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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,  
Respondent,**

**ALLAN R. FRUMKIN,  
Objector and Appellant.**

**A131591**

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

Allan R. Frumkin appeals from an order imposing sanctions against him in the amount of \$258,344. He contends the order was entered without sufficient notice, without a statement of reasons, without a showing of bad faith, and in an unreasonable amount. We will reverse on another basis: there is no statutory authority for the order.

**I. FACTS AND PROCEDURAL HISTORY**

The parties in this matter are Roger Powell and Catherine Powell, who were married in February 1985.<sup>1</sup> A petition for dissolution of the marriage was filed in

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

September 1999, and the parties have apparently been litigating their disputes ever since. A claimant in the dissolution proceeding is the Estate of Elizabeth Rees, of which Catherine is the executor. The attorney for the estate in this proceeding is appellant Allan R. Frumkin.

Although the subject of this appeal is a January 2011 order that imposed sanctions against Frumkin, an understanding of the context of the order requires a summary of what occurred before.

*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.

*B. Probate Case for Estate of Rees*

Rees died in 2003. Her will, which Catherine had purportedly helped draft, left nearly the entirety of Rees's estate to Catherine.

A probate case was opened for Rees's estate (Alameda County Case No. FP03132081). Catherine was appointed executor of the estate, and the estate became a claimant in the dissolution proceeding with respect to the amounts the community purportedly owed Rees. Thus, Catherine was the spouse in the dissolution action, and the executor and beneficiary of the Rees estate, who was the claimant in the dissolution action. At times relevant to this appeal, Frumkin represented the estate in the dissolution action in the Family Court, while another attorney in his office, Stephen M. Sirota, represented the estate in the probate proceeding.

*C. June 2004 Judgment in the Dissolution Matter*

The dissolution matter proceeded to two bifurcated trials, the first of which occurred over several days 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 2004 Judgment stated: "*Roger Powell and Catherine Powell are found to have owed Dr. Rees \$466,405 as of December 31, 1999. This was a community obligation as of that date. Any loans or advances made by Dr. Rees to Catherine Powell after that date would likely be the separate obligation of Catherine Powell. [¶] The Powells are entitled to credit for payments made against the debt since December 31, 1999. The payments would be community in nature if they came from the 'Tucker note' — a note that was assigned to Dr. Rees as security. We do not have evidence of what has been paid since December 31, 1999. [¶] Jurisdiction is reserved to determine what either or both of the Powells have paid to Elizabeth Rees after December 31, 1999. [¶] Likewise, it remains to be determined what further amounts either party may have borrowed from Dr. Rees since December 31, 1999.*" (Italics added.)

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 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.

*D. May 2007 Order to Cease and Desist Enforcement Efforts*

In 2004-2006, the estate apparently attempted to recover the \$466,405 mentioned in the 2004 Judgment through various enforcement efforts.<sup>2</sup> In addition, after the estate obtained a writ of execution based on the 2004 Judgment in 2007, Roger filed a motion to recall it.

On May 11, 2007, the court issued an Order on Motion to Recall Writ of Execution and Vacate Levy (May 2007 Order), which directed the estate to cease and desist its efforts to enforce the 2004 Judgment. In pertinent part, the court stated: "The request to recall the writ and stay any and all attempts to execute upon the 'Judgment' entered herein on June 30, 2004 is GRANTED. While denominated a 'Judgment' and finally adjudicating the issues on which a bifurcated trial has been held, *that adjudication is not a final adjudication of the claims and defenses or the net payable by one party to another in this matter. [¶] The Estate is ordered to cease and desist any and all efforts to enforce the Judgment of June 30, 2004, unless and until (a) the trial of the remaining issues is concluded and a final judgment thereon is rendered or (b) leave of the trial court is granted to proceed in the absence of such a judgment.*"

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<sup>2</sup> In his respondent's brief, Roger alleges the estate's unsuccessful attempts in 2004-2006 to collect on the 2004 Judgment: in the Family Court, the estate sought to satisfy the judgment from community funds held in an attorney trust account; the estate tried to foreclose on the Mission Boulevard Property; the estate filed a new civil action (by Catherine as executor) against Catherine and Roger; and, without notice to Roger or his attorneys, the estate procured a stipulation and order in the probate court in an attempt to circumvent the Family Court's order. Roger does not support these allegations with citations to the appellate record, but Frumkin does not dispute them.

