominium.

Respondent Del Castillo apparently sought to suppress all of the evidence seized in the searches. App. 78–80. The respondents also moved to suppress evidence seized in the searches of their automobiles.

2. "I just cannot find this warrant sufficient for a showing of probable cause.

* * *

"There is no question of the reliability and credibility of the informant as not being established.

"Some details given tended to corroborate, maybe, the reliability of [the informant's] information about the previous transaction, but if it is not a stale transaction, it comes awfully close to it; and all the other material I think is as consistent with innocence as it is with guilt.

"So I just do not think this affidavit can withstand the test. I find, then, that there is no probable cause in this case for the issuance of the search warrant . . . ." *Id.*, at 127.

3. The District Court concluded that Sanchez and Stewart had standing to challenge the search of 620 Price Drive; that Leon had standing to contest the legality of the search of 716 South Sunset Canyon; that none of the respondents has established a legitimate expectation of privacy in the condominium at 7902 Via Magdalena; and that Stewart and Del Castillo each had standing to challenge the searches of their automobiles. The Government indicated that it did not intend to introduce evidence seized from the other respondents' vehicles. *Id.*, at 127–129. Finally, the court suppressed statements given by Sanchez and Stewart. *Id.*, at 129–130.

suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable good-faith reliance on a search warrant.[4]

The District Court denied the Government's motion for reconsideration, *id.*, at 147, and a divided panel of the Court of Appeals for the Ninth Circuit affirmed, judgt. order reported at 701 F.2d 187 (1983). The Court of Appeals first concluded that Officer Rombach's affidavit could not establish probable cause to search the Price Drive residence. To the extent that the affidavit set forth facts demonstrating the basis of the informant's knowledge of criminal activity, the information included was fatally stale. The affidavit, moreover, failed to establish the informant's credibility. Accordingly, the Court of Appeals concluded that the information provided by the informant was inadequate under both prongs of the two-part test established in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).[5]

* * *

We have concluded that, in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions. Accordingly, we reverse the judgment of the Court of Appeals.

II

Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 651, 655–657, 81 S.Ct. 1684, 1689, 1691–1692, 6 L.Ed.2d 1081 (1961); *Olmstead v. United States*, 277 U.S. 488, 462–463, 48 S.Ct. 564, 567, 72 L.Ed. 944 (1928), or that the rule is required by the conjunction of the Fourth and Fifth Amendments. *Mapp v. Ohio, supra*, 367 U.S., at 661–662, 81 S.Ct., at 1694–1695 (Black, J., concurring); *Agnello v. United States*, 269 U.S. 20, 33–34, 46 S.Ct. 4, 6–7, 70 L.Ed. 145 (1925). These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time, see *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), and the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 3048, 49 L.Ed.2d 1067 (1976).

A

The Fourth Amendment contains no provisions expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a part unlawful search or seizure "work[s] no new Fourth Amendment wrong." *United States v. Calandra*, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed.2d 561 (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, *ibid.*, and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." *Stone v. Powell, supra*, 428 U.S., at 540, 96 S.Ct., at 3073 (WHITE, J., dissenting). The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra, supra*, 414 U.S., at 348, 94 S.Ct., at 620.

* * *

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States v. Payner*, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445, 65 L.Ed.2d 468 (1980). An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences

4. "On the issue of good faith, obviously that is not the law of the Circuit, and I am not going to apply that law.

"I will say certainly in my view, there is not any question about good faith. [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true." *Id.*, at 140.

5. In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), decided last Term, the Court abandoned the two-pronged *Aguilar–Spinelli* test for determining whether an informant's tip suffices to establish probable cause for the issuance of a warrant and substituted in its place a "totality of the circumstances" approach.

as a result of favorable plea bargains.[6] Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. *Stone v. Powell*, 428 U.S., at 490, 96 S.Ct., at 3050. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and administration of justice." *Id.*, at 491, 96 S.Ct., at 3051. Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra, supra*, 414 U.S., at 348, 94 S.Ct., at 670; see *Stone v. Powell, supra*, 428 U.S., at 486–487, 97 S.Ct., at 3048–3049; *United States v. Janis*, 428 U.S. 433, 447, 96 S.Ct. 3021, 3028, 49 L.Ed.2d 1046 (1976).

* * *

III

A

Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" *United States v. Chadwich*, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977) (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)), we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106, 85 S.Ct., 741, 744, 13 L.Ed.2d 687 (1965).

See *Aguilar v. Texas*, 378 U.S., at 111, 84 S.Ct., at 1512. Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. *Spinelli v. United States*, 393 U.S., at 419, 89 S.Ct., at 590. See *Illinois v. Gates*, 462 U.S., at 236, 103 S.Ct., at 2331; *United States v. Ventresca, supra*, 380 U.S., at 108–109, 85 S.Ct., at 745–746.

