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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF RIVERSIDE

13 IN RE MARRIAGE OF:
14 PETITIONER: JENNIFER SMITH
15 and
16 RESPONDENT: JOHN SMITH

CASE NUMBER: IND 000003

**RESPONDENT'S POINTS AND
AUTHORITIES IN SUPPORT OF
REQUESTS FOR ORDERS
(ATTORNEY FEES AND COSTS)**

DATE: October __, 2013
TIME: 8:15 a.m.
DEPT: XXXXXX

17 **I. Argument**

18 As set forth in the declarations filed in connection herewith, it is necessary and
19 proper that \$100,000 be awarded to Respondent's attorney and \$37,000 be awarded to
20 his forensic accountant.

21 The accompanying declarations establish that Respondent is in control of none
22 of the parties' community property because Petitioner has seized control of all of it. The
23 remaining community property consists of these assets:

24 • \$2,236,000 held in a blocked Citibank Bank account from the July,
25 2013 sale of the parties' jointly titled family residence located at BigHorn. Petitioner
26 refuses to allow the release of any of the \$2,236,000 for any purpose.

27 • A free and clear Mexican villa located in San Miguel de Allende, Mexico

1 worth \$2.5 million free and clear.

2 • A 55 foot motor yacht that is free and clear, as to which Petitioner has
3 taken exclusive control and enjoyment.

4 • Approximately \$4,755,117 (including half of BigHorn) is held by the
5 Petitioner that Respondent contends to be community property funds, or partly CP.

6 • Petitioner has admitted numerous times under oath that the parties'
7 remaining assets are community property, as shown by the Respondent's declaration
8 and the preliminary declarations of disclosure which the parties have exchanged to
9 date.

10 • Respondent is unemployed and has no employment or investment
11 income, and cannot continue what both parties did during the marriage. The parties
12 have made millions buying, improving and selling real estate that supported a very
13 luxurious standard of living, and while the Petitioner continues to engage in such
14 ventures, using both community and separate funds that she controls, Respondent has
15 no such ability.

16 • Respondent has received no contribution towards his attorneys fees or
17 forensic costs from the Petitioner. Awarding the Respondent the amounts request as
18 they impact Petitioner are nothing more than a "flea on the back of an elephant." For
19 Respondent they make or break this case. It would constitute a manifest abuse of
20 discretion to deny Respondent his attorney fee and forensic requests, and these
21 requests are eminently reasonable and even-handed.

22 **A. A Review of Interspousal Fiduciary Duties**

23 Interspousal duties involve a duty of loyalty, a duty of care, and a duty of
24 disclosure. The nature of the duty may change after separation, depending upon
25 whether management and control of assets continues. Family Code section 721 is the
26 starting place. Subsection (b) states "This confidential relationship is a fiduciary
27 relationship subject to the same rights and duties as non-marital business partners...,"

1 as set forth in the Corporations Code. It "imposes a duty of the highest good faith and
2 fair dealing on each spouse, and neither shall take any unfair advantage of the other."
3 Section 721(b)(1) entitles each spouse access to the marital books, so to speak;
4 subsection (b)(2) rendering upon request a truth accounting about "all things affecting
5 any transaction which concerns the community property estate; and subsection (b)(3)
6 requires spouses and domestic partners to account to each other any benefit or profit
7 derived from "any transaction by one spouse without the consent of the other spouse
8 which concerns the community property" and to hold as trustee (constructive trust) any
9 such benefit.

10 A breach of fiduciary duty is a consequence of actual or constructive (i.e.,
11 implied) fraud. Traditional remedies in the non-marital context include the imposition of
12 a constructive trust, essentially a finding that some item of property that was obtained
13 by constructive fraud is being held for the benefit of the other party too. Constructive
14 breaches of fiduciary duties are way more common than you might imagine. Essentially,
15 whenever the separate property interests of one spouse are enriched and improved to
16 the detriment of the community estate or the other's spouses separate property, in the
17 absence of an express waiver or consent of the harmed party, a breach of fiduciary
18 duty has occurred.

19 Family Code section 1100(e) elaborates upon the duties established by section
20 721, and directly addresses spousal fiduciary duties in the management and control of
21 community property before the assets have been divided by agreement or by the court.
22 "This duty includes the obligation to make full disclosure ... of all material facts and
23 information regarding the existence, characterization, and valuation of all assets in
24 which the community has or may have an interest and debts for which the community is
25 or may be liable...." Family law attorneys refer to this as "MFI's" - material facts and
26 information. Section 1100(d) permits one spouse as the primary managing partner (and
27 assuming they held that role prior to separation) to "act alone in all transactions" but
28

1 requires that he or she give prior written notice of any "sale, lease, exchange,
2 encumbrance, or other disposition" of personal property used in the operation of a
3 business. Disclosure responsibilities continue in real time under the time of final
4 judgment and division of the marital and separate assets and liabilities.