*E. October 2008 Abstract of Judgment*

In October 2008, the estate nonetheless recorded in Alameda County an abstract of judgment against Catherine and Roger in the amount of \$466,405, based on the 2004 Judgment. The application for the abstract was signed by Stephen M. Sirota (of the Law Offices of Allan R. Frumkin, Inc.), as counsel for the estate, on October 2, 2004; the abstract was issued and recorded on October 3, 2008.

*F. October 2009 Amended Decision*

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.

In the Amended Decision, the court noted the amount stated in the 2004 Judgment and determined that the updated amount due to the estate, with accrued interest as of July 31, 2009, was \$516,688. The credits and offsets still had not been decided.

The court further 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. In addition, the court found that Catherine breached her fiduciary duties by executing another deed of trust without notice to Roger in 2008 in favor of her daughter, Kathleen A. Wolfe, for which Catherine was sanctioned \$75,000.

*G. March 2010 Family Court Order Regarding the Tucker Note*

On March 4, 2010, the Family Court issued an Order Re Attorney's Fees, by which the court ruled, among other things, that Catherine's share of the Tucker Note was awarded to Roger as and for Roger's attorney fees.<sup>3</sup>

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<sup>3</sup> Roger contends that Frumkin nonetheless directed Tucker to continue sending the installment payments to the estate in care of Frumkin's law firm, and discovery revealed that Rees's portion of the installment payments was used by Frumkin's firm as compensation for legal services in the probate matter, without court approval, in violation of Probate Code section 10830. Roger does not provide a record citation for these assertions, but Frumkin does not dispute them. In addition, Roger sets forth numerous other alleged improprieties by Catherine, Frumkin, and the attorneys in Frumkin's law firm, without citations to the appellate record. We disregard all of Roger's unsupported factual assertions for purposes of resolving the appeal. (Cal. Rules of Court,

#### H. *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 and Sanctions.” The decision adjudicated issues that the court had previously reserved and included the following: (1) the Mission Boulevard Property would be sold ; (2) Catherine's portion of the Tucker Note and the monthly installments paid on the note by Tucker were to be paid to *Roger*; (3) the installment payments to the estate would cease upon entry of the August 2010 Judgment, as “the debt shall be satisfied;” and (4) the court retained jurisdiction of “the final determination over the final amount owed to the Estate as of the division of the community property.”

#### I. *October 2010 Abstract of Judgment*

At some point, Roger's attorney found out that, notwithstanding the May 2007 Order, the estate had obtained and recorded the 2008 Abstract of Judgment based on the 2004 Judgment. In addition, Frumkin informed Roger’s attorney that, according to Frumkin’s understanding, the May 2007 Order to cease and desist enforcement efforts no longer applied because the remaining issues had now been tried, and Frumkin intended to record a new abstract of judgment based on the August 2010 Judgment on Reserved Issues.

Thus, although the final credits and offsets against the amount the community owed to the estate had not been finally adjudicated by the Family Court, Frumkin proceeded to record an abstract of judgment on October 4, 2010 (2010 Abstract of Judgment) in the amount of \$516,688.

#### J. *January 2011 Order*

On October 26, 2010, Roger obtained an order to show cause why an order should not issue establishing the final division of assets and debts, including matters such as the disposition of the Mission Boulevard Property and the adjustment of credits and offsets

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rule 8.204(a)(1)(C). See *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29; *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1260 & fn. 1.)

which, in Roger's calculation, required payment by Catherine to Roger in the net amount of \$115,747.52.

