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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re the Marriage of ROGER  
POWELL and CATHERINE POWELL.**

**ROGER POWELL,**

**Respondent,**

**v.**

**CATHERINE POWELL,**

**Appellant.**

**A129916**

**(Alameda County  
Super. Ct. No. CH209591)**

Catherine Powell appeals from a judgment on the ground that its provision for monetary sanctions, award of attorney fees, and award of attorney fees in the form of an allocation of property, were erroneous. All three awards had been imposed by separate orders issued approximately seven months before she filed her notice of appeal. We conclude she has waived her right to appeal from those issues and we have no jurisdiction to consider them; no other issues being raised as to the judgment, we will dismiss the appeal.

## I. FACTS AND PROCEDURAL HISTORY

Roger Powell and Catherine Powell were most recently married on February 14, 1985.<sup>1</sup> A petition for dissolution of the marriage was filed in September 1999, and the parties have been litigating ever since.

### A. *Dr. Rees, The Tucker Note, and the 1999 Deed of Trust*

During the parties' marriage, Roger and Catherine cared for Dr. Elizabeth Rees, an elderly and incapacitated woman. After the parties' separation, Catherine continued to care for Rees.

Catherine had a power of attorney over Rees's financial affairs. Before and after the parties' separation, she obtained funds from Rees, purportedly by loans.

Catherine filed for legal separation from Roger in June 1999 but dismissed the petition with his consent on September 15, 1999. Two days later, Catherine unilaterally assigned to Rees a partial interest in a promissory note payable to the Powells (the Tucker Note), such that Rees (and later her estate, of which Catherine would be essentially the sole heir) would receive about one-half of each installment payment on the note, while Catherine would receive the community interest in the balance of the installment payment.

Also on September 17, 1999, Catherine unilaterally executed and recorded a \$240,000 Deed of Trust (1999 Deed of Trust) on the parties' family residence on Mission Boulevard in Fremont (Mission Boulevard Property) in favor of Rees, to secure the obligations purportedly owed to Rees by the community.

Roger filed for divorce on September 28, 1999. Catherine – heir to the future Rees estate – alleged that the Powells owed Rees a debt for the repayment of the monies. Roger contended they owed Rees nothing.

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<sup>1</sup> Because they have the same last name, we refer to Roger and Catherine by their first names for clarity, without disrespect.

*B. June 2004 Judgment*

The dissolution matter proceeded to two bifurcated trials, the first of which occurred in 2003 before the Honorable Stephen Dombrink. Judgment as to the issues in this trial was entered on June 30, 2004 (2004 Judgment).

The court found, among other things, that the community had owed Rees \$466,405 in regard to the debt alleged by Catherine, although credits and offsets to that amount were to be determined later. The court also found that the 1999 Deed of Trust that Catherine had recorded on the Mission Boulevard Property was null and void. The court reserved jurisdiction as to whether Catherine breached her fiduciary duty to Roger when she recorded it.

Catherine appealed from the 2004 Judgment (appeal number A107718), challenging the court's invalidation of the 1999 Deed of Trust. In an unpublished opinion, we dismissed the appeal for lack of jurisdiction but treated it as a petition for an extraordinary writ, concluded the trial court did not err, and denied the petition.

*C. June 2008 Order: Attorney Fees*

By written order filed on June 16, 2008, the court ordered Catherine to pay Roger: \$38,000 for attorney fees and costs Roger incurred in connection with Catherine's unsuccessful appeal in appeal number A107718; and \$82,000 towards Roger's attorney fees in the dissolution matter. The court clerk served a file-stamped copy of the order on June 16, 2008.

In regard to the attorney fees in the dissolution matter, Roger had asked for \$350,000 of the approximately \$360,000 in attorney fees he had incurred. After reviewing the parties' income and expense declarations and the parties' contentions, the court concluded: "On a need and ability to pay basis[,] it is [Catherine] who as Dr. Rees'[s] heir will collect the \$500,000+ judgment owed by the Powells. Under the best case scenario of each party it is [Catherine] who will have, by virtue of her inheritance from Dr. Rees, a substantial amount of money/equity with which to pay her attorneys and repay debts. [Roger] will have no such resources. [Catherine] is ordered to contribute \$82,000 to [Roger]'s attorneys fees and costs."

*D. October 2009 Amended Decision: Monetary Sanctions for Breach of Duty*

A second multi-day bifurcated trial in the dissolution proceeding was held in 2007 before the Honorable Yolanda Northridge, resulting in an Amended Decision filed on October 15, 2009.

