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April 2018

## Plaintiff's Immigration Status No Longer Discoverable or Admissible in California Personal Injury Cases

Credit to Tyson & Mendes, La Jolla, CA

In 1986, California decided *Rodriguez v. Kline*, which held that an individual injured in the United States ("U.S.") who attempted to recover for loss of future earnings and subject to deportation, was not entitled to recover compensation based on his or her projected earning capacity in the U.S. (1986) 186 Cal.App.3d 1145. Instead, the individual's future lost wages was limited to the future income he or she would have earned in their country of origin. *Id.*

Under *Rodriguez v. Kline*, "Whenever a plaintiff whose citizenship is challenged seeks to recover for loss of future earnings, his status in this country must be decided by the trial court as a preliminary question of law. At the hearing conducted on this issue, the defendant will have the initial burden of producing proof that the plaintiff is an alien who is subject to deportation. If this effort is successful, the burden will shift to the plaintiff to demonstrate to the court's satisfaction that he has taken steps which will correct his deportable condition." *Id.* If the plaintiff prevails, all evidence relative to his or her immigration status will be excluded and earnings will be based on U.S. wages instead of his or her country of origin's wages. Conversely, if defendant prevails, plaintiff's earnings will be based on what he or she would have earned in their respective country of origin.

2017 marked the end of the longstanding *Rodriguez v. Kline* ruling in California. In August 2016, Governor Jerry Brown signed AB 2159 into law, which became effective January 1, 2017. AB 2159 prohibits a person's immigration status from being admitted into evidence or being subject to discovery in personal injury and wrongful death actions. AB2159 is now *California Evidence Code* Section 351.2, which states:

In a civil action for personal injury or wrongful death, evidence of a person's immigration status shall not be permitted into evidence, nor shall discovery into a person's immigration status be permitted.

This section does not affect the standards of relevance, admissibility, or discovery prescribed by Section 3339 of the Civil Code, Section 7285 of the Government Code, Section 24000 of the Health and Safety Code, and Section 1171.5 of the Labor Code.

According to proponents, "[t]his important change increases consistency with other laws that recognize that immigration status is not relevant to issues of liability and closes off one controversial exception to that general rule created by a single Court of Appeal decision from 1986... AB 2159 seeks to end the legal argument that immigration status is relevant to determine the recovery an injured undocumented person should receive in California. No individual should have to face having immigration status raised in discovery for the sole purpose of intimidating or undervaluing his or her claims for future loss." Further, proponents claimed that defendants rely on *Rodriguez v. Kline* to "leverage the fear of deportation against undocumented plaintiffs in order to reduce or even eliminate claims for future lost income and, increasingly, to limit future medical damages to what the injured person would expect to pay for medical care in the plaintiff's country of origin, rather than in the U.S. where he or she lives but where medical costs are typically much higher."

According to Assemblywoman Lorena Gonzalez (D-San Diego), sponsor of AB 2159, the new code section aims "to ensure an injured person in California receives fair and just compensation for future income loss and future medical costs regardless of their immigration status." Continued on page 4

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### Inside this issue.....

Immigration Status	Pg. 1
President's Message	Pg. 2
Save the Date	Pg. 3
Past President letter	Pg. 3
Faulty Workmanship	Pg. 4
Counterfeit Wine claim	Pg.5
DOI Press Release	Pg.6
SEED Enrollment	Pg.6
CAIIA Mid-term	Pg. 8
On the Lighter Side	Pg. 9

#### CAIIA Newsletter

CAIIA Office  
PO Box 168  
Burbank, CA 91503-0168  
Website: [www.caiia.com](http://www.caiia.com)  
Email: [info@caiia.com](mailto:info@caiia.com)  
Tel: (818) 953-9200

Editor: Sterrett Harper  
Harper Claims Service, Inc.  
(818) 953-9200  
[harperclaims@hotmail.com](mailto:harperclaims@hotmail.com)

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## California Association of Independent Insurance Adjusters, Inc.

