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Superior Court of California
County of Los Angeles

In re the Marriage/Matter of:

PETITIONER:

X,

and

RESPONDENT:

X

: Case No.: BD

: TENTATIVE DECISION ON THE
: ISSUE OF ATTORNEYS' FEES &
: COSTS

: (*California Rules of Court, Rule 3.1590*)

In this document, the Court announces its Tentative Decision. The Tentative Decision will be the Statement of Decision unless within ten (10) days either party files and serves a document that specifies controverted issues or makes proposals not covered in the Tentative Decision as provided by *California Rules of Court, Rule 3.1590(c)*. Pending further order or entry of Judgment, the Tentative Decision constitutes the temporary orders of the Court.

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1 After considering all the admissible evidence and the arguments of counsel, and good
2 cause appearing, the Court announces its Memorandum of Decision and Statement of
3 Decision:

4 1. General Provisions Concerning Attorneys' Fees & Costs

5 1.1. Authority to Order Attorneys' Fees & Costs Child Support

6 1.1.1. This is an order for attorneys' fees and costs under the court's
7 subject matter jurisdiction as generally permitted by *Family Code*
8 *Section 2010*.¹

9 1.2. Personal Jurisdiction & Proper Notice

10 1.3. The Court finds it has personal jurisdiction over both parties; and each
11 party received proper statutory notice of the issue of attorneys' fees and
12 costs related to this order. Taking into account all of the relative
13 circumstances, the Court finds that its order is just and reasonable under the
14 relative circumstances of the parties under *Sections 2030* and *2031*.²

15 1.4. Timely Order on Fees

16 Under *Section 2031*, the Court issued its order within 15 days of the matter
17 being submitted.

18 1.5. Access to the Legal System

19 Among other considerations, the order for attorneys' fees and costs under
20 this order fulfills the Court's obligation to assure that both parties have
21 equal access to legal representation.

22 1.6. All Factors Related to Ability to Pay & Need for An Award

24 ¹ Unless indicated to the contrary, all statutory references are made to the *Family Code*.

25 ² (See: California Family Law Practice Chapter A, Section A.1, 11 Witkin, Summary of Cal. Law
26 (9th ed. 1989 Husband and Wife, Section 185 *et. seq.*; Hogoboom & King, Cal. Practice guide:
27 Family Law (The Rutter Group 2003) Par. 14.1.)

1 The order for fees herein considers all factors affecting the parties'
2 respective abilities to pay for attorneys' fees and costs including their
3 respective incomes and assets under *Section 2040(a)(2)*.

4 1.7. Ability to Augment Award of Fees

5 In fixing the order for fees and costs under this order, the Court has duly
6 considered the ability of the Court to augment or modify an award as may
7 be reasonably necessary for the prosecution or defense in the proceeding.
8 See *Marriage of Hobday* (2004) 123 Cal. App. 4th 360.

9 1.8. Consideration of Order for Case Management of Attorneys' Fees

10 To the extent this case involves complex issues as defined under *Section*
11 *2032(d)*, the Court articulates its case management plan for attorneys' fees
12 and costs:

13 1.8.1. X

14 1.8.2. X

15 1.8.3. X

16 1.9. X

17 1.10. X

18 2. Need & Ability Considerations in Making Fee Order

19 2.1. In General

20 An award of attorneys' fees and costs must take into account the respective
21 need for a contribution of fees and the ability of the payor to pay fees.
22 Among other things, the Court considered the impact of the fee award
23 taking into account any order for support. *Marriage of Keech* (1999) 75
24 Cal. App. 4th 860.

25 3. Case Management of Attorneys' Fees & Costs

26 3.1. In General

27 *Section 2032(d)* authorizes an order for case management of attorneys' fees
28 and costs upon a finding that the cause involves complex or substantial

1 issues of fact or law related to property rights, visitation, custody or
2 support.

3 3.2. Findings

4 The Court makes the following findings regarding whether case
5 management of attorneys' fees and costs is justified.

6 3.2.1. X

7 3.2.2. X

8 3.3. Order for Payment of Filing Fee for Complex Case

9 In light of the Court's finding that the matter is a complex case under
10 *Government Code Section 70616*, the Court orders the parties to pay the
11 filing fee required by that provision.

12 4. Fees Against Third Parties

13 4.1. Fees Against Third Party Individual or Corporation

14 Under this Order, the Court has considered whether fees are appropriate
15 against any third party individual or corporation. The Court finds it has
16 personal and subject matter jurisdiction to award fees against the joined
17 claimants. *Marriage of Siller* (1986) 187 Cal. App. 2d 231.

18 4.2. Fees Related to Specific Issue Related to Joined Party

19 Fees against a joined party are permitted only with respect to those fees
20 reasonably incurred to maintain or defend on issues related to controversy
21 involving the joined party (*Marriage of Jovel* (1996) 49 Cal. App. 4th 575)
22 and the specific policy of assuring that all parties have equal access to
23 representation (*Marriage of Perry* (1999) 61 Cal. App. 4th 295).