On the same date, Roger obtained another order to show cause why an order should not be issued declaring the 2008 and 2010 abstracts of judgment null and void in light of the May 2007 cease and desist order, requiring those abstracts of judgment to be removed and released, and enjoining further encumbrances on the Mission Boulevard Property. The order to show cause also gave notice that Roger sought attorney fees and sanctions against Catherine and Frumkin.

Specifically, the declaration supporting (and attached to) the issuance of the order to show cause stated in bold-faced print: "In addition, Petitioner requests that the Court order attorney's fees and costs payable to Petitioner, as well as *sanctions against* Respondent, Catherine Powell, as the Executor and sole heir of Claimant, and *Claimant's attorneys of record, Allan R. Frumkin and Stephen M. Sirota, of the Law Offices of Allan R. Frumkin, Inc.*, for the unauthorized issuance and recording of these Abstracts of Judgment and their refusal to sign and record releases to remove them." (Italics added.) The declaration set forth several pages of supporting facts, including Frumkin's acts and purported lack of cooperation. The declaration further advised: ". . . Respondent/Claimant and Respondent/Claimant's attorney, *Allen R. Frumkin, Esq.*, *should be sanctioned* pursuant to Family Code section 271 and Code of Civil Procedure section 128.5 for their repeated bad faith actions, lack of cooperation, and the direct violation of the Court's May 11, 2007 order in recording the improper Abstracts." (Italics added.) After summarizing those two statutes, the declaration continued: "Respondent/Claimant and her attorney, *Allan R. Frumkin, Esq.*, have repeatedly engaged in bad faith actions that have increased the cost and length of this litigation and *should be sanctioned.*" (Italics added.)

As to the amount of the sanctions against Catherine, Roger relied on Family Code section 1101 to request \$258,344, which constituted Roger's one-half share of the \$516,688 preliminary calculation of the community's debt to Rees under the August 2010 Judgment. Roger did not request a specific amount of sanctions against Frumkin. Nor

did Roger submit evidence of attorney fees or other expenses he incurred as a result of Frumkin's actions.

On December 15, 2010, Frumkin signed and filed, on the estate's behalf, two declarations responding to the orders to show cause. As to the proposed credits and offsets, Frumkin disagreed with Roger's calculation and arguments. As to the removal of the abstracts of judgment and award of attorney fees and costs, Frumkin argued: the August 2010 Judgment did not continue the cease and desist order of May 2007; the August 2010 Judgment was the final judgment on the remaining issues and therefore the May 2007 Order was no longer in effect; filing abstracts of judgment did not constitute a collection effort anyway; and he acted in good faith.

On January 11, 2011, the court held a hearing on the matters set forth in the orders to show cause. Frumkin did not appear for the hearing, although an attorney from his office appeared on behalf of "the claimant" (the estate). Roger's attorney represented that the \$258,344 amount was based on one-half the community debt to Rees. After hearing argument from counsel, the Honorable Paul Delucchi ordered, among other things, that Catherine vacate the family home, pay \$115,747.52 to Roger as attorneys' fees and further sanctions, and release the 2008 and 2010 abstracts of judgment. The court also announced that "Mr. Frumkin is hereby sanctioned in the amount of \$258,344." The court confirmed that the sanction was as "requested" and was against Frumkin specifically.

On January 26, 2011, the court filed its Findings and Order After Hearing with respect to the matters addressed at the January 11, 2011 hearing. In this written order, the court: (1) assigned Catherine and Roger each one-half interest in the Mission Boulevard Property and ordered Catherine to vacate the premises; (2) assigned to Catherine the debt owed by the community to the estate; (3) declared the 2008 and 2010 abstracts of judgment null and void and ordered that they be released and removed forthwith; (4) enjoined Catherine (as respondent and as executor of the estate) and all others acting on her behalf from any actions toward the collection on the judgment; (5) ordered Catherine to pay Roger \$115,747.52 as attorney fees and sanctions; and (6) decreed that "*Attorney Allan Frumkin is hereby ordered to pay sanctions in the amount of \$258,344 payable to*

[Roger] forthwith.” (Italics added.) The court did not specify the statutory basis for the sanction against Frumkin.