### President's Office

P.O. Box 18444  
South Lake Tahoe, CA 96151  
Email: [mail@missionadjusters.com](mailto:mail@missionadjusters.com)

### President

Paul Camacho, RPA, ARM, Mission Adjusters, So. Lake  
Tahoe, CA  
[mail@missionadjusters.com](mailto:mail@missionadjusters.com)

### Immediate Past President

Steve Washington – Washington & Finnegan, Inc., Anaheim, CA  
[steve.washington@sbcglobal.net](mailto:steve.washington@sbcglobal.net)

### Vice President

John Ratto  
Reliant Claims Services, Inc.  
Oakland, CA  
[mail@reliantclaims.com](mailto:mail@reliantclaims.com)

### Secretary Treasurer

Gene Campbell  
Carter Insurance Claims Services, Inc.  
Tustin, CA  
[gcampbee@carterclaims.com](mailto:gcampbee@carterclaims.com)

### ONE YEAR DIRECTORS

Neal Thornhill  
Thornhill & Associates, Inc.  
Chatsworth, CA  
[neal@thornhillandassociates.com](mailto:neal@thornhillandassociates.com)

Eric Sieber  
E.J. Sieber and Co.  
Rancho Cucamonga, CA  
[EJSieberco@gmail.com](mailto:EJSieberco@gmail.com)

### TWO YEAR DIRECTORS

Richard Kern  
SGD Inc.  
San Diego, CA  
[rkern@sgdinc.com](mailto:rkern@sgdinc.com)

Pete Vaughan  
Vaughan and Associates Adjusting Services, Inc.  
Benicia, CA  
[pvaughan@pacbell.com](mailto:pvaughan@pacbell.com)

### OF COUNSEL

Kevin Hansen, Attorney, McCormick Barstow, LLP  
7647 N. Fresno St.  
Fresno CA 93729-8912  
T. 559.433.1300  
F. 559.433.2300  
[kevin.hansen@mccormickbarstow.com](mailto:kevin.hansen@mccormickbarstow.com)

## President's Message

Hello and Happy Spring!

It is a rain and snow mix here in the mountains as Mother Nature seems to be running a little behind.

We are now scheduling our certifications classes for Fair Claim Settlement Practices and Evaluation of Earthquake Practices. Consider participating in this DOI approved class. The lessons are not just in the material presented, but in the participant interaction. The details are in the flyer included in this Status Report.



Paul Camacho  
CAIIA President

Cyber safety seems to be in the daily news with new hacks and releases of information that was thought to be secure. Unfortunately, technology is changing so much, it seems we are always looking to catch up. Phishing is something we see daily in our inbox as well as phone calls on our mobile devices from phony numbers looking to catch you. Take the time to be vigilant and make sure you are running the latest security software for yours as well as your client's protection.

I hope to see you at the April 6, 2018, CAIIA Mid-Term meeting in South Lake Tahoe to plan the future of our organization! We will be discussing a new category of membership, and I am sure the discussion will be lively.

As you know, each month I am asking a past CAIIA President to share their observations of this organization and their views of change. This month I have asked Peter Schiffrin, who was the CAIIA president in 2007-2008, to write this month's President's message.

Many of you do not know the commitment that Peter has made to the CAIIA to keep it a current and viable organization. He has continued to be an active participant and continues to serve on committees as needed. Peter has been the CAIIA representative on the CA Department of Insurance Curriculum Board for the past three years. As his term is now concluding, we owe him our gratitude.

Peter is a lifelong fan of a Southern California baseball team and out of respect, my picture for this month does not have any orange. My Northern California baseball team is rebuilding, and it will be an interesting season. The rivalry will continue!!

Please take the time to reach out to our past presidents to reconnect if you have lost touch. Stay tuned to see who is next!

See you next month!

CAIIA President 2017-2018  
**Paul Camacho**

**CAIIA President 2017-2018**

**Mission Adjusters**

[mail@missionadjusters.com](mailto:mail@missionadjusters.com)



**NEWS FOR OUR MEMBERS****SAVE THE DATE**

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

April 6, 2018

CAIIA Mid-term, South Lake Tahoe

August 28-30

Claims Conference of Northern Ca., Squaw Valley

When Paul asked me to write an article for the Status Report it led me to the pleasurable task of rereading the articles I wrote in 2007-2008. I ran across an article that rings true today.

I espoused about the many skills needed to be a competent adjuster including:

**People Skills** – Adjusters are regularly thrust into meetings and conversations with people they have never met before, some of whom can be quite confrontational. A good adjuster can diffuse conflict and create successful working relationships. I have learned recently that these skills can work (somewhat) with teenage daughters as well.