5 An excellent case that discusses breach of management and control fiduciary
6 duties in practical terms is *IRMO Margulis* (2011) 198 Cal.App.4th 277. There the
7 parties were married for 33 years, with the husband controlling everything and claiming
8 that assets had disappeared by time of trial. There was evidence of what the assets
9 had consisted of at one point in time after a lengthy separation spanning some eleven
10 years, consisting of a document that came to light listing the parties' assets as worth
11 \$1,305,500 that was dated three years after the husband moved out. This was
12 introduced at trial, and the key holding of the Margulis decision is that given Husband's
13 sole management of assets, the burden shifted to him to explain where these assets
14 went per Family Code sections 721(b)(1)-(3), 1100(e) and 2100(c) - all of which
15 address disclosure obligations. Mr. Margulis had explained nothing, despite the
16 language of 2100(c) "*that each party has a continuing duty to immediately, fully, and*
17 *accurately update and augment that disclosure to the extent there have been any*
18 *material changes so that at the time the parties enter into an agreement for the*
19 *resolution of any of these issues, or at the time of trial on these issues, each party will*
20 *have a full and complete knowledge of the relevant underlying facts.*" [Italics added].
21 Note that this is a "*sua sponte*" duty, i.e., it arises by operation of law and no request
22 needs to be made of that status of property or assets, although that is always a good
23 idea if one suspects a FD breach.

24 The *Margulis* court stated it this way, at 198 CA4th at 1268:

25 "Given that '**bedrock concerns**' of 'policy and fairness' drive the analysis
26 [citation omitted] , it is not surprising that a common trigger for burden-shifting is
27 'when the parties have unequal access to evidence necessary to prove a
28 claim lies peculiarly within the knowledge and competence of one of the parties,
that party has the burden of going forward with the evidence on the issue

1 although it is not the party asserting the claim.'....

2 Concerns over 'unequal access to evidence' [citations omitted] are particularly
3 pressing in the context of a marital dissolution where financial records can be
4 crucial to ensuring the equal division of property required by Family Code section
5 2550.... Undoubtedly, in marriages and separations like the Margulis's where one
6 spouse exercised exclusive control over community property, the parties will
7 have vastly unequal access to evidence concerning the disposition of that
8 property. When this occurs, fairness requires shifting to the managing spouse
9 the burden of proof on missing assets. Moreover, ..., the statutory fiduciary duties
10 of disclosure and accounting owed between spouses further justify that result."
11 [Emphasis added].

12 Similarly, the Fourth Appellate District, Division One (San Diego) by P.J.
13 McConnell published *Marriage of Georgiou and Leslie* (Slip Op. D061200) on July 31,
14 2013 likewise restating the extreme important of fiduciary duty principles within the
15 context of Family Code section 2122 judgment set aside motions, and the fact that they
16 extend throughout dissolution proceedings per FC sections 2100(c), 2102 - 2107: "From
17 the date of separation to the date of the distribution of the community or quasi-
18 community asset or liability in question, each party is subject to the standards provided
19 in section 721.... (section 2102(a).)" Further, "each party has a continuing duty to
20 immediately, fully, and accurately update and augment that disclosure to the extent
21 there has been any material changes." (Section 2100(c)).

18 **B. Statutory Authorities Re Attorney Fees**

19 The 2011 Amendments to Family Code section 2030 provide:

20 (a) (1) In a proceeding for dissolution of marriage, nullity of marriage, or legal
21 separation of the parties, and in any proceeding subsequent to entry of a related
22 judgment, the court shall ensure that each party has access to legal
23 representation, including access early in the proceedings, to preserve each
24 party's rights by ordering, if necessary based on the income and needs
25 assessments, one party, except a governmental entity, to pay to the other party,
26 or to the other party's attorney, whatever amount is reasonably necessary for
27 attorney's fees and for the cost of maintaining or defending the proceeding
28 during the pendency of the proceeding.

(2) When a request for attorney's fees and costs is made, the court shall make
findings on whether an award of attorney's fees and costs under this section is
appropriate, whether there is a disparity in access to funds to retain counsel, and
whether one party is able to pay for legal representation of both parties. If the
findings demonstrate disparity in access and ability to pay, the court shall make
an order awarding attorney's fees and costs....

