

CALIFORNIA LAWYERS ASSOCIATION

FAMILY LAW NEWS

Issue 2, 2018 | Volume 40, No. 2

**Neverland Practice: Representing
Minor Children**

By B J Fadem

**Guardians Ad Litem—What Are They
and When Are They Necessary in a
Family Law Case?**

By Rhoda Chandler

Blended Families

By Tiffany L. Andrews

CLA
CALIFORNIA LAWYERS ASSOCIATION

Consideration of Fault In Divorce Proceedings After the #MeToo Movement

Rod Firoozye

The Filing of Divorces after the #MeToo Movement

The #MeToo Movement has led to a public discussion about the actions of various men in positions of prominence and influence toward women. Since then, this movement and other similar ones have led to many prominent people losing their jobs and facing potential criminal and civil liability to their victims. Furthermore, this movement seems to have caused several high-profile divorce cases.

Many aggrieved spouses in such divorce proceedings may have sought to initiate the divorce proceedings in advance of various civil (and criminal) claims being filed on behalf of the victims against their spouses. This article seeks to address the issue of fault in California divorce proceedings and whether it should play any role in such proceedings. Furthermore, if a court is to consider a spouse's fault, who should have the burden of proof? And what about the impact of conflicting public policies on these matters?

California is a No-Fault Divorce State. Really?

California was the first state in the United States to pass a no-fault divorce law. No-fault divorce was adopted with the Family Law Act of 1969, which became effective on January 1, 1970. This Act codified a general public policy against the consideration of fault in family law proceedings.¹ It abolished California's action for divorce and replaced it with a proceeding for dissolution of marriage on the grounds of irreconcilable differences, which continues to be the law today.²

After the enactment of this Act, spouses generally could not maintain a cause of action for alienation of



Rod Firoozye has practiced law since 1996 in Silicon Valley and been certified as a Family Law Specialist since 2004. Before practicing family law, Mr. Firoozye represented clients in business litigation disputes against various businesses, including Microsoft and Earthlink. He has also previously testified as an expert witness in the areas of spousal support and California family law. Mr. Firoozye has been regularly selected as a Superlawyer by San Francisco Magazine.

affection.³ Furthermore, in family law proceedings, a party's misconduct was generally inadmissible.⁴ However, in spite of the stated public policy against acceptance of fault-based evidence in family law proceedings, there are certain limited exceptions that permit the consideration of such evidence.

One area in which where fault-based evidence may be considered is with regard to evidence of domestic violence in determining spousal support.⁵ Another is in the area of breach of fiduciary duties.

Potential Claims for Breach of Fiduciary Duties

Generally, spouses share equal management and control of their community property.⁶ However, in 1992, the California Legislature adopted the predecessor statutes to current Family Code §§ 721 and 1100 to further clarify spouses' fiduciary obligations to each other in the management and control of their community property. Section 1100 states that in exercising management and control of the community assets and liabilities, each spouse "shall act with respect to the other spouse... in accordance with the general fiduciary relationship standards specified in Fam. Code § 721(b)."⁷

Family Code § 721 provides that "in transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital

business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code ...”⁸

Corporate Code § 16404 specifically notes that “(c) A partner’s duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law” and “(d) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.”⁹ Partners are also required to provide “without demand any information concerning a partnership’s business and affairs reasonably required for the proper exercise of the partner’s rights and duties.”¹⁰ Additionally, a spouse may not “make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse.”¹¹

In the context of breach of fiduciary duties, aggrieved spouses may submit evidence of fault, such as showing that the other spouse spent certain funds without their knowledge, whether on another party or used as payments made to keep a potential victim of abuse quiet. Additionally, in corporate cases, a partner can make a claim against the other partner for failure to exercise appropriate duty of care in the management of a business. Section 721 indicates that an aggrieved spouse can make similar claims related to a spouse’s failure to exercise due care.¹²

Who Has or Should have the Burden of Proof?

Generally, a party making a claim in civil proceedings bears the burden of proof.¹³ However, in family law proceedings, where a spouse can establish that the other spouse used community funds *after separation* without prior agreement, the burden of proof would shift to the “using” spouse to establish the appropriate use of those funds.¹⁴

During marriage, a spouse may not “make a gift of community personal property or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse.”¹⁵ Presently, there is no specific family law authority regarding the shifting of the burden of proof for the *pre-separation* use of funds. However, in civil breach of fiduciary proceedings, courts have shifted the burden of proof to a defending party when “evidence necessary to

establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.”¹⁶ However, a spouse defending against a claim of gifts given in violation of fiduciary duties may be able to raise appropriate defenses such as waiver or laches.¹⁷ Furthermore, spouses managing a business may be relieved of the obligation to obtain such prior written notice if the gifts were made as part of their roles in management of their business enterprise.¹⁸