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).[7] Second, the courts must also insist the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas, supra*, 378 U.S., at 111, 84 S.Ct., at 1512. See *Illinois v. Gates, supra*, 462 U.S., at 239, 103 S.Ct., at 2332. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. *Lo-Ji Sales, Inc.*

6. Researchers have only recently begun to study extensively the effects of the exclusionary rule on the disposition of felony arrests. One study suggests that the rule results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies. Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 A.B.F.Res.J. 611, 621. The estimates are higher for particular crimes the prosecution of which depends heavily on physical evidence. Thus, the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%. *Id.*, at 680. Davies' analysis of California data suggests that screening by police and prosecutors results in the release because of illegal searches or seizures of as many as 1.4% of all felony arrestees, *id.*, at 650, that 0.9% of felony arrestees are released, because of illegal searches or seizures, at the preliminary hearing or after trial, *id.*, at 653, and that roughly 0.5% of all felony arrestees benefit from reversals on appeal because of illegal searches. *Id.*, at 654. See also K. Brosi, A Cross-City Comparison of Felony Case Processing 16, 18–19 (1979); U.S. General Accounting Office, Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 10–11, 14 (1979); F. Feeney, F. Dill, & A. Weir, Arrests Without Convictions: How Often They Occur and Why 203–206 (National Institute of Justice 1983); National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 1–2 (1982); Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 A.B.F.Res.J. 585, 600. The exclusionary rule also has been found to affect the plea-bargaining process. S. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence 63 (1977). But see *Davies*, *supra*, at 668–669; *Nardulli, supra*, at 604–606.

Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. "[A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official unlawlessness." *Illinois v. Gates*, 462 U.S., at 257–258, 103 S.Ct., at 2342 (WHITE, J., concurring in judgment). Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case, see *infra*, at 3417–3419, we conclude that it cannot pay its way in those situations.

* * *

7. Indeed, "it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." 438 U.S., at 165, 98 S.Ct., at 2681.

v. New York, 442 U.S. 319, 326–327, 99 S.Ct. 2319, 2324–2325, 60 L.Ed.2d 920 (1979).

Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates*, 462 U.S., at 239, 103 S.Ct., at 2332. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Ibid.* See *Aguilar v. Texas, supra* 378 U.S., at 114–115, 84 S.Ct., at 1513–1514; *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed.159 (1933).[8] Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, *Illinois v. Gates, supra,* 462 U.S., at 238–239, 103 S.Ct., at 2332–2333, or because the form of the warrant was improper in some respect.

Only in the first of these three situations, however, has the Court set forth a rationale for suppressing evidence obtained pursuant to a search warrant; in the other areas, it has simply excluded such evidence without considering whether Fourth Amendment interests will be advanced. To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.[9]

Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.[10] Many of the factors that indicate that the exclusionary rule cannot provide an effective "special" or "general" deterrent for individual offending law enforcement officers[11] apply as well to judges or magistrates. And, to the extent that the rule is thought to operate as a "systemic" deterrent on a wider audience,[12] it clearly can have no such effect on individuals empowered to issue search warrants. Judges

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8. See also *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), in which the Court concluded that "the record . . . does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him." *Id.*, at 95, 85 S.Ct., at 227. Although the Court was willing to assume that the arresting officers acted in good faith, it concluded that:

> "'[G]ood faith on the part of the arresting officers is not enough,' *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." (*Id.*, at 97, 85 S.Ct., at 228.)

We adhere to this view and emphasize that nothing in this opinion is intended to suggest a lowering of the probable-cause standard. On the contrary, we deal here with the remedy to be applied to a concededly unconstitutional search.

9. Although there are assertions that some magistrates become rubber stamps for the police and others may be unable effectively to screen police conduct, see, *for example*, 2 W. LaFave, Search and Seizure § 4.1 (1978); Kamisar, Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L.Rev. 565, 569–571 (1983); Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo.L.J. 1361, 1412 (1981), we are not convinced that this is a problem of major proportions. See L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 119 (1967); Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich.L.Rev. 1319, 1414, n. 396 (1977); P. Johnson, New Approaches to Enforcing the Fourth Amendment 8–10 (Working Paper, Sept. 1978), quoted in Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 229–230 (5th ed. 1980); R. Van Duizend, L. Sutton, & C. Carter, The Search Warrant Process, ch. 7 (Review Draft, National Center for State Courts, 1983).

10. As the Supreme Judicial Court of Massachusetts recognized in *Commonwealth v. Sheppard*, 387 Mass. 488, 506, 441 N.E.2d 725, 735 (1982):

> "The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges . . . . [I]deally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates."

But see *United States v. Karathanos*, 531 F.2d 26, 33–34 (CA2), cert. denied, 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976).

11. See, *for example, Stone v. Powell*, 428 U.S., at 498, 96 S.Ct., at 3054 (BURGER, C.J., concurring); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.I.Rev. 665, 709–710 (1970).

