

November 2006

Volume 2006 • Issue No. 11

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NEW BOARD MEMBER

- We welcome new Editorial Board Member Stacy D. Phillips, a Certified Family Law Specialist, and founding partner of the Los Angeles firm of Phillips, Lerner, Lauzon & Jamra, LLP. Ms. Phillips is a celebrity divorce lawyer, and frequently appears on television as a guest expert on divorce and family law. She has written many articles for national publications, and is the author of the book *Divorce: It's All About Control*.



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Commentary

By Stacy D. Phillips and Ram F. Cogan

Significant to the Court of Appeal's decision was its conclusion that all reasonable findings must be implied to support the trial court's ruling. This is significant given the conflicts in the evidence presented to the trial court. The Court of Appeal found that a reasonable inference from W's statement that H hired V is that V really was H's attorney acting as a "double agent" on H's behalf. Similarly, the Court of Appeal resolved in W's favor the evidentiary conflict concerning who paid for V. After all, H could have asked W to sign the check to make it seem as if she hired V. Supporting this conclusion was W's statement that V was hired as "her" attorney to minimize the Court's concern over the inequitable division of assets.

Having resolved the evidentiary conflicts in W's favor, the Court of Appeal next identified the key legal issue as: what happens when a party moves to have a family law judgment set aside after more than six (6) months have passed? (Code of Civil Procedure section 473.) Relying on Family Code section 2122, the Court of Appeal noted the following circumstances which permit a party to set aside a family law judgment notwithstanding the passage of more than six (6) months: (1) Actual fraud; (2) perjury; (3) duress; (4) mental incapacity; (5) mistake (as to stipulated or uncontested judgments); and, (6) failure to comply with the disclosure requirements of Chapter 9. Of these, the Court of Appeal concentrated on the first. It noted, however, that the relief sought by W was not available to her if based on an actual fraud perpetrated against her because, at a minimum, she was aware of the fact of that fraud while it was being engineered. Nonetheless, the relief sought by W was still available if the trial court had the authority (not directly barred by statute) to set aside the Judgment in order to protect its own processes from fraud. Consequently, if the Court had the power to act *for its own sake* to prevent the fraud, then the decision to set aside the Judgment must be affirmed.

It was easy for the Court of Appeal to find that a fraud had been perpetrated against the trial court. The Court of Appeal reasoned that the trial court would have given the Marital Settlement Agreement much greater scrutiny had not V, allegedly, represented W.



Having concluded that a fraud had been perpetrated on the Court, the Court of Appeal next addressed whether the Court had the power to set aside the Judgment. Citing to the United States Supreme Court decision in *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944) 322 U.S. 238, the Court of Appeal concluded that the power clearly exists.

The Court of Appeal reasoned that the fraud in question is the kind of fraud that no judicial system can tolerate. It then turned to this state's own pronouncement on the judiciary's inherent power — i.e., *Le Francois v. Goel* (2005) 35 Cal. 4th 1094. The *Le Francois* Court concluded that the statutes must be construed to apply to a party's written motions for reconsideration, but not to limit the courts' authority.

Turning to section 2122, the Court of Appeal concluded that section 2122 does not address the ability of the court, on its own motion, to set aside a judgment where the court is the "defrauded party."

To support its conclusion, the Court of Appeal noted the very language of section 2122 (which refers to the "party" to the litigation) as well as Code of Civil Procedure section 128(a)(8). In the latter, the Legislature recognized that every court has the power to control its process to conform to law and justice. Section 128(a)(8) and section 2122 can be harmonized by recognizing that the latter does not curtail the residual power of the court as set forth in section 128. Section 128 applies to the courts; section 2122 applies to parties. Since the court is not a party to the litigation, in theory, the twain shall not meet and, in fact, furnish support for the propositions codified in each.

However, before completing its analysis, the Court of Appeal had to address (and reconcile) a portion of *Le Francois* which does not fit so nicely with its conclusion (which seems predestined at this point). The Court in *Le Francois* disapproved those appellate cases that hold the distinction between litigant-initiated action and judicially-initiated action is immaterial. *Le Francois* finds that unless the statutory requirements are satisfied, any formal action to correct a prior interim order must begin with the court itself. This is problematic for the *Deffner* Court because the issue was brought to its attention by the litigant. In fact, given the type of fraud perpetrated, the court would never discover the fraud on its own—only the adversely affected party would bring

the matter to the court. According to *Le Francois*, this would not permit revisiting the issue.

How did the Court of Appeal circumvent this portion of the *Le Francois* opinion? First, it noted the above—i.e., *Deffner* poses the situation where a horrendous fraud had been perpetrated *on the judicial system* which fraud could never be detected by the court. Second, *Le Francois* did not lay down a strict rule that a court could never correct its own error precipitated by some prompting from a litigant. Third, the fraud in question was so horrendous that the rule that the court must discover the fraud on its own could not possibly apply.

While the Court of Appeal's conclusion may very well be correct, the justification for distinguishing the facts in *Deffner* from the unsupportive portion of *Le Francois* sounds much like "salami tactics". After all, how does one decide where on the "horrendous gauge" the facts need to fall to justify judicial-initiated action? The phrase coined by Justice Potter Stewart—"I know it when I see it"—comes to mind. The Court of Appeal could (and perhaps should) simply decide that perpetrating a fraud is sufficiently egregious conduct that it does not matter how the courts are made aware of it. Instead, in footnote 10, the Court of Appeal does exactly the opposite. In addition, while the analysis in which the distinction between statutory directives and inherent judicial power clearly evidences the tightrope act the judiciary often performs and its desire to avoid constitutional conflicts, it may behoove the Court of Appeal to simply come right out and state the obvious—any attempt by the Legislature to curtail the court's power to review its own rulings abridges the separation of powers doctrine and will be considered unconstitutional. If the Court of Appeal is so concerned about maintaining the integrity of the judicial system, aren't these the obvious conclusions?



Commentary

By Stacy D. Phillips and Ram F. Cogan

The Court of Appeal held that Family Code Section 4955 only binds a non-registering party who fails to object prior to registration with respect to any matter that could have been asserted at the time of registration. Under the statute, the former wife could not have objected to an understatement of arrears at the time of registration.

On appeal, H contended that Sections 4954, 4955, and 4957 precluded W from contesting the support Order and accompanying statement of \$0 arrears because she was a “non-registering party” who failed to object within twenty (20) days of registration. The Court of Appeal disagreed.

The Court of Appeal reasoned that the statutory language does not provide that confirmation of the Order precludes *all* later objections raised by a non-registering party. The statute only provides that confirmation of a registered Order precludes further contest of the Order with respect to any matter *that could have been asserted at the time of registration.* (Section 4957.) An objection to the statement of arrears, in turn, is not a matter that W could have

