

Cute Appellate Maneuvers Bite Back

By Herb Fox

Here's another one for the "I can't believe someone prosecuted this appeal" file.

Appellant (Father) is an attorney and real estate licensee who owns a mortgage lending business. His ex-wife, the respondent, is also an attorney. In their dissolution proceeding, the parties waived spousal support, but became embroiled in an acrimonious child support and custody battle in L.A. Superior Court.

Father filed three Notices of Appeal from various trial court orders, including a \$40,500 sanction for violating discovery orders and refusing to produce more than four years worth of financial records. He also allegedly transferred large sums of money to his new wife on a monthly basis.

Father filed his first Notice of Appeal while on a lunch break *during the hearing* that resulted in the order he attempted to appeal from! On appeal, Father argued that the Notice of Appeal deprived the trial court of jurisdiction to resume the hearing after lunch and issue its findings.

A cute maneuver, perhaps, but not to the Court of Appeal. In an unpublished opinion written by **Justice Kenneth R. Yegan** (on assignment to Division 2 of the Second District Court of Appeal), Father was hit with over \$23,000 in appellate sanctions for, *inter alia*, the "sophomoric stunt" of filing a Notice of Appeal in the midst of a hearing and later arguing that the trial court had no jurisdiction to conclude the session and issue an order. That first Notice of Appeal was dismissed.

But wait, there's more. Father filed a second Notice of Appeal from a trial court ruling that directed Mother to prepare a formal order. No such order was ever prepared, and the trial court later determined that it had jurisdiction to amend that ruling notwithstanding the Appeal. The Court of Appeal agreed, finding the second Notice of Appeal to be "premature, a nullity, and of no force or effect."

Father struck pay dirt on the third Notice of Appeal, at least to the extent that the Court of Appeal agreed to consider its merits. But no further. Among the arguments rejected by the Court of Appeal were:

- The trial court improperly delegated judicial authority

to a special master (but Father stipulated to that special master; represented that he would fully cooperate; failed to turn over documents; and only objected to the appointment after the special master submitted his report);

- The trial court erred in failing to use Father's tax returns as evidence of his income (but the tax return filed with the court was unsigned, and the special master made a preliminary finding of a "vast disparity" between the income claimed on the tax returns and the deposits flowing through his accounts; and,

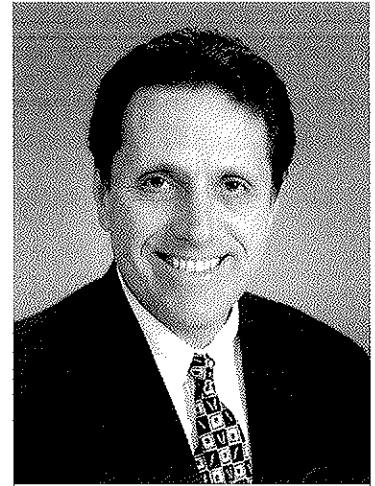
- The trial court should have sanctioned Mother, rather than him, for frustrating discovery and increasing the costs of discovery per *Family Code* §271 (but it is not the role of the Court of Appeal to re-weigh the evidence).

In imposing sanctions for filing and prosecuting a frivolous appeal, Justice Yegan also found that Father misrepresented on appeal what occurred at the trial court, and mischaracterized the evidence. Commenting on the fact that Father prosecuted his own appeal, the Court noted "This is not a good idea... appellant is so personally involved and blinded by such involvement that he has made a series of misjudgments not only in the trial court but in the Court of Appeal."

In addition to imposing sanctions, the Court ordered a copy of the opinion be forwarded to the State Bar.

The case is *In re Marriage of O'Brien*, Court of Appeal No. B177096, decided on December 29, 2005. Appellant **Michael J. O'Brien** was in pro per; Sheral A. Hyde of Hyde Mulvihill, of Monrovia, represented the wife.

Kudos to **Alan Blakeboro** and **Diana Lee of Reicker, Pfau, Pyle & McRoy** for winning a rare writ petition in a discovery matter in *Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826. The published opinion by **Justice Yegan** holds that the standards for discovery of a trade secret applies not only to the Uniform Trade Secrets Act (*Civ. Code* §3426 *et al*) but to any cause of action that relates to trade secrets.



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