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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 \$85,000 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
23 since the parties separated. The remaining community property consists of at least
24 these assets:

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

1 • A free and clear Mexican villa located in San Miguel de Allende, Mexico
2 worth \$1.5 million free and clear.

3 • A 65 foot motor yacht that is free and clear, as to which Petitioner has
4 taken exclusive control and enjoyment.

5 • Approximately \$5,000,000 is held by the Petitioner in various accounts
6 that Respondent contends to be community property funds, or partly CP.

7 • Petitioner has admitted numerous times under oath that the parties'
8 remaining assets are community property, as shown by the Respondent's declaration
9 and the declarations of disclosure which have previously been exchanged between
10 them.

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

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

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1 **POINTS AND AUTHORITIES**

2 **A. Statutory Authorities**

3 The 2011 Amendments to Family Code section 2030 provide:

4 (a) (1) In a proceeding for dissolution of marriage, nullity of marriage, or legal
5 separation of the parties, and in any proceeding subsequent to entry of a related
6 judgment, the court shall ensure that each party has access to legal
7 representation, including access early in the proceedings, to preserve each
8 party's rights by ordering, if necessary based on the income and needs
9 assessments, one party, except a governmental entity, to pay to the other party,
10 or to the other party's attorney, whatever amount is reasonably necessary for
11 attorney's fees and for the cost of maintaining or defending the proceeding
12 during the pendency of the proceeding.

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

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

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

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

(a) The court may make an award of attorney's fees and costs under Section
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.

(b) In determining what is just and reasonable under the relative circumstances,
23 the court shall take into consideration the need for the award to enable each
24 party, to the extent practical, to have sufficient financial resources to present the
25 party's case adequately, taking into consideration, to the extent relevant, the
26 circumstances of the respective parties described in Section 4320. The fact that
27 the party requesting an award of attorney's fees and costs has resources from
28 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.

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

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

10 **B. Case Authorities**

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

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

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

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

27 The Court ruled:

1 "If [Husband] can afford to pay his own attorneys according to the above
2 agreement, the trial court should be able to fashion a pendente lite award of
3 attorney fees and costs to assure [Wife] reasonably equal representation,
4 including an order for installment payments. The court could retain jurisdiction for
5 the trial judge to allocate or charge amounts paid on account of attorney fees
6 and costs to the separate property of the parties or the community. [Citations
7 omitted].

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

16 If necessary the husband must invade his investments to provide the wife with
17 the sinews to conduct her litigation with him." [Citations omitted]. Money is the
18 mother's milk of more than politics." *Id.*, at 1221. [Emphasis added].

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

20 The DCA2 upheld a trial order of a \$750,000 attorney fee award, including
21 \$500,000 for future fees. The trial court recognized that the case was, and had
22 become, extremely complicated and difficult due to the Husband's manipulating his
23 assets and that the Wife's burden was thereby increased in locating them and proving
24 ownership. The DCA2 held that the trial court properly relied on its own experience in
25 setting a reasonable award to enable Wife to support the litigation.

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

27 The DCA2 affirmed a trial court award of \$100,000 in attorney and accountant's
28 fees to the Wife. The parties owned two Burger King franchises. The DCA2 noted that

"Wife's attorney testified that his fees seemed "obscene," given the total amount
of community assets, but extensive preparation had been required in this case....
The court also heard conflicting evidence regarding whether husband had
"stonewalled" and been difficult during discovery." *Id.*, at 1264. Accordingly, the
trial court did not abuse its discretion.

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

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

"It is well established in California that, although the trial court has considerable

1 discretion in fashioning a need-based fee award [citation omitted], the record
2 must reflect that the trial court actually exercised that discretion, and considered
3 the statutory factors in exercising that discretion. [Citations omitted]. The record
4 presented in this appeal contains overwhelming evidence that, at the time of the
5 trial court proceedings, Connie had no assets other than her share of the family
6 home, no income other than child support, and only the most minimal earning
7 ability. Daniel, on the other hand, had substantial income, few expenses, and a
8 large amount of separate property. There was no apparent reason for the trial
9 court's decision to award fees so grossly disproportionate to those actually
10 charged to the client. Where, as here, there was no showing that the time spent
11 or fees charged were unreasonable, and the parties' respective financial
12 circumstances clearly justify a higher fee award, such a drastic reduction in the
13 requested amount cannot be sustained.” *Id.*, at 828-828. [Emphasis added].

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

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

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

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

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

18 Cal.Rptr.4th 241. The Orange County trial court was reversed on a writ petition
19 “because [Husband’s] petition presents an important issue regarding access to
20 justice....” *Id.*, 172 Cal.App.4th at 238. The Court ruled that per Family Code section
21 2032(b), in ruling upon an application for pendente lite fees the court must consider the
22 Family Code section 4320 factors.

23 The parties’ marital standard of living is more particularly detailed in the
24 accompanying declaration of Respondent, and the reasonableness of the fees and
25 costs requests are as set forth in the accompanying declaration of Thurman W. Arnold,
26 III.

1 **CONCLUSION**

2 Without significant financial resources Respondent will not be able to overcome
3 the burden that results from the underpowered 'out-spouse' and he will be deprived of
4 his day in Court. Respondent requests that the Court issue the Family Code section
5 2030(2) findings.

6 Dated:

RESPECTFULLY SUBMITTED,

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8 THURMAN W. ARNOLD, III, CFLS
9 Attorney for Respondent,
10 JOHN SMITH
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