12. See, *for example, Dunaway v. New York*, 442 U.S. 200, 221, 99 S.Ct. 2248, 2261, 60 L.Ed.2d 824 (1979) (STEVENS, J., concurring); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo.L.J. 365, 399–401 (1981).

and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.[13]

B

If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping" and thus promotes the end of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by a probable cause also might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. We find such arguments speculative and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.[14]

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect . . . ." *United States v. Janis*, 428 U.S., at 452, n. 22, 96 S.Ct., at 3031, n. 22. But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182 (1974), and reiterated in *United States v. Peltier*, 422 U.S., at 539, 95 S.Ct., at 2318:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater deal of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier Court* continued, *id.*, at 542, 95 S.Ct., at 2320:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

See also *Illinois v. Gates*, 462 U.S., at 260–261, 103 S.Ct., at 2344 (WHITE, J., concurring in judgment); *United States v. Janis, supra*, 428 U.S., at 459, 96 S.Ct., at 3034; *Brown v. Illinois*, 422 U.S., at 610–611, 95 S.Ct., at 2265–2266

13. Limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications. We doubt that magistrates are more desirous of avoiding the exclusion of evidence obtained pursuant to warrants they have issued than of avoiding invasions of privacy.

Federal magistrates, moreover, are subject to the direct supervision of district courts. They may be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. § 631(i). If a magistrate serves merely as a "rubber stamp" for the police or is unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule.

14. Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant. Cf. *Massachusetts v. Sheppard*, 468 U.S. 981, 989, n. 6, 104 S.Ct. 3424, 3429, n. 6, 82 L.Ed.2d 737 ("[I]t was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested").

(POWELL, J., concurring in part).[15] In short, where the officer's conduct is objectively reasonable,

> "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."

Stone v. Powell, 428 U.S., at 539–540, 96 S.Ct., at 3073–3074 (WHITE, J., dissenting).

This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.[16] In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id.*, 428 U.S., at 498, 96 S.Ct., at 3054 (BURGER, C.J., concurring). Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.[17]

We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness," *Illinois v. Gates*, 462 U.S., at 267, 103 S.Ct., at 2347

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15. We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. "Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Illinois v. Gates*, 462 U.S., at 261, n. 15, 103 S.Ct., at 2344, n. 15 (WHITE, J., concurring in judgment); see *Dunaway v. New York*, 442 U.S., at 221, 99 S.Ct., at 2261 (STEVENS, J., concurring). The objective standard we adopted, moreover, requires officers to have a reasonable knowledge of what the law prohibits. *United States v. Peltier*, 442 U.S. 531, 542, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1975). As Professor Jerold Israel has observed:

> "The key to the [exclusionary] rule's effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits. [An objective good-faith exception] is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police instructors to pay less attention to fourth amendment limitations. Finally, [it] should not encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality."

Israel, *supra* n. 14, at 1412–1413 (footnotes omitted).

16. According to the Attorney General's Task Force on Violent Crime, Final Report (1981), the situation in which an officer relies on a duly authorized warrant

> "is a particularly compelling example of good faith. A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions. Accordingly, we believe that there should be a rule which states that evidence obtained pursuant to and within the scope of a warrant is prima facie the result of good faith on the part of the officer seizing the evidence."

Id., at 55.

17. To the extent that Justice STEVENS' conclusions concerning the integrity of the courts, *post*, at 3454–3455, rest on a foundation other than his judgment, which we reject, concerning the effects of our decision on the deterrence of police illegality, we find his argument unpersuasive. "Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment." *United States v. Janis*, 428 U.S. 433, 458, n. 35, 96 S.Ct. 3021, 3034, n. 35, 49 L.Ed.2d 1046 (1976). "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Stone v. Powell*, 428 U.S., at 485, 96 S.Ct., at 3048. Our cases establish that the question whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts

> "is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose . . . . The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment."

United States v. Janis, supra, 428 U.S., at 459, n. 35, 96 S.Ct., at 3034, n. 35. Absent unusual circumstances, when a Fourth Amendment violation has occurred because the police have reasonably relied on a warrant issued by a detached and neutral magistrate but ultimately found to be defective, "the integrity of the courts is not implicated." *Illinois v. Gates, supra*, 462 U.S., at 259, n. 14, 103 S.Ct., at 2343, n. 14 (WHITE, J., concurring in judgment).

See *Stone v. Powell,* 428 U.S., at 485, n. 23, 96 S.Ct., at 3048, n. 23; *id.*, at 540, 96 S.Ct., at 3073 (WHITE, J., dissenting); *United States v. Peltier*, 442 U.S. 531, 536–539, 95 S.Ct. 2313, 2317–2318, 45 L.Ed.2d 374 (1975).

(WHITE, J., concurring in judgment), for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." *United States v. Ross*, 456 U.S. 798, 823, n. 32, 102 S.Ct. 2157, 2172, n. 32, 72 L.Ed.2d 572 (1982). Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 815–819, 102 S.Ct., 2727, 2737–2739, 73 L.Ed.2d 396 (1982),[18] and it is clear that in some circumstances the officer[19] will have no reasonable grounds for believing that the warrant was properly issued.

Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S., at 610–611, 95 S.Ct., at 2265–2266 (POWELL, J., concurring in part); see *Illinois v. Gates, supra*, 462 U.S., at 263–264, 103 S.Ct., at 2345–2346 (WHITE, J., concurring in the judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*that is,* in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. Cf. *Massachusetts v. Sheppard*, 468 U.S., at 988–991, 104 S.Ct. at 3428–3430.

In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. Other objections to the modification of the Fourth Amendment exclusionary rule we consider to be insubstantial. The good-faith exception for searches conducted pursuant to warrants is not intended to signal our willingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.

Nor are we persuaded that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state.[20] There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate. As cases addressing questions of good-faith immunity under 42 U.S.C. § 1983, compare *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), with *Procunier*

18. In *Harlow*, we eliminated the subjective component of the qualified immunity public officials enjoy in suits seeking damages for alleged deprivations of constitutional rights. The situations are not perfectly analogous, but we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant. Although we have suggested that, "[o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule," *Scott v. United States*, 436 U.S. 128, 139, n. 13, 98 S.Ct. 1717, 1724, n. 13, 56 L.Ed.2d 168 (1978), we believe that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts v. Painten*, 389 U.S. 560, 565, 88 S.Ct. 660, 663, 19 L.Ed.2d 770 (1968) (WHITE, J., dissenting). Accordingly, our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered.

19. References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. See *Whiteley v. Warden*, 401 U.S. 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971).

20. The argument that defendants will lose their incentive to litigate meritorious Fourth Amendment claims as a result of the good-faith exception we adopt today is unpersuasive. Although the exception might discourage presentation of insubstantial suppression motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished.

v. Navarette, 434 U.S. 555, 566, n. 14, 98 S.Ct. 855, 862, n. 14, 55 L.Ed.2d 24 (1978), and cases involving the harmless-error doctrine, compare *Milton v. Wainwright*, 407 U.S. 371, 372, 92 S.Ct. 2174, 2175, 33 L.Ed.2d 1 (1972), with *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), make clear, courts have considerable discretion in conforming their decision-making processes to the exigencies of particular cases.

If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.[21] Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue.

Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officers' good faith only after finding a violation. In other circumstances, those courts could reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith. We have no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing reviewing courts to exercise an informed discretion in making this choice.

IV

When the principles we have enunciated today are applied to the facts of this case, it is apparent that the judgment of the Court of Appeals cannot stand. The Court of Appeals applied the prevailing legal standards to Officer Rombach's warrant application and concluded that the application could not support the magistrate's probable-cause determination. In so doing, the court clearly informed the magistrate that he had erred in issuing the challenged warrant. This aspect of the court's judgment is not under attack in this proceeding.

Having determined that the warrant should not have issued, the Court of Appeals understandably declined to adopt a modification of the Fourth Amendment exclusionary rule that this Court had not previously sanctioned. Although the modification finds strong support in our previous cases, the Court of Appeals' commendable self-restraint is not to be criticized. We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.

In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. Only respondent Leon has contended that no reasonably well trained police office could have believed that there existed probable cause to search his house; significantly, the other respondents advance no comparable argument. Officer Rombach's application for a warrant clearly was supported by much more than a "bare bones" affidavit. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Accordingly, the judgment of the Court of Appeals is *Reversed*.

Justice BLACKMUN, concurring.

The Court today holds that evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded, as a matter of federal law, from the case in chief of federal and state criminal prosecutions. In so doing, the Court writes another chapter in the volume of Fourth Amendment law opened by *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). I join the Court's opinion in this case and the one in *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), because I believe that the rule announced today advances the legitimate interests of the criminal justice system without sacrificing the individual rights protected by the Fourth Amendment. I write separately, however, to underscore what I regard as the unavoidably provisional nature of today's decision.

21. It has been suggested, in fact, that "the recognition of a 'penumbral zone,' within which an inadvertent mistake would not call for exclusion, . . . will make it less tempting for judges to bend fourth amendment standards to avoid releasing a possibly dangerous criminal because of a minor and unintentional miscalculation by the police." Schroeder, *supra* n. 14, at 1420–1421 (footnote omitted); see Ashdown, Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process, 24 Wm. & Mary L.Rev. 335, 383–384 (1983).

As the Court's opinion in this case makes clear, the Court has narrowed the scope of the exclusionary rule because of an empirical judgment that the rule has little appreciable effect in cases where officers act in objectively reasonable reliance on search warrants. See *ante*, at 3419–3420. Because I share the view that the exclusionary rule is not a constitutionally compelled corollary of the Fourth Amendment itself, see *ante*, at 3412, I see no way to avoid making an empirical judgment of this sort, and I am satisfied that the Court has made the correct one on the information before it. Like all courts, we face institutional limitations on our ability to gather information about "legislative facts," and the exclusionary rule itself has exacerbated the shortage of hard data concerning the behavior of police officers in the absence of such a rule. See *United States v. Janis*, 428 U.S. 433, 448–453, 96 S.Ct. 3021, 3029–3031, 49 L.Ed.2d 1046 (1976). Nonetheless, we cannot escape the responsibility to decide the question before us, however imperfect our information may be, and I am prepared to join the Court on the information now at hand.