**Analytical Skills** – Adjusters need to be able to gather facts, evaluate damage, interpret information, analyze insurance coverage and perform many other high brain level functions. And as technology speeds us forward we must try and keep up.

**Organizational Skills** – Adjusters need to find a way to manage their time, so they can handle all their files promptly, get their reports done on time, and comply with rules directed to them by their clients and even an insurance commissioner.

I often feel and say that we are an under appreciated group, working a job that requires expert level skills, but not often seen and recognized as experts. One of the greatest rewards of being involved with the CAIIA has and continues to be the chance to interact with claim handling experts.

I want to thank Paul for taking on a second term and for his energy and vision that I know will help the CAIIA continue to foster education and camaraderie for California independent adjusters and to provide a resource for those looking for talented adjusters to handle their claims.

Lastly, I noticed that my Status Reports often spoke of hope that the Dodgers would achieve their first world championship since 1988. Some things never change....

Peter Schiffrin, Schiffrin, Gagnon & Dickey, Inc.

CAIIA President 2007-2008 & Super

Dodger Fan!



Continued from page 1

The recently added code section has had, and will continue to have, a severe impact on defendants' exposure to damages relative to lost income and medical expenses. As of January 1, 2017, California Evidence Code Section 351.2 prohibits the discovery and admissibility of a plaintiff's immigration status. Now, undocumented plaintiffs will no longer be capped at recovering loss of earnings potentially earned in his or her country of origin. Instead, they are entitled to U.S. wages, irrespective of whether the plaintiff's immigration status allows him or her to legally work legally in the U.S. These same principles apply to medical costs. An undocumented plaintiff is now entitled to the medical expenses incurred in the U.S. instead of the limiting medical damages to what they would expect to pay in their country of origin.

Accordingly, the enactment of California Evidence Code section 351.2 has resulted in considerably larger monetary awards. Relative to earnings and medical expenses in other countries undocumented Plaintiffs are poised to obtain significantly higher damage awards in the U.S..

### **Faulty Workmanship Exclusions**

**Credit to: Smith, Smith & Feeley, Newport Beach, CA**

A commercial general liability policy's "faulty workmanship" exclusions – exclusions j.(5) and j.(6) – did not relieve the insurer of a duty to indemnify its insured for property damage to the insured's non-defective work occurring before the work was complete. (*Global Modular, Inc. v. Kadena Pacific, Inc.* (2017) 15 Cal. App. 5th 127)

#### **Facts**

The United States Department of Veterans Affairs ("VA") hired Kadena Pacific, Inc. ("Kadena") as general contractor for construction of a rehabilitation center that would consist of 53 modular units. Kadena hired Global Modular, Inc. ("Global") to partially build, deliver, and then install the modular units for the project. Because Kadena hired a different subcontractor to install the roofing for the modular units, Global agreed to deliver the modular units covered only by a roof substrate consisting of a 3/4" base sheet of plywood. The Kadena-Global subcontract stated that Global assumed responsibility "for any loss or damage to the [units] ... however caused, until final acceptance thereof by [Kadena]." The subcontract conditioned "final acceptance" upon the VA's approval of the units.

Initially, the subcontract called for Global to deliver and finish the modular units during the summer of 2010. However, due to delays caused at least partially by Global, Global did not deliver the units until October and November 2010 (the beginning of the rainy season). Although Global tried to protect the units from rain by covering them with plastic tarps, the interiors suffered water damage from October 2010 through January 2011. As of mid-February 2011, Global was still in the process of trying to remediate the interior water damage and had not yet completed installing the units. However, by this time, the relationship between Kadena and Global had deteriorated, and Kadena and Global mutually terminated their contract. Kadena then oversaw remediation of the water-damaged interiors and completion of the project.

Global sued Kadena for alleged failure to pay under the subcontract. Kadena cross-complained against Global, alleging that Global had breached the contract by (1) failing to provide services and materials required under the contract in a timely manner, (2) failing to provide modular units which were constructed in a workmanlike manner, and (3) failing to deliver the modular units in a manner which would protect them from rain. The jury agreed with Kadena and found Global contractually liable for a total of \$1,068,542, consisting of \$776,478 for repair of the water-damage interiors and \$292,064 for delay cause by the repairs.