Public Policy Concerns with Fault Issues and the Slippery Slope Effect

Former Supreme Court of California Associate Justice Stanley Mosk once described the actions of parties in divorce proceedings prior to the enactment of no-fault law this way:

“Every day, in every superior court in the state, the same melancholy charade was played: the ‘innocent’ spouse, generally the wife, would take the stand and, to the accompanying cacophony of sobbing and nose-blowing, testify under the deft guidance of an attorney to the spousal conduct that she deemed ‘cruel.’”¹⁹

Also, prior to the enactment of the no-fault basis for dissolution, spouses arguing against fault could plead a variety of defenses such as recrimination (essentially an accusation of “so did the other person”), or that the other spouse was aware of the wrongdoing but did nothing about it. Where does a court draw the line between the admission of fault-based evidence in divorce proceedings? Are fiduciary duty claims simply “fault” in disguise?

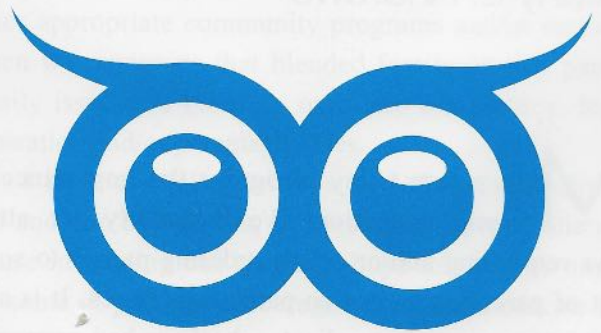
Can spouses claim that a spouse misused funds without their knowledge or failed to exercise their duty of care, and be allowed to submit fault-based evidence in every divorce case? Should spouses be found to have breached their fiduciary duties based only on accusations without first establishing the truth of the allegations? Or does the party bringing the claim for breach of fiduciary duty bear the burden of proof to establish the truth of the allegations before making the claim?

This issue is obviously a tough call for each judge weighing the public policy concerns against consideration of no-fault evidence in relation to the spouse’s fiduciary obligations to each other and must be judged on a specific

case by case basis. However, both spouses making or defending these arguments need to be wary of potential victims being able to use any information obtained in their divorce proceedings against the spouse in later civil or criminal proceedings, which could lead to potential dissipation of community funds or income available for support.

Endnotes

- 1 Family Law Act (CAL. CIV. CODE div. 4, pt. 5, § 4000 et seq., operative Jan. 1, 1970) ; Family Law Rules of Court, rule 1201 et seq., effective Jan. 1, 1970).
- 2 CAL. FAM. CODE § 2333.
- 3 CAL. CIV. CODE § 43.5; *Askew v. Askew*, 22 Cal. App. 4th 942, 947 (1994).
- 4 CAL. FAM. CODE § 2335.
- 5 CAL. FAM. CODE § 4320(i); *In re Marriage of Schu*, 6 Cal. App. 5th 470, 474 (2016).
- 6 *See Farmers' Exch. Nat. Bank v. Drew*, 48 Cal. App. 442, 449 (1920).
- 7 CAL. FAM. CODE § 1100.
- 8 CAL. FAM. CODE § 721(b).
- 9 CAL. FAM. CODE § 16404.
- 10 CAL. CORP. CODE § 16403.
- 11 CAL. FAM. CODE § 1101(b).
- 12 *See In re Marriage of Walker*, 138 Cal. App. 4th 1408, 1424 - 1425 (2006).
- 13 CAL. EVID. CODE § 500.
- 14 *In re Marriage of Margulis*, 198 Cal. App. 4th 1252, 1268 (2011).
- 15 CAL. FAM. CODE § 1100(b).
- 16 *Wolf v. Superior Court*, 107 Cal. App. 4th 25, 35 (2003).
- 17 *See In re Marriage of Hopkins*, 74 Cal. App. 3d 591, 602, n. 7 (1977); *cf. Estate of Bray*, 230 Cal. App. 2d 136 (1964).
- 18 *See CAL. FAM. CODE § 1101(d); Farmers' Exch. Nat. Bank v. Drew*, 48 Cal. App. 442, 449 (1920).
- 19 *In re Marriage of McKim*, (1972) 6 Cal. 3d 673 (Mosk, J., dissenting).



BE SEEN!

ADVERTISE IN FAMILY LAW NEWS.

Contact
Editor Dawn Gray
for further information at
dawn_gray@earthlink.net.