

5/9/12

Greetings!

Another byte of law for your interest.

Setting: wife accuses husband of abusing her daughter (his step daughter). Wife confronts husband with this issue in a phone call, makes allegations of the abuse and husband never actually denies the charges. Is the husband's response the allegations an admission against his interests? This issue was taken up by the California Court of Appeal, 2nd District (Los Angeles/Ventura), in the case of *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75 and the answer is "yes."

Under California Evidence Code section 1221, pertaining to "adoptive admissions," an adoptive admission is a statement "which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." For the adoptive admission to apply, the accusations must be made under circumstances in which a reasonable person had the opportunity to deny the accusation and failed to do so. The decision as to whether the husband's responses to the charges qualify as an adoptive admission is a jury question.

In *Kincaid* the husband never actually denied the charges. He stammered around the issue and his response, the court decided, was sufficient to raise a triable issue as to whether the husband's response was an adoptive admission. The appellate court ruled that the trial court erred in barring the phone conversation transcript. Thus, wife survived husband's Motion for Summary Judgment.

Don't try this at home! In *Kincaid* the conversations were taped by the Ventura County Police Department. In California, generally, one still needs the permission of the other party to record a conversation.

Disclaimer: The author assumes no responsibility for the applicability of this analysis to your case.

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