Global had a commercial general liability policy with North American Capacity Insurance Company (NAC). The NAC policy covered damages Global owed because of "property damage" caused by an "occurrence" and not otherwise excluded. NAC filed a declaratory judgment action seeking a determination regarding its duty to indemnify Global for the underlying judgment in favor of Kadena. The trial court granted summary judgment in favor of Kadena, finding that the judgment Kadena obtained against Global in the underlying action was covered by the NAC policy. NAC appealed.

#### **Holding**

The Court of Appeal affirmed the summary judgment in favor of Kadena and against NAC.

The appellate court began by holding that to the extent Kadena's judgment against Global was for the cost of repairing water damage to the interior of the units, the NAC policy provided coverage. Because the interior water damage clearly was "property damage" caused by an "occurrence," the only issue was whether some exclusion applied.

The appellate court rejected NAC's reliance on exclusion j.(5), which bars coverage for property damage to "that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf *are performing operations*, if the 'property damage' arises out of those operations." Italics added. According to the appellate court, the phrase "are performing operations"

Continued on page 6



**Counterfeit Wine is not an Insured Loss**  
**Credit to: McCormick Barstow, Fresno, CA**

**A loss based on diminution in value of rare, vintage wine due to the discovery that the insured was deceived into buying counterfeit wine does not constitute a loss to covered property under a Valuable Possessions property insurance policy.**

***Doyle v. Fireman's Fund Ins. Co.* (4th Dist. Ct. App. 2018) \_\_\_ Cal. App. 5th \_\_\_, 2018 DJDAR 2173, Case No. G54197**

#### UNDERLYING CLAIM

Doyle was a collector of rare, vintage wine. He insured his collection under a Valuable Possessions policy issued by Fireman's Fund with a \$19 million coverage limit. The policy provided that Fireman's Fund would insure for "direct and accidental loss or damage to covered property caused by 'an occurrence...'" An occurrence was defined as "a loss to covered property which occurs during the policy period...and is caused by one or more perils we insure against." The term "loss" was not defined. With respect to wine, the policy had specific exclusions which did not apply to the loss.

During the years Doyle was insured, he purchased close to \$18 million in what he thought was rare, vintage wine from Kurniawan. However, Kurniawan had apparently been filling empty wine bottles with his own wine blend and attaching counterfeit labels. Kurniawan was convicted of fraud and Doyle filed a claim with Fireman's Fund for the losses resulting from the fraud. Fireman's Fund denied coverage on the ground there was no covered loss. Doyle sued Fireman's Fund alleging breach of contract and other causes of action. Fireman's Fund filed a demurrer which was sustained without leave to amend. Doyle appealed.

#### APPELLATE COURT'S RULING

The appellate court started by citing general California law regarding the applicability of property insurance. Citing *Simon Marketing v. Gulf Ins. Co.* (2007) 149 Cal. App. 4th 616, the court noted that recovery under property insurance requires a physical loss or damage and that alleged losses that are intangible or incorporeal are not covered. Thus, claims where the insured has suffered only economic loss unaccompanied by a physical alteration of the property is not covered. With specific reference to the Fireman's Fund policy, the court noted that the policy "was insuring against 'direct and accidental loss...to covered property[.]' The word "loss" modifies the subject phrase "covered property" by way of the preposition "to." Fireman's Fund was insuring against any losses *to* the wine; Fireman's Fund was not insuring against any losses *to* Doyle's finances or *to* his unrealized expectations as to the value of the wine he had purchased. (Citation.)

The appellate court noted that the wine was counterfeit when Doyle purchased it and it remained so throughout the coverage period. Since diminution in value was not a covered peril, but instead a measure of loss, coverage did not apply. Furthermore, the lack of the use of the term "physical" in the Fireman's Fund policy did not change the result. Citing the "fundamental nature of property insurance," namely insuring against harm to the property itself as opposed to financial loss, the court stated that "Doyle did not buy a *provenance* insurance policy; Doyle bought a *property* policy.