24 4.2.1. X

25 5. Fees on Related Proceedings

26 5.1. In General

27 Where separate civil proceedings are intended to produce some result in a
28 family law proceeding (*Marriage of Seaman and Menjou* (1991) 1 Cal.

1 App. 4th 1489) or are intended to obstruct a party's access to representation
2 in the family law proceeding (*Marriage of Green [Green IV]* (1992) 6 Cal.
3 App. 4th 584), the court may award fees incurred in the related proceedings
4 even if the case is not consolidated (*Askew v. Askew* (1994) 22 Cal. App.
5 4th 942); or if it is consolidated (*Paduano v. Paduano* (1989) 215 Cal. App.
6 3d 346). There must be a nexus between the family law proceeding and the
7 separate proceeding before an award of fees is appropriate (*Marriage of*
8 *Seaman and Menjou, Id*). Ultimately, there must be a nexus between the
9 results in the non-related proceeding impacting the family law proceeding;
10 and any such fees must ensure the ability of the parties to maintain or
11 defend the family law action. The Court makes the following findings
12 regarding the nexus between the family law case and the other proceeding:

13 5.1.1. X

14 5.1.2. X

15 6. Custody Evaluation Expenses

16 As required by *California Rule of Court 5.220* and *Marriage of Laurenti* (2007)
17 154 Cal. App. 4th 395, the Court allocates the costs and the allocation of the cost
18 of the child custody evaluation report as follows:

19 6.1. X

20 6.2. X

21 7. X

22 8. Fees for Minor's Counsel

23 8.1. In General
24
25
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27
28

1 Where the Court appoints minor's counsel, the Court has authority to award fees
2 to counsel for a child against any party who is a party to the action (*Marriage of*
3 *Perry, Id*) under *Section 3153(a)* for dissolution of parentage.³

4 X

5 9. Sanctions Under *Code of Civil Procedure Sections 128.5 and 128.7*

6 9.1. In General

7 As a separate basis for attorneys' fees and costs, *Code of Civil Procedure*
8 *Sections 128.5 and 128.7*⁴ authorize Courts to award fees for bad-faith
9 actions or tactics that are frivolous or solely intended to cause unnecessary
10 delay. See: *Marriage of Falcone & Fyke* (2008) 164 Cal. App. 4th 814.
11 *Code of Civil Procedure Section 128.5* Sanctions are permitted where
12 conduct is meritless or frivolous action or tactics involving bad faith
13 conduct under *Javor v. Dellinger* (1992) 2 Cal. App. 4th 1258.

14 9.2. Specific Conduct & Notice

15 An award of sanctions against a party or counsel must specify the conduct
16 for which sanctions are sought; there must be proper notice to the
17 sanctioned party; and the order for sanctions must be in writing. See:

19 ³ Fees are not permitted under the Family Law Act against grandparents for a grandchild's court
20 appointed counsel in guardianship proceedings. See *Guardianship of Elan E.* (2000) 85 Cal.
21 App. 4th 998.

22 ⁴ Sanctions under *Section 128.5* only apply to proceedings initiated before December 31, 1994
23 whereas *Section 128.7* Sanctions apply to proceedings initiated after December 31, 1994.

24 Where sanctions are sought under *Section 128.7* for a case filed before 1995, the Court can only
25 consider sanctions under the cited *Section 128.7*. See *In Re Marriage of Reese and Guy* (1999)
26 73 Cal. App. 4th 1214. Also the statutory framework provides that notice under one section
27 cannot be deemed notice under the other section. Hence, due process considerations require
28 adequate notice.

1 *Marriage of Fuller* (1985) 163 Cal. App. 3d 1070, *Marriage of Quinlan*
2 (1989) 209 Cal. App. 3d 1417 and *Jansen Assocs., Inc. v. Codercard, Inc*
3 (1990) 218 Cal. App. 3d 1166.

4 9.3. Discourteous Conduct As Basis for Sanctions

5 Where counsel discourteously fails to appear when promised, and fails to
6 advise counsel or the court why counsel could not appear, This failure to
7 appear is not only discourteous, it is in bad faith, frivolous and can cause
8 unnecessary delay in proceedings justifying sanctions. See *Marriage of*
9 *Gumabao* (1984) 150 Cal. App. 3d 572.

