

Buried Treasure

Can Ex-Spouse Sue for Concealment of Marital Assets?

By Mitchell A. Jacobs
and David L. Marcus

If a spouse tortiously conceals the value of a community asset during a dissolution proceeding, should that spouse be liable for tort damages for the hidden value of the asset and for possible underpaid support? Alternatively, should the damages be limited to division of the community-property value of the asset?

That is the issue debated by the court in *Marriage of Dale*, 78 Cal.Rptr.2d 513 (1998). The *Dale* court allowed the wife, in the absence of a pending dissolution action, to maintain a civil action for the husband's tortious concealment of the value of his medical practice during their divorce. A petition for review before the California Supreme Court was granted and a decision is expected by the end of this month.

The parties were married in 1970, and a dissolution of marriage proceeding was filed in 1984. The judgment was entered in 1985, reserving jurisdiction over disposition of certain community assets. One of those assets was the husband's medical practice. A stipulated supplemental judgment was entered in 1988, disposing of these community assets and awarding the medical practice to the husband.

In 1993, five years after entry of the supplemental judgment, the wife sought to increase child support. The wife, who obtained from an accountant the records of the husband's medical practice, discovered that the financial records of the medical practice the husband had produced in connection with the divorce were altered.

Instead of bringing a post-judgment proceeding in the dissolution case, the wife brought a civil tort action in 1993, seeking compensatory and punitive damages. The wife contended that starting in 1984, the husband and his bookkeeper, in a variety of ways, altered documents and concealed the true value of the medical practice. The legal claims for relief included breach of fiduciary duty, fraud, constructive fraud, intentional and negligent misrepresentation, conversion, conspiracy, fraudulent conveyance, constructive trust and declaratory relief.

The husband argued that the civil action should be dismissed since the issues should be resolved in the family law court. He reasoned that the trial court did not have jurisdiction to decide the case since the family law court had

exclusive jurisdiction to decide matters in connection with the division of omitted community assets and spousal support. The trial court granted the husband's request for dismissal. The Court of Appeal reversed.

The first issue the court addressed was somewhat a matter of semantics. The trial court dismissed the action for lack of "jurisdiction." The Court of Appeal held that since the amount in controversy exceeded \$25,000, and the complaint sought declaratory relief, the superior court properly had subject-matter jurisdiction. The Court of Appeal thus phrased the issue in terms of

argument that there would be a flood of litigation by stating that his argument was not relevant to a decision of whether or not to allow the action. Also, there was no evidence that the flood of litigation would occur. Instead, the San Diego County Certified Family Law Specialists filed an amicus brief arguing, among other things, that permitting this type of tort litigation would ultimately reduce the amount of fraudulent-concealment situations and lawsuits.

An area that undoubtedly will be explored by future cases is how certain Family Code sections, not implicated in *Dale*, affect the rights of a party in the position of the wife in *Dale* to bring a civil tort action.

First, punitive damages for breach of fiduciary duty are now explicitly allowed by Family Code Section 1101. However, there is an issue as to possible retroactive application of this statute. *Marriage of Renling*, 23 CalApp.4th 1428 (1994), held that this section only applies to a breach of fiduciary duty occurring after Jan. 1, 1992. Another

case, *Marriage of Quay*, 18 CalApp.4th 961 (1993), held that the statutory remedy would apply if the parties were "fiduciaries in fact" at the time of the alleged wrongdoing.

Second, in Footnote 5 of the *Dale* opinion, the court noted that Family Code Section 2120 et seq. contains a "comprehensive scheme" for setting aside judgments on grounds that include fraud and mistake. The court stated that "[b]ecause the judgment at issue here was entered in 1988, we have no occasion to address the effect of Family Code section 2120 et seq. on the viability of a tort action for concealment of community assets."

An argument can be made that these Family Code sections do not prohibit a tort action for concealment of community assets. A tort action can seek punitive damages instead of seeking to set aside the judgment, whereas these Family Code sections can be interpreted as only setting forth the grounds and time limits for a motion to set aside a judgment. Nothing in Family Code Section 2120 et seq. states that it provides the exclusive remedy for a fraudulently concealed community asset.

On the other hand, the statutory scheme, taken as a whole, can support the conclusion that a tort claim for concealment of community assets should not be allowed. This scheme includes the sections in connection with relief from a judgment (Section 2120 et seq.), the breach-of-fiduciary-duty sections, and the court's continuing jurisdiction to award omitted community assets (Family Code Section 2556). Regardless of *Dale's* outcome in the Supreme Court, this is an area that is sure to result in future litigation.

The court in 'Dale' allowed the wife, in the absence of a pending dissolution action, to maintain a civil action for tortious concealment.

whether the trial court had the power, in a broad sense of the term, to decide the case, given that the Family Code gives the family law court in a dissolution action continuing jurisdiction over spousal support and division of omitted community assets.

The wife argued that the "continuing jurisdiction" set forth in the Family Code does not equate to "exclusive" jurisdiction, and the court agreed. The cases the husband cited stood for the proposition that when a dissolution action is pending in a family law court, another department of the Superior Court "may not act so as to interfere with the family court's exercise of its powers in that proceeding."

The court reasoned that although there was no opinion directly supporting the wife's position, her action should be allowed based on the general rule that one spouse may sue the other for intentional or negligent torts. The court found that there was no basis for limiting application of the general rule in this case when there was no dissolution action pending.

The court also found that the doctrine of res judicata did not bar the wife's claim since the husband's fraud prevented the wife from having a fair hearing.

Finally, the court reasoned that public policy supported a tort remedy. The court noted that punitive damages should deter intentional concealment of assets. The court stated that if punitive damages were not available, "[a] spouse would be able to practice concealment with little, if any risk." Moreover, simply awarding the wife additional spousal support and her half of the concealed value of the medical practice would deprive her of the remedy "traditionally available to a person injured by intentional tortious conduct."

The court dismissed the husband's

Mitchell A. Jacobs, a certified family law specialist in Los Angeles, limits his practice to marital dissolution and other family law matters. David L. Marcus, an attorney with the Law Offices of Mitchell A. Jacobs, also practices exclusively in the area of family law.