The court found that Catherine had breached her fiduciary duties in executing the 1999 Deed of Trust (one of the issues left open by the June 2004 Judgment) and sanctioned Catherine \$40,000. The court also found that Catherine breached her fiduciary duties by executing another deed of trust on the Mission Boulevard Property without notice to Roger in 2008, in favor of her daughter, Kathleen A. Wolfe. For this, Catherine was sanctioned an additional \$75,000.

The court clerk served a file-stamped copy of the Amended Decision on October 15, 2009.

*E. March 2010 Order: Share of Tucker Note to Roger as Attorney Fees*

On March 4, 2010, the Family Court issued an Order Re Attorneys Fees, by which the court ruled, among other things, that Catherine's share of the principal balance of the Tucker Note (\$118,750) was awarded to Roger as attorney fees. The court decided the matter based on the current relative circumstances of the parties, finding that Roger was of far greater need and Catherine had greater ability to pay.

The court clerk served a file-stamped copy of the order on March 4, 2010.

*F. August 2010 Judgment on Reserved Issues*

On August 12, 2010, the court entered a "Judgment on Reserved Issues (From Amended Decision filed 10/15/09 and Order re Attorney's Fees 03/4/10) Other Fees/Sanction Orders." The court determined, among other things, that the Mission Boulevard Property would be placed on the market for sale forthwith. The court also restated rulings that had been made previously: (1) the 1999 Deed of Trust and 2008 Deed of Trust executed by Catherine were null and void ; (2) Catherine breached her fiduciary duty to Roger when she executed the 1999 Deed of Trust and the 2008 Deed of Trust and is charged \$40,000 and \$75,000 respectively ; (3) "[p]ursuant to the order entered June 16, 2008, [Catherine] shall pay to [Roger], as and for attorney's fees, the

sum of \$120,000 (\$38,000 in fees and costs related to the appeal and \$82,000 in fees and costs related to the dissolution of marriage action), plus interest from and after entry of this order”; and (4) “pursuant to the order entered March 4, 2010, [Catherine] shall pay to [Roger], as and for attorney’s fees, her portion of the Tucker Note, including \$118,750 as principal.”

Thus, the August 2010 Judgment on Reserved Issues restated the June 2008 order awarding \$120,000 in attorney fees to Roger, the October 2009 amended decision ordering sanctions of \$115,000, and the March 2010 order requiring that Catherine’s share of the principal balance of the Tucker Note (\$118,750) be awarded to Roger as attorney fees.

#### G. *Catherine’s Appeal*

Catherine filed a notice of appeal on October 4, 2010, purporting to appeal from the judgment entered on August 12, 2010.

Roger filed a motion to dismiss the appeal on the ground it was untimely, in that it challenged awards that had been initially set forth in the orders of June 2008, October 2009, and March 2010. We deferred our ruling on the motion until the time for our consideration of the merits. (See *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 898.)

## II. DISCUSSION

Catherine contends that the August 2010 Judgment on Reserved Issues is erroneous to the extent it imposed sanctions under Family Code section 1101, subdivision (g) because: the statute is void as against public policy in depriving the court of discretion to ensure that the spouse who violated her fiduciary duties will have adequate financial resources; and the statute deprives a party of property without due process. Catherine further argues: the June 2008 order was erroneous because a determination of need-based fees must be decided on present circumstances and should not have been based on an assumption about her inheritance; and the October 2009 amended decision was erroneous on several grounds, including that the court did not

explain the basis of the amounts awarded and did not determine whether Catherine had an ability to pay.

Roger makes counter arguments and also urges that these matters are no longer subject to appellate review because Catherine failed to appeal in a timely matter from the orders that initially imposed the awards. We need address only the timeliness issue to resolve the appeal.

An order or interlocutory judgment directing payment of monetary sanctions of more than \$5,000 is immediately appealable. (Code Civ. Proc., § 904.1, subs. (a)(11), (12).) In addition, an order requiring one party to pay another party's attorney fees during a family law proceeding is immediately appealable as a final judgment on a collateral matter. (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 9 [“The provision of the order in the dissolution proceeding requiring petitioner to pay his wife's attorney's fees was ‘in effect a final judgment against a party in a collateral proceeding growing out of the action’ ”] (*Sarracino*); *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 [order reducing temporary support and denying attorney fees and costs is appealable] (*Skelley*); *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1311 [order awarding attorney fees for future work was immediately appealable] (*Tharp*); see *Smith v. Krueger* (1983) 150 Cal.App.3d 752, 756 [order denying attorney fees is appealable as a final determination on a collateral matter].)