Finally, Doyle pointed to the fact that the policy did not include a fraud exclusion and argued that the fraud was covered. However, the court noted that it was Doyle's burden to first show the loss fell within the insuring language, which he failed to do. The absence of a fraud exclusion was therefore irrelevant. In affirming the trial court's judgment in favor of Fireman's Fund, the appellate court offered the following wisdom to Doyle from Shakespeare's Othello: "The robbed that smiles steals something from the thief." This likely offered little comfort to Doyle.

#### EFFECTS OF THE COURT'S RULING

This ruling is helpful to insurers by clearly stating that property insurance does not apply to mere economic losses suffered by an insured due to the loss of value of physically unaltered property. When an insured suffers economic loss due to his or her property being worth less than the insured previously believed, coverage does not apply when the property itself has not been physically damaged. This remains true even when the property policy does not use the word "physical" in describing what constitutes a covered loss. Finally, interestingly, the court noted in a footnote that the parties settled a related claim regarding a mutual mistake of fact as to the value of what was being insured. Presumably, the insurer returned some portion of the premium charged.

Continued from page 4

indicates that exclusion j.(5) applies "only to damage caused during physical construction activities." Thus, exclusion j.(5) did not apply to the water intrusion damage "because the intrusion occurred during heavy rains when Global was not working on the units."

The appellate court likewise rejected NAC's reliance on exclusion j.(6), which bars coverage for property damage to "*that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.*" Italics added. According to the appellate court, exclusion j.(6)'s reference to "that particular part" means that the exclusion applies "to the specific part of the insured's work on which the insured performed faulty workmanship and not, more broadly, to the general area of the construction site affected by the insured's work." Thus, assuming Global's waterproofing efforts constituted "incorrectly performed" work, the "particular part" of the property "on" which Global performed work was the plywood roof substrate, not the interior parts of the units for which Kadena sought repair/replacement costs. The units' interior parts "were not defective and were not the subject of Global's incorrect work, and as a result, their repair and replacement costs do not fall under exclusion j.(6)."

The appellate court also held that to the extent Kadena's judgment against Global was for delay damages caused by the water intrusion, the NAC policy provided coverage. According to the appellate court, "delay damages arising from 'property damage' fall under the insuring clause, which obligates NAC to "pay those sums that the insured becomes legally obligated to pay as damages because of ... 'property damage' to which this insurance applies." Here, the delay damages constituted "a consequential loss (a loss occasioned by the water intrusion) and as such, is part of the damages NAC must pay 'because of' property damage."

#### Comment

Some prior California appellate decisions contain broad language suggesting that exclusions j.(5) and j.(6) always preclude coverage for damage to an insured's work while construction is ongoing. (See, e.g., *Baroco West, Inc. v. Scottsdale Ins. Co.* (2003) 110 Cal.App.4th 96 and *Clarendon America Ins. Co. v. General Security Indemnity Co. of Arizona* (2011) 193 Cal.App.4th 1311.) However, in *Kadena*, the appellate court distinguished those earlier decisions because "none of these decisions interpret the exclusionary language at issue here – 'are performing operations,' 'that particular part,' and 'work ... incorrectly performed.'" The Kadena court broke exclusions j.(5) and j.(6) down into constituent parts, and then narrowly construed each part. That is consistent with the general rule that courts resolve all doubts, uncertainties and ambiguities in exclusionary language in favor of the insured and against the insurer.



Take time to stop and smell the flowers.

### DOI Press Release

#### Orange County agent arrested in \$1.6 million fraud scheme targeting elderly

**ORANGE, Calif.** - Department of Insurance detectives today arrested Mark Malatesta, 55, of San Clemente, on 16 felony counts related to a \$1.6 million fraud scheme targeting elderly southern California residents.

Malatesta, a licensed insurance agent at the time, allegedly exploited at least six elderly consumers by falsifying information on annuity applications and netted more than \$135,000 in illegal commissions. Malatesta faces a range of other charges.

"Increasingly we are uncovering financial scams that target seniors," said Insurance Commissioner Dave Jones. "These crimes are reprehensible and we will continue to work with our district attorney partners to aggressively investigate and prosecute anyone who targets seniors."

An investigation revealed Malatesta convinced his senior victims to terminate their investments, causing them to lose a total of \$45,000 in surrender penalties. In a classic churning scheme, Malatesta then sold them new annuities for which they did not qualify due to their advanced age. The fraudulent investments were canceled by the insurers once they discovered Malatesta provided false information.