What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily in a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

If a single principle may be drawn from this Court's exclusionary rule decisions, from *Weeks* through *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom. It is incumbent on the Nation's law enforcement officers, who must continue to observe the Fourth Amendment in the wake of today's decisions, to recognize the double-edged nature of that principle.

UNITED STATES of America.

Plaintiff–Appellee,

v.

Gilbert MARTINEZ–JIMENEZ,
Defendant–Appellant.

No. 87–5305.
United States Court of Appeals,
Ninth Circuit.

Submitted Oct. 4, 1988.
Decided Jan.3, 1989.
864 F.2d 664 (9th Cir. 1989).

NELSON, Circuit Judge.

Gilbert Martinez–Jimenez appeals his conviction following a bench trial on one count of armed bank robbery in violation of 18 U.S.C. § 2113(a) & (d). He contends that the trial court erred in concluding that the toy gun that he held during the bank robbery was a "dangerous weapon" as defined by 18 U.S.C. § 2113(d). We affirm the judgment of the district court.

PROCEDURAL BACKGROUND

On July 14, 1987, a federal grand jury in the Central District of California returned a three-count indictment that charged the appellant and an accomplice, Joe Anthony De La Torre, with armed bank robbery in violation of 18 U.S.C. § 2113(a) & (d) and with carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). At a bench trial the appellant and his accomplice were found guilty of armed bank robbery as charged in count one and not guilty of carrying a firearm during a crime of violence, as charged in counts two and three.

FACTS

On June 19, 1987, at approximately 12:55 p.m., Martinez–Jimenez and De La Torre entered a bank in Bellflower, California. While De La Torre took cash from a customer and two bank drawers, Martinez–Jimenez remained in the lobby and ordered that the people in the bank lie "face down on the floor." During this time Martinez–Jimenez was holding an object that eyewitnesses thought was a handgun. These persons included two bank employees and a customer who was familiar with guns because he owned handguns, had handled weapons while in military service, and occasionally used weapons at firing ranges. The three witnesses testified that the object was a dark revolver about eight or nine inches long and that it caused them to fear for the safety of themselves and of those around them.

At trial, De La Torre testified that neither he nor Martinez–Jimenez had operable firearms when they entered the bank. He testified that Martinez–Jimenez had a toy gun that he and Martinez–Jimenez had purchased at a department store a few hours prior to the robbery. De La Torre also testified that he hid the toy gun in his closet after the robbery, that neither he nor Martinez–Jimenez wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives. Martinez–Jimenez testified that he had carried the toy gun because he felt secure with it and that during the robbery he held it down towards his leg in order to hide it so that people would not see it. The defense introduced into evidence a toy gun. Martinez–Jimenez testified that the gun used in the robbery was the toy gun introduced into evidence. It was stipulated that De La Torre's attorney had received the toy gun offered as the gun used in the robbery from De La Torre's mother.

Based upon observation of the bank robbery photographs and the toy gun, the court concluded that Martinez–Jimenez possessed a toy gun during the course of the bank robbery and that he had kept the toy gun pointed downwards by his side during the course of the bank robbery. On the basis of his display of the toy gun in the course of the robbery, Martinez–Jimenez was convicted under section 2113(d) which provides an enhanced penalty for use of a "dangerous weapon" during a bank robbery.

STANDARD OF REVIEW

The question presented is whether a toy gun is a "dangerous weapon" within the meaning of the federal bank robbery statute. Interpretation of a statute presents a question of law reviewable de novo. *United States v. Wilson*, 720 F.2d 608, 609 n. 2 (9th Cir.1983), *cert. denied*, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984); *United States v. Moreno–Pulido*, 695 F.2d 1141, 1143 (9th Cir.1983).

DISCUSSION

A robber may be guilty of an armed bank robbery under section 2113(d) if he uses a dangerous weapon or device in the commission of the crime. The instrumentality does not have to be a firearm. The use, or unlawful carrying, of a firearm in a bank robbery is a more serious offense punishable separately under section 924(c). In this case, the appellant carried a toy replica of a firearm that simulated the appearance but not the weight of a genuine firearm. The toy gun did not fit the statutory definition of a firearm under 18 U.S.C. § 921(a)(3). However, it did fall within the meaning of a "dangerous weapon or device" under section 2113(d). Section 2113(d) states that

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

In *McLaughlin v. United States*, 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the Supreme Court found that a defendant who used an unloaded handgun was convicted properly under section 2113(d) because the unloaded handgun was a dangerous weapon under the statute. *Id.* at 17, 106 S.Ct. at 1677–78. Prior to *McLaughlin* this circuit, and other circuits, had assumed that section 2113(d) was violated only by the use of a loaded operable gun. *United States v. Terry*, 760 F.2d 939, 942 (9th Cir.1985); see also *Parker v. United States*, 801 F.2d 1382, 1384 n. 2 (D.C.Cir.1986), *cert. denied*, 479 U.S. 1070, 107 S.Ct.964, 93 L.Ed.2d 1011 (1987).