If a matter is immediately appealable, but no appeal is timely filed, the right to appeal the matter is waived. To put it another way, if an appeal is not taken from an appealable order, the order may not later be reviewed on appeal from the final judgment. (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 761, fn. 8 [“California follows a ‘one shot’ rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited”]; *Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 [pendent lite attorney fee order, immediately appealable as a collateral final order, cannot be reviewed on appeal from final judgment]; *McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 357 [failure to appeal from appealable order precludes review of the matter on appeal from the subsequent judgment] (*McLellan*); *Chong v. Fremont*

*Indemnity Co.* (1988) 202 Cal.App.3d 1097, 1102-1103 [appeal challenging sanctions order was untimely where the notice of appeal was filed after the determination of the issues in the main action, and not within 60 days after the sanctions order] (*Chong*.)

Although the August 2010 Judgment on Reserved Issues repeated the substance of the awards initially issued in the June 2008, October 2009, and March 2010 orders, a restatement of earlier final orders in a later judgment does not restart the time to appeal those final orders. (See *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1139-1141 [once time to appeal an appealable order has passed, it does not again become appealable by its routine continuation, without change, in a subsequent order]; *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 [where post-judgment order did not amend the prior judgment in a substantive way, it did not restart the time to appeal from the judgment].)

In this appeal, Catherine challenges the requirement that she pay \$120,000 to Roger for attorney fees as initially ordered in the June 2008 order, a file-stamped copy of which was served by the court clerk on June 16, 2008. The June 2008 order constituted a final judgment on a collateral matter. (*Sarracino, supra*, 13 Cal.3d at p. 9; *Skelley, supra*, 18 Cal.3d at p. 368; *Tharp, supra*, 188 Cal.App.4th at p. 1311.) Therefore, a notice of appeal from the order had to be filed within 60 days. (Cal. Rules of Court, rule 8.104(a)(1).) The right to appeal the June 2008 order, and the \$120,000 award, was waived.

Catherine also challenges the requirement that Catherine pay \$115,000 to Roger as monetary sanctions for her breach of fiduciary duties, as initially ordered in the October 2009 Amended Decision, a file-stamped copy of which was served by the court clerk on October 15, 2009. An order directing payment of monetary sanctions by a party is immediately appealable. (Code Civ. Proc., § 904.1, subd. (a)(12).) Therefore, a notice of appeal from the amended decision had to be filed within 60 days. (Cal. Rules of Court, rule 8.104(a)(1).) The right to appeal the \$115,000 sanctions order was waived.

Lastly, Catherine seems to challenge the allocation of Catherine's share of the principal balance of the Tucker Note to Roger, as and for his attorney fees. This was the subject of the March 2010 Order re Attorney Fees, a file-stamped copy of which was

served by the court clerk on March 4, 2010. The order, which effectively directs the payment of money by allocating the parties' interest in the note and payments thereunder, constitutes a final judgment on a collateral matter and was thus immediately appealable. (See *Sarracino, supra*, 13 Cal.3d at p. 9; *Skelley, supra*, 18 Cal.3d at p. 368; *Tharp, supra*, 188 Cal.App.4th at p. 1311.) Therefore, a notice of appeal from the order had to be filed within 60 days. (Cal. Rules of Court, rule 8.104(a)(1).) The right to appeal from the order, and the \$118,750 award, was waived.

In sum, Catherine no longer has any right to appeal the challenges she asserts to the August 2010 Judgment on Reserved Issues, and we have no jurisdiction to consider them.

Catherine's arguments to the contrary are unpersuasive. In her reply brief in this appeal, Catherine contends the statute provides merely that an appeal "may be taken" from an "interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000)" or an "order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000)." (Code Civ. Proc., § 904.1, subd. (a)(11), (12), italics added.) Because of the statute's use of the word "may," Catherine insists she had a choice of appealing from the June 2008, October 2009, and March 2010 orders or awaiting the August 2010 Judgment on Reserved Issues.

By her own argument, Catherine thus admits that the June 2008 order, the October 2009 order, and the March 2010 order were indeed appealable orders. Her contention that she had the *option* of appealing them or waiting until issuance of a later judgment, however, is flat wrong. (Code Civ. Proc., § 906 ["The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken"]; *Marriage of Weiss, supra*, 42 Cal.App.4th at p. 119; *In re Baycol Cases I & II, supra*, 51 Cal.4th at p. 761, fn. 8; *McLellan, supra*, 23 Cal.App.3d at p. 357; *Chong, supra*, 202 Cal.App.3d at pp. 1102-1103.) She cannot pursue these matters in her appeal of the August 2010 Judgment on Reserved Issues.

