



Forensic Accounting Today

Newsletter of Ron J. Anfuso, CPA/ABV, An Accountancy Corp.

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Issue 49
Serving all of California

Ron's Corner

Although California is a no-fault divorce state, a growing trend exists toward financial fault rulings in cases of fiduciary breach of duty. In this and following issues of *Forensic Accounting Today*, I will examine the tendency away from no-fault dissolution decisions for certain financial aspects of cases. The topics I will address include:

- Fiduciary fault based on Family Codes §1100 and §1101
- Disentitlement
- Bad behavior post petition and Family Code §271
- Financial acts occurring before separation
- Financial acts occurring after separation
- Attempts by a party to take advantage of his or her own wrong.

We will also explore a form of fiduciary breach that has not deviated from no-fault rulings, which involves written marital agreements and breaches of contracts.

In this issue we will consider Family Codes §1100 and §1101 and the *Disentitlement Doctrine*. If you have questions or comments concerning no-fault exceptions, I welcome you to post them on my blog or contact me directly.

Ron

Need a Financial Expert to Speak?

Ron J. Anfuso can address any Forensic Accounting topic, including Moore/Marsden; marital standard of living and support needs analysis; financial specialists and Collaborative Law; gross cash flow available for support; DissoMaster™; divorce tax issues; divorce—what to expect; and business valuation.

To discuss your group's needs, call Ron today!

I Thought California is a No-Fault State

Presented by Ron J. Anfuso, CPA, ABV, CFF, CDFa, FABFA

Yes, of course, California is a no-fault state. However, *no fault* relates only to grounds for the termination of a marriage. Financial fault, on the other hand, has no limits. It can lie in the past, present or future. In fact, it seems that as time passes and cases grow, in law, the theories for asserting financial fault have increased. You might say that financial fault is trending.

There may have been instances in which Appellate Courts have ruled in favor of fiduciary faults. Let us first take a look at Family Code §1100 and §1101.

Family Codes §1100 and §1101

Under *Claim for Impairment of Community Property Interest*, section *g* and *h* read: *(g) Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs.*

The value of the asset shall be determined to be its highest value at the date of the breach of fiduciary duty, the date of the sale or disposition, or the date of the award by the court.

(h) Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty. (Am Stats 2001, C703).

When the family law court chooses to apply Section 3294 of the Civil Code, it allows for a spouse to recover actual damages, and damages for the sake of example should the breach of an obligation be proven by clear and convincing evidence that the other spouse has been guilty of oppression, fraud or malice. This section defines *fraud* as “*intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.*”

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The Disentitlement Doctrine

When a party unlawfully withholds evidence of his or her income and assets he or she will not be heard to complain that an order is not based on the evidence being refused to disclose.

The Marriage of John and Lisa Hofer (2012) 208 Cal.App.2d 100 is an excellent example of a disentitlement ruling in which John was ordered to pay Lisa's attorney fees and costs pursuant to Family Code § 2030. In this case, John failed to disclose evidence of the value of several family businesses of which John was a part owner.

During their marriage, Lisa did not work outside of their home. John, on the other hand, was the sole manager of the assets in which he had ownership interest. The parties did not dispute that John had substantial income and assets derived from these business interests. However, Lisa had no idea just how substantial the assets were.

Despite three discovery requests made by Lisa, John failed to produce any records. John never denied that he could obtain the documents. Rather, he asserted that the business entities owned by his family and John would not allow him to disclose any financial information. Despite this claim, Lisa moved to compel the responses. The trial court sanctioned John \$7,500.

Lisa then made a new motion to compel John to appear for a deposition and produce the documents. The discovery referee found that John was properly served but never appeared for his deposition. As a result, the referee recommended the court grant Lisa's motion and sanction John for \$5,670 in attorney fees and costs. The court adopted this recommendation.

The referee stated, *"Without these documents, Lisa cannot determine what, if any interest, the community has in any assets, nor can she rebut John's assertion that assets are his separate property."*

John was given one more chance to produce the documents before being precluded from presenting evidence that the business entities were his separate property. He again failed to do so. At this point, John was able to keep his fees to his attorneys current, which amounted to more than \$300,000. Because the extent of John's resources were not known and he demonstrated his ability to pay his attorneys, as well as Lisa having no resources of her own, the court ordered John to pay Lisa a contribution to her attorney's fees and costs an unallocated sum of \$200,000.

The disentitlement doctrine enables an appellate court to stay or dismiss the appeal of a party who refused to obey a superior court's legal orders. In this case, the appellate court chose to dismiss the case due to its inherent power to use its processes to induce compliance with a presumed valid order.

* For an explanation of these titles, please visit our website or request a copy of Issue 3 of *Forensic Accounting Today*.



How We Ensure We Leave No Assets Uncovered

Ron determines the actions needed based on the facts of the case. Then Ron:

- Carefully estimates how much time each required task will take
- Assigns tasks to correct personnel based on experience and expertise
- Provides each assigned staff with details of their scope of work
- Meets frequently with his team to ensure everything is uncovered and we meet the deadline.

Actions may include all or some of the following:

reviewing of tax returns to uncover asset liquidations • working with outside investigators to perform asset and bank account searches • investigating credit reports to reveal undisclosed bank accounts • performing expense reconstruction analyses to determine if expenses exceed reported income • conducting bank account testing analyses to scrutinize deposits and bank accounts for income not reported correctly

When you have a case where full disclosure of assets is in question, call Ron J. Anfuso, CPA/ABV, An Accountancy Corporation.

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