1 (b) Attorney's fees and costs within this section may be awarded for legal
2 services rendered or costs incurred before or after the commencement of the
proceeding.

3 (c) The court shall augment or modify the original award for attorney's fees and
4 costs as may be reasonably necessary for the prosecution or defense of the
proceeding, or any proceeding related thereto, including after any appeal has
5 been concluded. * * * [Emphasis added].

6 Family Code section 2032 makes clear that the Court must, upon a proper
7 showing, order a contributing party to invade principal and their own separate property
8 (assuming that in this case what Petitioner controls even is her SP). It provides in
pertinent part:

9 (a) The court may make an award of attorney's fees and costs under Section
10 2030 or 2031 where the making of the award, and the amount of the award, are
just and reasonable under the relative circumstances of the respective parties.

11 (b) In determining what is just and reasonable under the relative circumstances,
12 the court shall take into consideration the need for the award to enable each
13 party, to the extent practical, to have sufficient financial resources to present the
14 party's case adequately, taking into consideration, to the extent relevant, the
15 circumstances of the respective parties described in Section 4320. The fact that
16 the party requesting an award of attorney's fees and costs has resources from
which the party could pay the party's own attorney's fees and costs is not itself a
bar to an order that the other party pay part or all of the fees and costs
requested. Financial resources are only one factor for the court to consider in
determining how to apportion the overall cost of the litigation equitably between
the parties under their relative circumstances.

17 (c) The court may order payment of an award of attorney's fees and costs from
18 any type of property, whether community or separate, principal or income.

19 d) Either party may, at any time before the hearing of the cause on the merits, on
20 noticed motion, request the court to make a finding that the case involves
21 complex or substantial issues of fact or law related to property rights, visitation,
22 custody, or support. Upon that finding, the court may in its discretion determine
23 the appropriate, equitable allocation of attorney's fees, court costs, expert fees,
24 and consultant fees between the parties. The court order may provide for the
25 allocation of separate or community assets, security against these assets, and
26 for payments from income or anticipated income of either party for the purpose
27 described in this subdivision and for the benefit of one or both parties. Payments
28 shall be authorized only on agreement of the parties or, in the absence thereof,
by court order. The court may order that a referee be appointed pursuant to
Section 639 of the Code of Civil Procedure to oversee the allocation of fees and
costs. [Emphasis added].

1 **C. Case Authorities Re Attorney Fees**

2 1. *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 215 Cal.Rptr. 789.

3 The court is required to exercise discretion in analyzing fee order requests. Here
4 the trial court was reversed in a strongly worded opinion on its stated policy refusing to
5 make pendente lite fee orders. The DCA1 stated:

6 “The suggestion of the trial court that attorneys handling marital dissolution
7 cases must be prepared to "carry the client until the time of trial" is not only
8 demeaning to attorneys handling family law cases, it fails to consider the present
9 day realities of the economics of the practice of law. Today's high overhead
10 costs require that payment be received as rapidly as possible after services have
11 been rendered. A court's position that attorneys not be paid until the end of
12 litigation, in non-contingent fee cases, would almost certainly result in able
13 lawyers in such a county refraining from representing clients in family law cases.
14 Given the complexity of modern day family law litigation and the significance of
15 this litigation to our society, courts should be doing everything they can to
16 encourage, not discourage, able attorneys to handle family law cases.

17 It is a fact of life that attorneys representing clients in family law
18 cases frequently do not receive payment of full and adequate compensation for
19 the services they perform. The approach suggested by the trial court would make
20 things even worse. It would compel the attorney to finance the litigation by
21 deferring receipt of payment for services until months or years after they are
22 performed, while the attorney would have to personally advance the costs of
23 overhead attributable to the case. Even worse, it would require attorneys to
24 advance from their own pockets sizable expenditures required as a matter of
25 course in such litigation, such as expenses for depositions and experts. Banks
26 and finance companies are licensed for the purpose of lending money; lawyers
27 are not.” (*Id.* P. 1218, fn. 2)[emphasis added].

28 The Court ruled:

19 “If [Husband] can afford to pay his own attorneys according to the above
20 agreement, the trial court should be able to fashion a pendente lite award of
21 attorney fees and costs to assure [Wife] reasonably equal representation,
22 including an order for installment payments. The court could retain jurisdiction for
23 the trial judge to allocate or charge amounts paid on account of attorney fees
24 and costs to the separate property of the parties or the community. [Citations
25 omitted].