Catherine musters no other argument on the timeliness issue in her reply brief, but we also consider the arguments she posited in her opposition to the motion to dismiss. Primarily, she urged that the orders were not final or appealable because they were issued before the final property distribution in the August 2010 Judgment on Reserved Issues. More specifically, she argued that the June 2008 order and the October 2009 order were based on the assets Catherine was projected to have available after the sale of the family home, but the sale of the home was not actually ordered until August 2010.

Catherine's argument is unavailing, for several reasons. First, her argument assumes that the August 2010 Judgment on Reserved Issues constituted the final property distribution, while her opening brief demonstrates it did not. Catherine represents in her brief: "As of August 12, 2010, the issues of reimbursements, credits and offsets had yet to be determined. The family home had not yet been sold." Similarly, there is no indication in the record that the home was sold by the time Catherine filed her notice of appeal in October 2010, or even that it has been sold to this day. Therefore, if we were to accept Catherine's argument that the orders could not be appealed until the ascertainment of her assets after the sale of the family home, the appeal would be dismissed anyway, on the ground it is not ripe.

Second, the June 2008, October 2009, and March 2010 orders *were* final for purposes of appeal, even though they were issued before a final property distribution, because they constituted the final adjudication of the issues presented for decision. There was nothing more for the court to do in deciding whether and in what amount the sanctions and attorney fees should be awarded. Furthermore, not one of the orders specifies that it is contingent on a future event, such as the final property distribution or the proceeds of the sale of the family home. While the court did mention the amounts it believed would eventually be available to Catherine as a *reason* for its decision, the order was not contingent on these amounts; if the court's assumptions were erroneous as of the date of the order, they could be challenged by immediate appeal; if they later turned out to be erroneous, an adjustment could be made if appropriate in the final distribution. But there was nothing more for the court to consider in terms of deciding the specific issues

before it in June 2008, October 2009, and March 2010. The orders were final and triggered the time within which they could be appealed. (*Tharp, supra*, 188 Cal.App.4th at p. 1311 [where the trial court did not reserve jurisdiction to revisit the issue, its order awarding \$20,000 in attorney fees for *future* work in the case was dispositive of the issue and thus immediately appealable].)

Third, the finality of the orders is confirmed, and Catherine's arguments are further undermined, by the fact that none of the errors Catherine asserts in this appeal turns on the substance of the final property distribution. Catherine attacks the June 2008 order on the ground that the court improperly figured into its needs and ability analysis an assumption about an inheritance; she attacks the October 2009 amended decision on grounds such as the court's failure to explain the basis of the amounts awarded and its failure to determine whether Catherine had an ability to pay. These grounds could have been asserted without awaiting a final property distribution. The orders were final as issued.<sup>2</sup>

Lastly, Catherine argues that orders imposing attorney fees and sanctions cannot be appealable unless there has been a bifurcation of those issues for separate trial and decision. While there is a procedure for rendering otherwise nonappealable orders appealable in this manner (Fam. Code, § 2025; Code Civ. Proc., § 904.1, subd. (a)(10)), that does not mean that *all* collateral issues must be formally bifurcated before the orders adjudicating them can be appealed. Catherine does not support her contention with any legal authority, and her argument is contrary to the plain meaning of Code of Civil Procedure section 904.1, subdivision (a)(11) and the decisions in *Skelley* and *Tharp*. Her contention has no merit.

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<sup>2</sup> Apparently tied in with this argument is Catherine's urging that a dismissal of her appeal would unfairly violate the public policy of equitable division of community property and, because the appealed orders were not fully dispositive of the issue of attorney fees, appealing the orders as they were issued would have wasted valuable court time and resources. Neither contention has any merit. The public policy of equitable division of community property may be protected by appeals that are timely; appealing the orders as they were issued would have promoted the finality of rulings on collateral matters.

In conclusion, Catherine has no right to challenge the awards that were the subject of the June 2008, October 2009, and March 2010 orders, and we have no jurisdiction to consider them. Catherine has not raised any other issue in this appeal as to the August 2010 Judgment on Reserved Issues, or even contended that the amounts awarded by the prior orders became erroneous because of the other rulings set forth in the August 2010 judgment. There being no other challenge to the judgment, we will dismiss the appeal.

### III. DISPOSITION

The appeal is dismissed. Appellant shall pay respondent's costs on appeal.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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SIMONS, J.