When insurers canceled the new investments, they refunded the \$1,616,897 in deposits when they refunded the victims. The department suspended Malatesta's insurance license and will pursue revocation if he is convicted of the charges. This case is being prosecuted Orange County District Attorney's Office.



# CAIIA 2018 Educational Event



## Evaluation of Earthquake Damage (SEED)

Including the Fair Claims Settlement Practices Regulations (FCSPR)

**Date:** May 31, 2018  
**Location:** Embassy Suites Brea [map link](#)  
900 E. Birch Street  
Brea, CA 92821

### SEED Seminar (inc FCSPR) (8 hrs CA CE)

**Time:** Registration 7:30- 8:00 AM  
SEED Training 8:00- 5:00 PM

**Cost:** CAIIA Member \$ 75.00  
Ins Co Employee \$ 100.00  
Non-Member I/A \$ 150.00

### FCSPR Seminar Only (2 hrs CA CE)

**Time:** Registration 7:30- 8:00 AM  
FCSPR & SIU 8:00- 10:00 AM

**Cost:** CAIIA Member \$ 25.00  
Ins Co Employee \$ 35.00  
Non-Member I/A \$ 50.00

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Breakfast and Lunch provided with SEED Class. Breakfast only for FCSPR

Included in the SEED program is the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, §2695.40 through 2695.45 and Insurance Code 10089.3. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage as required for all adjusters who evaluate earthquake claims. Recertification required every three years. (CDI#279570 for 8 CE hours) Includes the **FCSPR** and **SIU** certifications.

**Questions: Call Richard Kern at (619) 280-7702 or via email at [rkern@sgdinc.com](mailto:rkern@sgdinc.com)**

**CAIIA REGISTRATION FORM**  
**California Association of Independent Insurance Adjusters**  
**MID-TERM BUSINESS MEETING—April 5-6, 2018**



**Tahoe Resort Hotel, 4130 Lake Tahoe Blvd., South Lake Tahoe, CA 96150**

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## On the Lighter Side

### HOW DO YOU DECIDE WHO TO MARRY? (definitely, words to live by)

(written by kids)

1. You got to find somebody who likes the same stuff. Like, if you like sports, she should like it that you like sports, and she should keep the chips and dip coming.

-- **Alan, age 10**

-No person really decides before they grow up who they're going to marry. God decides it all way before, and you get to find out later who you're stuck with.

-- **Kristen, age 10**

2. WHAT IS THE RIGHT AGE TO GET MARRIED?

Twenty-three is the best age because you know the person FOREVER by then..

-- **Camille, age 10**

3. HOW CAN A STRANGER TELL IF TWO PEOPLE ARE MARRIED?

You might have to guess, based on whether they seem to be yelling at the same kids.

-- **Derrick, age 8**

4. WHAT DO YOU THINK YOUR MOM AND DAD HAVE IN COMMON?

Both don't want any more kids.

-- **Lori, age 8**

5. WHAT DO MOST PEOPLE DO ON A DATE?

-Dates are for having fun, and people should use them to get to know each other. Even boys have something to say if you listen long enough.

-- **Lynnette, age 8** (isn't she a treasure?)

- On the first date, they just tell each other lies and that usually gets them interested enough to go for a second date.

-- **Martin, age 10**

6. WHEN IS IT OKAY TO KISS SOMEONE?

-When they're rich.

-- **Pam, age 7** (Love her)

-The law says you have to be eighteen, so I wouldn't want to mess with that.

-- **Curt, age 7**

-The rule goes like this: If you kiss someone, then you should marry them and have kids with them. It's the right thing to do.

-- **Howard, age 8**

7. IS IT BETTER TO BE SINGLE OR MARRIED?

It's better for girls to be single but not for boys. Boys need someone to clean up after them.

-- **Anita, age 9** (bless you child)

8. HOW WOULD THE WORLD BE DIFFERENT IF PEOPLE DIDN'T GET MARRIED?

There sure would be a lot of kids to explain, wouldn't there?

-- **Kelvin, age 8**

And the #1Favorite is.....

9. HOW WOULD YOU MAKE A MARRIAGE WORK?

Tell your wife that she looks pretty, even if she looks like a dump truck.

-- **Ricky, age 9**