10 9.4. No Consequential Damages As Form of Sanction

11 Without prejudice to any other rights of the aggrieved party, the Court does
12 not award consequential damages as a form of sanction since such an award
13 is impermissible under the case law. See *Brewster v. Southern Pac.*
14 *Transp. Co.* (1991) 235 Cal. App. 3d 701

15 9.5. Safe Harbor Provisions of *Code of Civil Procedure Section 128.7*

16 *Code of Civil Procedure Section 128.7* requires that the party seeking
17 sanctions must first serve the motion on the offending party who then has
18 21 days in which to withdraw or correct the challenged pleading. After the
19 21 day safe harbor provision lapses, the motion may be filed only if no
20 corrective action has been taken by the end of that period. See *Goodstone v.*
21 *Southwest Airlines Co.* (1988) 63 Cal. App. 4th. On the issues of notice
22 and corrective action prior to the filing of the motion, the Court finds that:

23 9.5.1. X

24 9.5.2. X

25 9.6. X

26 10. Contract Award of Attorneys' Fees & Costs

27 10.1. In General

1 imposes such an onerous burden as to constitute a confiscation of all net
2 spendable income or assets as defined by *Marriage of Keech* (1999) 75 Cal.
3 App. 4th 860 is not permitted.

4 12.2. Ability to Pay

5 When awarding fees, the court must consider the ability of the payor to
6 comply with the fee award taking into account whether an order should be
7 made payable forthwith or in reasonable monthly installments as articulated
8 by *Marriage of Schulze* (1997) 60 Cal. App.4th. A fee award can take
9 into account the earning capacity and expected investment income and
10 sufficiency of assets after the award of fees as articulated by *Marriage of*
11 *Duncan* (2001) 90 Cal. App. 4th 617. The Court has authority to consider
12 projected earnings or the enhanced future earnings of the payor when
13 ordering fees as enunciated by *Marriage of Sullivan* (1984) 37 C3d 762.
14 The Court can also consider substantial unreported income in awarding fees
15 as permitted by *Marriage of Lister* (1984) 152 Cal. App. 3d. If the Court
16 finds that the community property business has paid a portion of the other
17 party's fees, then the Court may establish a fee award on this basis under
18 *Marriage of Czapar* (1991) 232 Cal. App. 3d 1308. Where one party has
19 indirect control of extensive assets from which he or she enjoys benefit, the
20 court may consider this fact in awarding fees as permitted by *Marriage of*
21 *Dick* (1993) 15 Cal. App. 4th 144.

22 12.3. Failure to Award Pretrial Fees May Be Abuse of Discretion

23 In ordering fees, the court is required to consider the impact on a party by
24 deferring fees to the time of trial. Orders that fail to award fees to assure
25 access to the legal system are an abuse of discretion as announced by
26 *Marriage of Hatch* (1985) 169 Cal. App. 3d 1213.

27 13. Need For Fees

28 13.1. Avoiding Preconceptions of Prevailing Party

1 When awarding fees under *Section 2032*, the focus remains on access to the
2 legal system, not whether a party prevails on a particular issue unless there
3 is an abuse of the process as defined by *Section 271*. If a party needs fees
4 to defend a reduction of spousal support, an award of fees is permissible
5 under *Marriage of Hublou* (1991) 231 Cal. App. 3d 956.

6 14. Excessive Litigation

7 When one party engages in excessive litigation in relation to issues in a particular
8 matter, the court can disallow or reduce a fee award on the basis that a party's
9 litigation strategy has caused the other party to incur unnecessary fees. See
10 *Marriage of Huntington* (1992) 10 Cal. App. 4th 1513 and *Marriage of Keech*,
11 *supra*.

12 14.1. X

13 15. Attorneys' Fees & Costs Under *Section 271*

14 15.1. In General

15 The *Family Code* permits an award of fees in the nature of a sanction. An
16 award of fees under *Section 271* (hereinafter *Section 271 Sanctions*) is
17 without regard to need for fees on the part of the recipient. *Section 271*
18 *Sanctions* are only awarded against a party, not against his or her attorney.
19 *Marriage of Daniels* (1993) 19 Cal. App. 4th 1102 specifically prohibits
20 *Section 271 Sanctions* against a lawyer, although the client can be ordered
21 to pay fees based on the lawyer's conduct. The threshold for an award of
22 *Section 271 Sanctions* is whether the sanctioned party (or counsel) has
23 engaged in conduct that frustrates settlement, increases litigation. An
24 award of *Section 271 Sanctions* must not impose an unreasonable financial
25 burden. See: *Marriage of Norton* (1988) 206 Cal. App. 3d 53. See Also:
26 *Marriage of Falcone & Fyke, supra*.

27 15.2. Conduct Justifying Fees Under *Section 271*

28 15.2.1. Noncompliance with Earlier Fee Award

1 Where a party fails to comply with an earlier award of fees,
2 further fees under *Section 271* the Court may consider this
3 conduct in assessing fees under *Section 271*. See: *Marriage of*
4 *Huxley* (1984) 159 Cal. App. 3d.

