

March 2017

Volume 2017 • Issue No. 3

**HIGHLIGHTS**

**PARENTAGE ISSUES**

- Juvenile Court Properly Found that Child Had Two Presumed Fathers (see Page 56)
- Surrogate Mother Had No Rights to Children Born as Result of Surrogacy Agreement, when Surrogacy Agreement and Procedure Substantially Complied with Statutory Requirements (see Page 50)
- In *Point of View*, Deborah H. Wald offers an experienced practitioner’s perspective on surrogacy agreements (see Page 47)
- A complete table of contents appears on the next page.

Spouses’ Fiduciary Duties

## Section 1101 Remedies for Spouse’s Breach of Fiduciary Duty Do Not Apply to Nondisclosure of Assets Spent Prior to Separation

By Carol Rothstein, Esq.\*

In *In re Marriage of Schleich* (Nos. H039870, H041234, Ct. App., 6th Dist. 2/8/16) — Cal. App. 5th —, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 94, the Sixth District Court of Appeal held that the Family Code section 1101(g) and (h) remedies for a spouse’s breach of fiduciary duty do not apply to either a spouse’s failure to disclose separate property in dissolution proceedings or to a spouse’s failure to disclose community property received pre-separation, if that property was dissipated prior to separation.

In the opinion by Justice Grover (Rushing, P.J. and Elia, J., concurring), the court further held that a spouse who receives 50 percent or 100 percent of the value of an asset pursuant to section 1101(g) or (h) is not entitled to receive an additional 50 percent of the asset in the division of community property.

**Facts and Procedure.** The parties enjoyed a high standard of living during their nearly 10-year marriage. Husband earned over \$200,000 annually working for a semiconductor manufacturer in Silicon Valley and generated significant additional income running two side businesses. Wife was unaware of these businesses until after the parties separated.

Husband filed a petition for dissolution of marriage in February 2009. He presented Wife with a \$75,000 marital settlement agreement and warned her that “it could get very ugly” if she didn’t sign it. Wife rejected the offer and retained counsel, who sought temporary spousal

\* Carol Rothstein, J.D., is the principal author of the CALIFORNIA FAMILY LAW MONTHLY. She is a research attorney in Lafayette, California.

the asset in the property division. They were aware of this and enacted it without change. Regardless of what the legislative sponsor may have believed, the full Legislature was aware of this issue, aware that this was how the amendments would be interpreted, and enacted it in light of those comments.

Nothing in SB 716's legislative history even suggested that the amendments to section 5125.1 would replace the court's duty to equally divide the community estate. No comments described the award of an amount equal to 50% of the assets value to be a substitute for the harmed spouse's property right in half of that asset. The analysts and the family law jurists who commented on the proposed bill contemplated that a breaching spouse would be punished by a "surcharge," and that the non-breaching spouse would be entitled to his or her property interest in the asset in addition to the mandatory sanction. *Schleich's* holding is completely contrary to this intent.

Penalties for breaches of fiduciary duty have great deterrent effect as well as provide financial remedies to the harmed spouse. The holdings in *Schleich* do nothing to discourage fiduciary duty breaches and much to render them immune to penalty. That will not only undermine over two decades of fiduciary duty cases and the purpose for which the Legislature enacted the fiduciary duty statutes, but will encourage more game-playing in dissolution cases and cause harm to parties already undergoing turmoil at the end of their marriages.

---

### Commentary

#### **Stacy D. Phillips and Kevin B. Martin**

Financial transparency between spouses is a basic tenet of Family Law. What is the remedy when a party opts for obfuscation in lieu of transparency?

Family Code section 2100 codifies California's strong public policy favoring full financial disclosure between spouses post separation. Family Code section 2100(c) provides:

*In order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or*

*separate, together with a disclosure of all income and expenses of the parties. Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts.*

(Emphasis added.)

In *Schleich*, the Court of Appeal was presented with a husband who clearly ignored California's mandate of full financial disclosure. Finding that Husband breached the fiduciary duty he owed to Wife by failing to be transparent and provide complete and accurate financial disclosures, the trial court "threw the book" at Husband and levied severe monetary sanctions against him. Unfortunately for Wife, the trial court used the wrong Family Code Sections to sanction Husband. This commentary focuses on the trial court's award of sanctions pursuant to Family Code section 1101 and the Court of Appeal's reversal of those sanctions.

