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Please note:  
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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF REDWOOD

In re Marriage of: Case No. XYZ 54321  
SARAH MONARDA, RESPONDENT’S REPLY TO  
Petitioner, PETITIONER’S OPPOSITION TO  
MOTION TO VACATE JUDGMENT  
vs. Date: November 2, 20\_\_  
Time: 9:00 a.m.  
GEORGE CYAN, Dept.  
Respondent.

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Monarda makes two arguments opposing the motion: (1) that the dissolution-of-marriage judgment is res judicata and (2) that Cyan has no admissible evidence showing that he is not Jean’s father and is prohibited by law from obtaining further genetic testing that would be admissible. At this point, only one of these contentions is true—that Cyan has no admissible evidence that he is not Jean’s father. But this Court has the authority to order a test that *will* be admissible. Contrary to petitioner’s contentions, Cyan is not prohibited by case law from obtaining admissible evidence that he is not Jean’s father, and the dissolution judgment is not res judicata.

1 **ARGUMENT**

2 **1. Petitioner misstates the appellate court’s ruling.**

3 The appellate court made two relevant rulings: (1) that the dissolution judgment  
4 could not be set aside on the basis of extrinsic fraud and (2) that the default judgment  
5 could not be set aside under Family Code § 7645 because petitioner did not have the  
6 opportunity to be heard and oppose the motion. Unpublished Opinion, Ex. 1. These are  
7 very narrow rulings, which petitioner is trying to expand beyond their scope. What  
8 petitioner has failed to address is the court’s other ruling: “Now that Family Code section  
9 7645 et seq. are in effect, respondent is free to bring a new motion based on those  
10 statutes, so long as he does so in a timely manner. (See *Sanchez, supra* 135 Cal.App.4th  
11 at p. 20.)” Opinion at p. 6.

12 Cyan brings his motion under that ruling. Appellate courts do not encourage  
13 frivolous or futile litigation; in fact, they actively discourage it. If the court of appeal had  
14 concluded, as petitioner now argues, that bringing this motion would be futile because the  
15 dissolution judgment would stand regardless of the outcome, it would not have invited  
16 Cyan to make the motion.

17 The court ruled that the dissolution judgment could not be vacated on the grounds  
18 of extrinsic fraud. But in keeping with its well-established policy of not speculating or  
19 making overly broad rulings, the court did not rule as to what the effect would be on the  
20 dissolution judgment if Cyan’s § 7645 motion were granted. The court did not address  
21 the possibility that the dissolution judgment could be set aside for another reason—  
22 namely, that it is based solely on the existing default judgment. Given the court’s  
23 reluctance to address a hypothetical outcome, it is no reflection on the merits of Cyan’s  
24 argument that the court was silent as to any future proceedings, other than to suggest that  
25 Cyan proceed with the motion.

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1 **2. This Court must order a genetic test under Family Code § 7645.**

2 Family Code § 7645 et seq. sets out the procedure by which a judgment of  
3 paternity may be set aside on a motion of an interested party. It has been in effect for less  
4 than two years and respondent is unaware of any reported case law applying the statute to  
5 facts similar to those presented here.<sup>1</sup> Section 7647 sets out all the required elements for  
6 the motion, including in subsection (a)(2)(C):

7 A declaration that the person filing the motion believes that the previously  
8 established father is not the biological father of the child, the specific reasons  
9 for this belief, and a declaration that the person desires that the motion be  
10 granted. The moving party is not required to present evidence of a paternity  
11 test indicating that the previously established father is not the biological  
12 father of the child in order to bring this motion pursuant to Section 7646.

13 Cyan attached the DNA laboratory report, not for the purpose of establishing paternity,  
14 but to establish the foundation for Cyan’s belief that he is not Jean’s father. As the code  
15 section states, Cyan did not have to have a test to bring the motion in the first place.

16 Now, the next step for the Court before ruling on the motion is to order a genetic  
17 test under § 7647. This is a mandatory requirement that petitioner cannot oppose. Under  
18 § 7647, to determine paternity, the court shall, on a party’s request, or may, on its own  
19 motion, order genetic testing that follows the statutory guidelines. Cyan requests that,  
20 under § 7647, this Court order genetic testing to establish Jean’s paternity.

21 Any genetic testing used to support the motion to set aside or vacate shall be  
22 conducted in accordance with Section 7552. The court *shall*, at the request  
23 of any person authorized to make a motion pursuant to this article, or may  
24 upon its own motion, order genetic testing to assist the court in making a  
25 determination whether the previously established father is the biological

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26 <sup>1</sup>The only case respondent is aware of is *County of Fresno v. Sanchez* (2005) 135  
27 Cal.App.4th 15, which held only that § 7645 superseded prior case law.

1 father of the child.

2 Fam. Code § 7647.7 (emphasis added).

3 Cyan is not asking the Court to make a ruling based on his privately obtained test;  
4 he is asking the Court to order a test under §§ 7647.7 and 7552. Once the test has  
5 conclusively established who is Jean’s father, then the Court will have all the admissible  
6 evidence it needs to rule on the motion.

7 The cases petitioner cited in support of her argument that the Court cannot order  
8 testing preceded the enactment of § 7645 in 2005. Therefore, § 7645 supersedes any  
9 precedent cited in those cases.

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11 **3. Petitioner’s claim of paternity depends on the default judgment.**

12 Petitioner argues that the court of appeal clearly upheld the judgment of  
13 dissolution, with the inference that the ruling establishes paternity. No such inference is  
14 supported by the court’s ruling. The court held that extrinsic fraud was not grounds for  
15 setting aside the dissolution judgment, but it did *not* rule on the ultimate question of what  
16 effect a ruling on a § 7645 motion would have on the dissolution judgment.

17 The cases cited by petitioner do not support her argument. *Garcia v. Garcia*  
18 (1957) 148 Cal.App.2d 147 involved a married couple and the child of a marriage, which  
19 Jean is not. The facts in *Garcia* are not analogous to this case. The facts in *County of*  
20 *Alameda v. Sampson* (1980) 104 Cal.App.3d 584, are not analogous either. In *Sampson*,  
21 the father had stipulated to paternity, which Cyan did not do as part of the dissolution  
22 action. In the dissolution judgment of April 2001, box 4. n. “Parentage is established for  
23 children of this relationship born prior to the marriage.” is *not* checked off. Petitioner’s  
24 Ex. D. The only basis for establishing paternity that exists is the default judgment of  
25 19\_\_\_. That judgment was consolidated into the dissolution judgment in July 20\_\_\_,  
26 presumably to support the request for child support.

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1 **CONCLUSION**

2 For all of the reasons set forth above, the Court must order a genetic test under  
3 § 7552 and, once the results are presented to the Court, grant respondent’s motion.

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5 Dated:

Respectfully submitted,

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Attorney for Respondent  
GEORGE CYAN

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