The *McLaughlin* opinion stated:

> Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a "dangerous weapon." First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. *In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue.* Finally, a gun can cause harm when used as a bludgeon.

McLaughlin, 476 U.S. at 17–18, 106 S.Ct. at 1677–78 (footnote omitted) (emphasis added).

The *McLaughlin* opinion recognizes that the dangerousness of a device used in a bank robbery is not simply a function of its potential to injure people directly. Its dangerousness results from the greater burdens that it imposes upon victims and law enforcement officers. Therefore an unloaded gun that only simulates the threat of a loaded gun is a dangerous weapon. The use of a gun that is inoperable and incapable of firing also will support a conviction under section 921(a)(3) and section 2113(d). *United States v. York*, 830 F.2d 885, 891 (8th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1047, 98 L.Ed.2d 1010 (1988); see also *United States v. Goodheim*, 686 F.2d 776, 778 (9th Cir.1982).

These cases reflect a policy that the robber's creation of even the appearance of dangerousness is sufficient to subject him to enhanced punishment. Other cases have given effect to this policy by holding that the trier of fact may infer that the instrument carried by a bank robber was a

firearm based only on witness testimony that it appeared to be genuine. *Parker*, 801 F.2d at 1283–84; *United States v. Harris*, 792 F.2d 866, 868 (9th Cir.1986). *McLaughlin* validates this policy but eliminates the inefficiencies associated with the inference process.

A robber who carries a toy gun during the commission of a bank robbery creates some of the same risks as those created by one who carries an unloaded or inoperable genuine gun. First, the robber subjects victims to greater apprehension. Second, the robber requires law enforcement agencies to formulate a more deliberate, and less efficient, response in light of the need to counter the apparent direct and immediate threat to human life. Third, the robber creates a likelihood that the reasonable response of police and guards will include the use of deadly force. The increased chance of an armed response creates a greater risk to the physical security of victims, bystanders, and even the perpetrators. Therefore the greater harm that a robber creates by deciding to carry a toy gun is similar to the harm that he creates by deciding to carry an unloaded gun.

The *McLaughlin* opinion examined the floor debate on the provision that became section 2113(d) and concluded that Congress was concerned with the potential of an apparently dangerous article to incite fear. *McLaughlin*, 476 U.S. at 18 n. 3, 106 S.Ct. at 1678 n. 3. The House debate on the provision that became section 2113(d) indicates that an ersatz wooden gun used in a bank robbery would satisfy the statutory meaning of a dangerous weapon or device. *See* 78 Cong.Rec. 8132 (1934). If Congress intended that an ersatz wooden gun would fall within the statute, by analogy an ersatz plastic gun should fall within the statute. Congress' intent focused on the nature of the effect that the robber creates, not the specific nature of the instruments that he utilizes.

Appellant concedes that *McLaughlin* applies to the use of an inherently dangerous weapons such as an unloaded firearm but argues that it does not apply to a harmless instrumentality of a crime, such as a toy gun, unless the defendant used the instrumentality in an assaultive manner. The trial court found that the replica was a "totally plastic and extremely light" toy gun, and that Martinez–Jimenez had held it downward by his side and not towards any of the bank employees or customers. Therefore the defendant urges that his manner of displaying this particular toy gun avoids *McLaughlin's* definition of a dangerous weapon because it would not have instilled fear in an average citizen and would not have created a danger of a violent response.

We disagree. A bank robber's use of a firearm during the commission of the crime is punishable even if he does not make assaultive use of the device. He need not brandish the firearm in a threatening manner. *United States v. Mason*, 658 F.2d 1263, 1270–71 (9th Cir.1981). His possession of the weapon is an integral part of the crime. *United States v. Moore*, 580 F.2d 360, 362 (9th Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978). By analogy, a bank robber's use of a replica or simulated weapon violates section 2113(d) even if he does not make assaultive use of the device. His possession of the instrument during the commission of the crime evidences his apparent ability to commit an assault. The appellant's possession of the toy gun facilitated the crime and increased its likelihood of success. The appellant testified that he carried the toy gun because he "felt secure with it." This suggests that he may not have begun the robbery without it.

Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of creating the harm. The record shows substantial evidence that the appellant's possession of the toy gun created fear and apprehension in the victims. Appellant argues that we should put aside this testimony because it was based upon the witnesses' mistaken assessment of the apparent threat. Appellant's argument fails because, during a robbery, people confronted with what they believe is a deadly weapon cannot be expected to maintain a high level of critical perception.[1]

By extension, appellant also argues that the toy gun did not jeopardize the life of any person because it did not increase the police's burden to interdict the crime during its commission or aftermath and could not have provoked the police's use of a deadly response that could have endangered others. This argument fails because the police must formulate a response to an apparently armed robber during the course of the crime, not after it. They must confront the risk that a replica or simulated gun creates before knowing that it presents no actual threat. These confrontations often lead to gunfire and casualties. *See, for example*, L.A. Times, Oct. 18, 1988, § 2, at 3, col. 1 (San Diego County ed.); *id.*, May 13, 1988, § 2, at 2, col. 5 (home ed.).

1. The recent trend in toy and replica manufacturing to duplicate precisely the outward appearance of genuine weaponry compounds the difficulty and risk of making any distinction. *See* N.Y. Times, Oct. 16, 1988, § 4, at 7, col. 1. This trend has led some state and local governments to enact bans on realistic toy guns. *See* N.Y. Times, Aug. 5, 1988, § A, at col. 1; L.A. Times, Apr. 29, 1988, § 1, at 2, col. 6 (home ed.). Congress has held hearings on a federal ban. 134 Cong.Rec. D 1084 (daily ed. Aug. 11, 1988).

CONCLUSION

The values of justice, administrability, and deterrence require the rule that a robber's use of a replica or simulated weapon that appears to be a genuine weapon to those present at the scene of the crime, or to those charged with responsibility for responding to the crime, carries the same penalty as the use of a genuine weapon. In this case appellant avoided the harsher penalties associated with use of a firearm in violation of section 924(c) by proving that he only had simulated the use of a firearm. However, the appellant's decision to bluff did not eliminate the harms that Congress intended to address in section 2113(d).

AFFIRMED.

Stephen Alan WOLCOTT,
Petitioner–Appellant,

v.

Sandra Lee WOLCOTT,
Respondent–Appellee.

No. 9308.
Court of Appeals of New Mexico
March 5, 1987.

Certiorari Denied April 9, 1987.
105 N.M. 608, 735 P.2d 326 (Ct. App. 1987)

OPINION

FRUMAN, Judge.

Our opinion, previously filed on February 3, 1987, is withdrawn and the following opinion is substituted therefor.

Husband appeals from the denial of his post-divorce motions to reduce or abate his child support obligations and to terminate or abate his alimony obligation. Husband relied upon his voluntary change of employment, which resulted in a major reduction of his income, as the substantial change of circumstances justifying his motions. In denying these motions, the trial court found that husband had not acted in good faith with regard to his support obligations when he changed employment.

Husband's issues on appeal are: "1. Whether the voluntary career change of a professional never justifies modification of his support obligation, even if undertaken in good faith." and 2. Whether there is substantial evidence to support the trial court's finding that husband was not acting in good faith when he changed specialty.

As the first issue is presented in the abstract, it would require an advisory opinion on review. This court does not give advisory opinions. *In re Bunnell*, 100 N.M. 242, 668 P.2d 1119 (Ct.App.1983). Although the first issue will not be directly addressed, it will be generally considered in our review of the second issue. We affirm the trial court on the second issue.

FACTS

Following their marriage of thirteen years, the parties were divorced in December 1983. Pursuant to the marital settlement agreement incorporated into the decree of dissolution, husband was to pay $1,500 monthly for the support of the three minor children, and $300 monthly for alimony for a period of five years. At the time of the divorce, husband was a physician specializing in obstetrics and gynecology in Albuquerque.

For a number of years husband had considered changing his specialty to psychiatry. In March 1985, he was accepted in a psychiatric residency program in Washington, D.C. Husband closed his Albuquerque office in June 1985 and commenced his residency the following month. The duration of the program is three to four years, and during this period, husband's annual gross income will range from approximately $21,000 to $24,000. This salary is approximately one-fourth of his annual gross income during the several years prior to and the year following the divorce.

In June 1985, husband unilaterally reduced his combined monthly child support and alimony payment from $1,800 to $550, contrary to the terms of the marital settlement agreement and without judicial approval or forewarning his former spouse.

DISCUSSION

Husband contends that the denial of his motion for reduction of support payments was erroneously based on the trial court's finding of a lack of good faith in changing his speciality and that there was not substantial evidence to support this finding.

To justify modification in the amount of child support already awarded, there must be evidence of a "substantial change of circumstances which materially affects the

existing welfare of the child and which must have occurred since the prior adjudication where child support was originally awarded." *Henderson v. Lekvold*, 95 N.M. 288, 291, 621 P.2d 505, 508 (1980). See *Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978). A similar change in circumstances of the supported spouse must be shown before the request may be granted as to alimony. See *Brister v. Brister*, 92 N.M. 711, 594 P.2d 1167 (1979). The recipient's actual need for support is the essential criterion. See *Weaver v. Weaver*, 100 N.M. 165, 667 P.2d 970 (1983); *Brister v. Brister.*

Husband, as the petitioner for the modification, had the burden of proving to the trial court's satisfaction that circumstances had substantially changed and, thereby, justified his requests. See *Smith v. Smith*, 98 N.M. 468, 649 P.2d 1381 (1982); *Spingola v. Spingola.* Any change in support obligations is a matter within the discretion of the trial court, and appellate review is limited to a determination of whether that discretion has been abused. *Henderson v. Lekvold.* If substantial evidence exists to support the trial court's findings, they will be upheld. See *Chavez v. Chavez*, 98 N.M. 678, 652 P.2d 228 (1982). Cf. *Pitcher v. Pitcher*, 91 N.M. 504, 576 P.2d 1135 (1978).