Section 1101 creates a right of action and delineates specific remedies for the breach of a spouse's fiduciary duty "that results in impairment to the claimants spouse's *present undivided one-half interest in the community estate.*" (Emphasis added) Notably, in reversing in part the trial court's award of sanctions against Husband pursuant to Family Code section 1101(g) and (h), the Court of Appeal *did not* find Husband's disclosures were adequate. Instead, it found that the trial court sanctioned Husband pursuant to the wrong Family Code section. With respect to sanctions awarded pursuant to Family Code section 1101(g) and (h), the Court Appeal reversed those sanctions arising from Husband's failure to disclose his separate property and Husband's disclosure violations that had no impact on Wife's interest in the community estate. Relying on *In re Marriage of Simmons* (2013) 215 Cal. App. 4th 584, the Court of Appeal found that the remedies afforded by Family Code section 1101(g) and (h) were exclusive to breach of fiduciary claims that impaired *community property*.

The Court of Appeal noted that the unavailability of section 1101 remedies did not mean that Wife

was left without a remedy for Husband's financial disclosure violations, stating that "Husband's fiduciary breaches that impair Wife's community property interests are appropriately remedied under subdivisions (g) and (h), and Husband can be held accountable for non-disclosures implicating his separate property interests under section 2107."

What is to be learned from the Court of Appeal in *Schleich*? Broad brush sanctions requests are inadequate and can end up hurting our clients in the end. The better approach for seeking sanctions is the approach adopted by the Court of Appeal in *Schleich*—examine each "bad act" and determine where the appropriate remedy lies.

In addition, one cannot help but note that this case presents that all too often fact pattern where the parties' litigation wipes out their estate and causes counsel to have extremely large receivables. Here, the Court of Appeal seems to place the blame primarily on the Husband. "Had Husband been forthright with Wife when he initiated the dissolution, he could have avoided this expensive and burdensome proceeding for the parties and the courts."

We all know this scenario; we have all heard threats similar to those uttered by Husband. And yet, the result is still the same: the parties have burned through their estate and the lawyers do not get paid. And if Husband is to be blamed, the court's order requiring Husband to pay Wife one and one-half times the attorneys' fees he paid his own counsel does not make Wife whole. Wife still finds herself post-judgment with more debt than assets, including a very large outstanding attorneys' fees bill.

---

### **Commentary**

#### **Vanessa Kirker Wright**

I went to law school because I can't do math, so the facts of this case made my head spin. After I settled down, read the case two or three more times, reviewed some commentary, did some research and listened to Judge Lewis talk about the case at a seminar, I finally got it. This is truly a case that involves statutory interpretation regarding the intent of Family Code section 1100 et seq. Some say the *Schleich* court got it right and that non-disclosure, no matter how egregious, should never cost the "bad spouse" more than the

value of the asset plus fees. Others say no—non-disclosure is punishable as a "stand alone" offense and the court has the authority to levy sanctions (up to 100% of the asset) AND to divide the asset—sometimes resulting in an award of 150% of the value of the asset plus fees to the victim spouse.

I have read what I could find of the legislative history of this particular statute back to the early 1990s when it was being hotly debated as SB 716 (Roberti). Having read that history and other research, it appears to me that the *Schleich* court's statutory interpretation is not out of the bounds of reason, but it could have gone either way.

There are those who disagree—not the least of whom are the signatories on a recent letter to the Supreme Court seeking to depublish sections C1 and C2 of the case because they believe that *Schleich* does not discourage fiduciary duty breaches, but instead eviscerates the statutory penalty. This camp takes the position that the remedies set forth in section 1101 are separate and apart from the division of the property. They base their analysis on the fact that the remedies set forth in section 1101 are "including but not limited to" those described by the statute.

In the real world, some people have enough money to play hide-and-seek with impunity regardless of the penalty. It is true that most people would be deterred from playing that game if the penalty is that they potentially lose their entire interest in the asset and are required to pay fees to the other side. But, as the facts in *Schleich* illustrate, that penalty (the 100% award to the other spouse) is obtained only after a good deal of litigation and determined digging, probably because it involves a finding that one spouse was "bad"—something family law courts are usually loathe to do. Thus, if the Legislature truly intended to allow a court to "pile on" the penalties for non-disclosure (as advanced by the "depublish *Schleich*" group), I believe some legislative clarification is needed.

---

### **Commentary**

#### **Marshall S. Zolla**

This opinion travels a lengthy and convoluted path, perhaps because of the multiplicity of alleged non-disclosures, arguably sanctionable conduct on both sides, and the apparent necessity to address the