K. *Motion for New Trial*

Frumkin thereafter filed a notice of intention to move for a new trial, and a motion for a new trial, with respect to the order requiring him to pay \$258,344. Frumkin, however, failed to timely serve Roger with the declarations and memorandum supporting his motion.

Roger opposed Frumkin’s motion on the ground that it failed to comply with the applicable requirements of the Code of Civil Procedure and California Rules of Court. The court denied Frumkin’s motion on this basis, noting that Frumkin’s excuses for his failure to comply with the requirements “simply don't constitute any sort of 'good cause' or legitimate reason for ignoring these provisions.”

This appeal followed.<sup>4</sup>

## II. DISCUSSION

Frumkin challenges the sanctions order against him on two grounds: (1) the court had no authority to impose the sanctions under Family Code section 271; and (2) the requirements for the imposition of sanctions under Code of Civil Procedure section 128.5 were not met.

Although Roger had requested sanctions under Family Code section 271 as well as Code of Civil Procedure section 128.5, he now concedes that an attorney may not be sanctioned under Family Code section 271 and insists that Code of Civil Procedure section 128.5 was the only basis for the sanctions order.<sup>5</sup> (See *Marriage of Daniels*

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<sup>4</sup> Frumkin’s notice of appeal states that he is appealing from an order entered on January 20, 2011. The parties appear to assume, as will we, that he meant the order entered on January 26, 2011. In his appellate briefs, Frumkin does not directly challenge the denial of his new trial motion. Also pending in this court is an appeal from the January 2011 order by Catherine Powell (appeal number A129916); we address that appeal in a separate opinion.

<sup>5</sup> Roger’s respondent’s brief states: “The trial court did not need to specifically state the code section that the sanctions award was pursuant to as it was understood by all

(1993) 19 Cal.App.4th 1102, 1110 [predecessor statute to Family Code section 271 does not permit award against attorney].)

Code of Civil Procedure section 128.5, however, applies to complaints filed, or proceedings initiated, *before January 1, 1995*. (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 819.) The proceedings in this case were commenced after that date. As a matter of law, Code of Civil Procedure section 128.5 does not provide a basis for the imposition of the sanctions against Frumkin.

There are instances in which other rules or statutes, referring to or incorporating the procedure and standard set forth in Code of Civil Procedure 128.5, may provide a basis for the imposition of monetary sanctions. (*Olmstead, supra*, 32 Cal.4th at p. 817.) In addition, as to proceedings filed in 1995 or later, Code of Civil Procedure section 128.7 authorizes the court to impose monetary sanctions for certain court filings. Roger makes no argument that any such rule or statute applies here. On this basis, the order imposing sanctions against Frumkin must be reversed.

Nonetheless, because Roger argues that Frumkin effectively stipulated to the court's power to impose sanctions under Code of Civil Procedure section 128.5, we will briefly address the parties' arguments as to the reasonableness of the order and the requirements of the statute. We do so to complete our analysis and to forestall any argument that, given Frumkin's implied stipulation, the court's sanction order could be upheld if the requisites set forth in the statute were met.

As to the notice issue Frumkin raises, Code of Civil Procedure section 128.5, subdivision (c) states: "Expenses pursuant to this section shall not be imposed except on

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parties that any sanctions order against the attorney would be pursuant to Code of Civil Procedure section 128.5. Roger's motion did not ask for sanctions against Frumkin pursuant to any other statute than Code of Civil Procedure section 128.5. All parties and the trial court were aware that Family Code section 271, Family Code section 1101, subdivision (g), and Family Code section 1101, subdivision (h), do not provide the authority for the trial court to sanction the attorney, only the party spouse who acts in a bad faith manner or breaches fiduciary duties. In the context of the proceedings, the only statute that provided the trial court authority to sanction Frumkin as the attorney was Code of Civil Procedure section 128.5."