26 The public policy of California strongly favors settlement as the primary
27 means of resolving legal disputes. This is especially true in marital dissolution
28 litigation where it is so clearly in the financial and emotional interests of the
parties, especially where they have children, to reach an expeditious and final
resolution of their dispute. This result can most easily and most rapidly be
reached where each spouse has reasonable and able counsel representing
them with some assurance they will be fairly compensated for their services,
consistent with the financial circumstances of the parties.

.... If necessary the husband must invade his investments to provide the wife with

1 the sinews to conduct her litigation with him." [Citations omitted]. Money is the
2 mother's milk of more than politics." *Id.*, at 1221. [Emphasis added].

3 2. *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 18 Cal.Rptr.2d 743

4 The DCA2 upheld a trial order of a \$750,000 attorney fee award, including
5 \$500,000 for future fees. The trial court recognized that the case was, and had
6 become, extremely complicated and difficult due to the Husband's manipulating his
7 assets and that the Wife's burden was thereby increased in locating them and proving
8 ownership. The DCA2 held that the trial court properly relied on its own experience in
9 setting a reasonable award to enable Wife to support the litigation.

10 3. *In re Marriage of Kozen* (1986) 185 Cal.App.3d 1258, 230 Cal.Rptr. 304

11 The DCA2 affirmed a trial court award of \$100,000 in attorney and accountant's
12 fees to the Wife. The parties owned two Burger King franchises. The DCA2 noted that
13 "Wife's attorney testified that his fees seemed "obscene," given the total amount
14 of community assets, but extensive preparation had been required in this case....
15 The court also heard conflicting evidence regarding whether husband had
16 "stonewalled" and been difficult during discovery." *Id.*, at 1264. Accordingly, the
17 trial court did not abuse its discretion.

18 4. *In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 53 Cal.Rptr.2d 179

19 The DCA1, J. Phelan, overruled the trial court's failure to award appropriate fees
20 to the Wife. It ruled:

21 "It is well established in California that, although the trial court has considerable
22 discretion in fashioning a need-based fee award [citation omitted], the record
23 must reflect that the trial court actually exercised that discretion, and considered
24 the statutory factors in exercising that discretion. [Citations omitted]. The record
25 presented in this appeal contains overwhelming evidence that, at the time of the
26 trial court proceedings, Connie had no assets other than her share of the family
27 home, no income other than child support, and only the most minimal earning
28 ability. Daniel, on the other hand, had substantial income, few expenses, and a
large amount of separate property. There was no apparent reason for the trial
court's decision to award fees so grossly disproportionate to those actually
charged to the client. Where, as here, there was no showing that the time spent
or fees charged were unreasonable, and the parties' respective financial
circumstances clearly justify a higher fee award, such a drastic reduction in the
requested amount cannot be sustained." *Id.*, at 828-828. [Emphasis added].

5. *In re Marriage of Fransen* (1983) 142 Cal.App.3d 419, 190 Cal.Rptr. 885

1 The DCA2 overturned a trial court failure to issue an attorney fee award to the
2 Wife, commenting that “[n]o attorney should be paid a fee inconsistent with the work he
3 has performed.” [Emphasis added].

4 6. *In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 97 Cal.Rptr.3d 616

5 The DCA4, J. Fybel, reversed the trial court’s failure to award Wife attorney fees
6 because the lower court felt that the Wife had adequate resources to pay her own fees.
7 The Court stated “the trial court is required to determine how to apportion the overall
8 cost of the litigation equitably between the parties under their relative circumstances.”

9 7. *Alan S., Jr., v. Superior Court* (2009) 172 Cal.App.4th 238, 91 Cal.Rptr.4th

10 241. The Orange County trial court was reversed on a writ petition “because
11 [Husband’s] petition presents an important issue regarding access to justice....” *Id.*, 172
12 Cal.App.4th at 238. The Court ruled that per Family Code section 2032(b), in ruling
13 upon an application for pendente lite fees the court must consider the Family Code
14 section 4320 factors.

15 Respondent describes the marital standard of living in his accompanying
16 Declaration, and Attorney Thurman W. Arnold discusses the reasonableness of the
17 Respondent’s fee and forensic accounting requests, and the work to be performed in
18 this case in order to bring it settlement or trial, in his Declaration filed herewith.

19 **CONCLUSION**

20 Without significant financial resources Respondent will not be able to overcome
21 the burden that results from the underpowered ‘out-spouse’ and he will be deprived of
22 his day in Court. Respondent requests that the Court issue the Family Code section
23 2030(2) findings.

24 Dated:

RESPECTFULLY SUBMITTED,

25 _____
26 THURMAN W. ARNOLD, III
27 Attorney for Respondent,
28 JOHN SMITH