The common trend in various jurisdictions is that a good faith career change, resulting in a decreased income, *may* constitute a material change in circumstances that warrants a reduction in a spouse's support obligation. See *Thomas v. Thomas*, 281 Ala. 397, 203 So.2d 118 (1967); *Graham v. Graham*, 21 Ill.App.3d 1032, 316 N.E.2d 143 (1974); *Schuler v. Schuler*, 382 Mass. 366, 416 N.E.2d 197 (1981); *Giesner v. Giesner*, 319 N.W.2d 718 (Minn.1982); *Fogel v. Fogel*, 184 Neb. 425, 168 N.W.2d 275 (1969); *Nelson v. Nelson*, 225 Or. 257, 357 P.2d 536 (1960); *Anderson v. Anderson*, 503 S.W.2d 124 (Tex.Civ.App. 1973); *Lambert v. Lambert*, 66 Wash.2d 503, 403 P.2d 664 (1965). Likewise, where the career change is not made in good faith, a reduction in one's support obligations will not be warranted. See *In re Marriage of Ebert*, 81 Ill.App.3d 44, 36 Ill.Dec. 415, 400 N.E.2d 995 (1980) (evidence of a desire to evade support responsibilities); *Moncada v. Moncada*, 81 Mich. App. 26, 264 N.W.2d 104 (1978) (no evidence that husband acted in bad faith or with willful disregard for the welfare of his dependents); *Bedford v. Bedford*, 49 Mich. App. 424, 212 N.W.2d 260 (1973) (husband voluntarily avoided reemployment opportunities); *Nelson v. Nelson* (no evidence that the sale of a medical practice and assumption of clinic duties, resulting in a decrease in income, was made to jeopardize the interests of the children); *Commonwealth v. Saul*, 175 Pa.Super. 540, 107 A.2d 182 (1954) (husband literally gave away assets available for support payments). *See generally* Annot., 89 A.L.R.2d 1 at 54 (1963).

Husband challenges the trial court's findings that: (1) at the time husband entered the marital settlement agreement, he had planned to terminate his private practice and return to school, but did not so advise wife; (2) although wife may have had prior knowledge of husband's future employment desires, she had no reason to believe that he would effect a career change upon entering the settlement agreement, if it interfered with the support obligations he was assuming; and (3) husband was not acting in good faith with regard to his child support and alimony obligations when he voluntarily made his career change.

The record contains both direct and reasonably inferred evidence from the testimony of the parties to support the first two challenged findings. The third finding is supported by evidence of husband's disregard for several financial obligations undertaken by him in the marital settlement agreement, by his failure or inability to make a full disclosure of his income and assets to wife and the court, and by his self-indulgence with regard to his own lifestyle and personal necessities without regard to the necessities of his children and his former spouse. We find this evidence sufficient to support the trial court's decision to deny husband's petition for a modification of his child support obligation.

Husband also argues that, during their marriage, wife was willing to make changes in the family's lifestyle as would be necessary to accommodate his career change. Because of this, husband contends that his career change following the divorce does not indicate a lack of good faith. Husband did not, however, request a finding as to this contention, and his failure to do so waives any merit the argument may have. See *Worland v. Worland*, 89 N.M. 291, 551 P.2d 981 (1976).

In the determination of alimony, the recipient's actual need for support is the focal point. See *Brister v. Brister.* While husband did request a finding as to wife's employment and there was testimony as to her employment, there was also testimony indicating her continued need for alimony. We find this evidence sufficient to support the trial court's decision to continue wife's alimony.

Although husband asserts that his voluntary career change was made entirely in good faith, without a disregard of the welfare of his children and former spouse, this change does not automatically mandate a reduction in his support obligation. See *Spingola v. Spingola.* The decision

as to reducing or maintaining the support obligation rests within the trial court's discretion. *Id.*

We recognize that the "responsibilities of begetting a family many times raise havoc with dreams. Nevertheless, the duty [to support] persists, with full authority in the State to enforce it." *Romano v. Romano*, 133 Vt. 314, 316, 340 A.2d 63, 63 (1975).

Based upon our review of the record we conclude that the decision of the trial court does not constitute an abuse of its discretion. Its decision is affirmed.

IT IS SO ORDERED.

DONNELLY, C.J., and ALARID, J., concur.