5 15.2.2. Dishonest or Conflicting Testimony

6 If a party lies to the Court, the court can assess fees based on this
7 dishonest testimony. See: *Marriage of Frick* (1986) 181 Cal.
8 App. 3d 997. Likewise, conflicting testimony may justify a
9 portion of the fees awarded by the Court. See: *Marriage of*
10 *Kozen* (1986) 185 Cal. App. 3d 1258.

11 15.2.3. Failure to Deliver or Return Documents

12 A deliberate failure to return agreed upon documents such as a
13 stipulation can form the basis for *Section 271 Sanctions*. See:
14 *Marriage of Melone* (1987) 193 Cal. App. 3d 757.

15 15.2.4. Failure to Cooperate With Intent to Harass

16 Where a party unreasonably fails to cooperate or consistently
17 attempts to frustrate the policy of the law with a discernable
18 intent to harass the other party, this conduct can serve as the basis
19 for *Section 271 Sanctions*. See: *Marriage of Norton, supra* and
20 *Marriage of Green (Green II)* (1989) 213 Cal. App. 3d 14.

21 15.2.5. Excessive Settlement Demands

22 Where a party makes excessive settlement demands, *Section 271*
23 *Sanctions* may be appropriate. See: *Marriage of Abrams* (2003
24 105 Cal. App. 4th 979. Excessive settlement demands typically
25 involve a position so devoid of merit as to require a sanction.
26 Using strong arm tactics to gain an advantage or linking issues
27 such as custody and child support are common examples.

28 15.3. *Marriage of Feldman* Findings For *Section 271* Sanctions

1 *Marriage of Feldman* (2007) 153 Cal. App. 4th 1470 and *Marriage of*
2 *Falcone & Fyke, supra* authorize courts to impose sanctions under *Section*
3 *271(a)* without reference to the actual fees incurred by the party seeking the
4 fees as mandated when the court orders fees under *Section 2030, et seq.*
5 Stated differently, *Section 271* sanctions are not attorneys' fees per se under
6 the *Family Code*. So long as the provisions of *Section 271* prohibiting the
7 imposition of an undue economic hardship when imposing the sanction are
8 not violated, the Court has discretion taking into account all the
9 circumstances of the case to impose *Section 271* sanctions in an amount the
10 court deems just.

11 15.3.1. Findings Under *Marriage of Feldman*

12 The Court makes the following findings on the rationale for the
13 Court's decision to impose *Section 271* sanctions:

14 15.3.1.1. X

15 15.3.1.2. X

16 16. Order for Fees

17 Case law requires that courts consider various factors in awarding fees. See
18 *Marriage of Cueva* (1978) 86 Cal. App. 3d 290. The record must establish the
19 reasonableness of the fees sought. See: *Marriage of Borson* (1974) 37 Cal. App.
20 3d 632. Taking into consideration the *Cueva, supra* factors and the itemization of
21 fees required by *Keech, supra*, the Court makes the following findings on the issue
22 of attorneys' fees and costs:

23 16.1. The nature of the litigation-

24 16.2. The difficulty of the action-

25 16.3. The amount of time expended-

26 16.4. The learning, expertise and skill of the attorney-

27 16.5. The intricacies and importance of the litigation-

28 16.6. The necessity for skilled legal training and ability in trying the case-

1 16.7. The responsibility undertaken by the attorney-

2 16.8. X

3 17. Order for Fees

4 Unless otherwise provided here, all fee amounts ordered are payable directly to the
5 attorney listed herein under *Section 272*. Any award of attorneys' fees and costs
6 shall bear interest at the legal rate on the unpaid balance as of the due date. (See:
7 *Howard v. Howard* (1956) 142 Cal. App. 2d 222). If the order provides for
8 installment payments, then if any installment is paid five (5) days late, the unpaid
9 balance shall accelerate, become all due and payable; and the unpaid balance shall
10 bear legal interest from the date of default, which is defined as the due date.

11 Where an attorney is no longer attorney of record, that attorney shall comply with
12 the ten (10) day requirements of *Section 272(c)*. The Court makes the following
13 orders for fees and costs:

14 17.1. X

15 17.2. X

16 18. General Provisions

17 18.1. By stipulation of the parties, this document was served upon the parties by
18 facsimile or e-mail as indicated on the transmittal form attached.

19 18.2. Based on the Stipulation for method of service, the Court Clerk is relieved
20 of his/her obligation to serve this document by mail.

21 18.3. The Clerk shall file the Memorandum of Decision and Statement of
22 Decision; and it shall be entered on the register of actions. Pending entry of
23 a formal order or judgment, this order is effective when signed by the
24 Court.

25 **IT IS SO ORDERED.**

26 Date: 2008

27 _____
[Judicial Officer]
28 JUDGE OF THE SUPERIOR COURT

TENTATIVE DECISION ON ATTORNEYS' FEES & COSTS

13 of 13