*notice contained in a party's moving or responding papers*; or the court's own motion, after notice and opportunity to be heard.” (Italics added.) Frumkin argues that he did not have notice that the court was going to sanction him personally, let alone in such a high amount.

Frumkin’s argument is baseless. As set forth *ante*, Frumkin was provided with express notice that sanctions were being requested against him personally in the declaration attached to the order to show cause issued on October 26, 2010. He had the opportunity to be heard – and was heard – by virtue of the responsive declaration he authored, in which he replied to Roger’s allegations concerning the abstracts of judgment, gave his interpretation of the May 2007 Order and August 2010 Judgment, and requested that the sanctions not be imposed. Furthermore, the court held a hearing on the request for sanctions on January 11, 2011, at which he would have had further opportunity to be heard if he had bothered to appear. If he had appeared, he would have known how much was being awarded against him and been able to address the matter with the court before the written order was issued.

Next, Code of Civil Procedure section 128.5, subdivision (c) states: “An order imposing expenses shall be in writing and shall *recite in detail the conduct or circumstances* justifying the order.” (Italics added.) The trial court's oral sanctions order of January 11, 2011, was reduced to writing in the Findings and Order After Hearing filed on January 26, 2011. While there was thus a written order, it did not “recite in detail the conduct or circumstances justifying the order.” (Code Civ. Proc., § 128.5, subd. (a).) To the contrary, it merely stated: “Attorney Allan Frumkin is hereby ordered to pay sanctions in the amount of \$258,344, payable to Petitioner forthwith.” The statutory requirement was not met, and we are not persuaded by Roger’s argument that the error was waived by Frumkin’s failure to object when his office was requested to approve the written order as “conforming to court order.” The written order did, in fact, conform to the court’s oral order.

Lastly, we turn to Frumkin’s argument that \$258,344 was not a reasonable amount of sanctions. Noting that Roger did not request a particular amount of sanctions against

Frumkin, Frumkin surmises that the amount of the award was premised erroneously on what Roger requested against Catherine under Family Code section 1101, subdivision (g), as one-half the amount of the community debt (i.e. one-half of \$516,688) owed to the estate.

Roger acknowledges that Family Code section 1101 does not authorize a monetary sanction against an attorney, but argues that the trial court nonetheless had discretion to award that amount as a sanction against Frumkin pursuant to Code of Civil Procedure section 128.5. Citing several cases, he warns us that we must be deferential to the trial court's determination of an appropriate amount of sanctions.

Code of Civil Procedure section 128.5, subdivision (a) reads: "Every trial court may order a party, the party's attorney, or both to pay any *reasonable expenses, including attorney's fees, incurred by another party as a result of* bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Italics added.) The question is therefore what expenses (including attorney fees) were incurred by the attorney's bad-faith actions, and whether those expenses were reasonable. This requires *evidence* of the expenses.

Roger presented no evidence of specific expenses incurred as a result of Frumkin's purportedly bad-faith actions or tactics; nor does he present any argument in this court that he incurred \$258,344 in expenses as a result of what Frumkin did. While he argues that a court may grant sanctions based upon a party's entire pattern of conduct over the course of the litigation, that does not absolve him of the obligation to present evidence of the type, amount, and reasonableness of the expenses incurred. Thus, even if Code of Civil Procedure section 128.5 did apply, we would reverse the sanctions order.<sup>6</sup>

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<sup>6</sup> Frumkin also urges that his acts were not frivolous or perpetrated in bad faith. Code of Civil Procedure section 128.5(b)(2) defines "frivolous" as "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party." Because we need not decide the issue to resolve this appeal, we do not address it further.

### III. DISPOSITION

The order of January 26, 2011, to the extent it imposes sanctions against Frumkin in the amount of \$258,344, is reversed. Respondent shall pay appellant'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.