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## Beware using real property liens as security for fees

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In the recent case *In re Marriage of Turkhanis and Price*, 213 Cal. App. 4th 332 (Cal. App. 2d Dist., Jan. 30, 2013), the Court of Appeal affirmed the trial court's decision to expunge the Family Law Attorney Real Property Liens, or FLARPLs, recorded by wife's counsel and only grant a small percentage of the attorney fees requested in her counsel's *Borson* motion.

Richard and Joan married in 1995 and separated in 2003. The court entered a status only judgment of dissolution in 2005, and the trial on the remaining issues was divided into two parts: (1) the valuation of Richard's closely held corporation; and (2) property division. The couple owned two community residences on Bundy Drive in Los Angeles.

Joan told her attorneys — Spitzer and Kramer, the 10th and 11th attorneys to represent her — that she had no money available to pay attorney fees, but they could seek to record FLARPLs pursuant to Family Code Section 2033 against one of the Bundy properties (valued over \$1,000,000). Kramer was permitted to record a FLARPL for \$140,000, and Spitzer recorded a FLARPL for \$150,000.

After the valuation trial had ended, Spitzer substituted out as Joan's attorney; Kramer also substituted out after filing a *Borson* motion for attorney fees. See *In re Marriage of Borson*, 37 Cal. App. 3d 632 (1974).

The trial resulted in the court awarding both Bundy properties to Richard. Richard filed a motion to extinguish, expunge or deny enforcement of the FLARPLs, claiming that they were unjust in the current circumstances — including Richard's prior payments of fee awards to Joan and the trial court awarding him with both Bundy

properties.

Joan argued that the FLARPLs should not be expunged because (1) Richard had agreed to them; (2) her attorneys had relied on the FLARPLs in agreeing to represent Joan; and (3) there was no legal basis for expunging them.

The trial court granted Richard's motion, finding that both FLARPLs were properly recorded, but that attorneys take FLARPLs subject to the risk that property values or other elements in the case may eliminate their client's interest in the property. In the subsequent written order, the trial court found that Family Code Section 2034(c) gives the court the authority to resolve any dispute arising from the existence of FLARPLs and that, given the financial facts of the case, allowing the FLARPLs to remain would result in an unequal property division. Her attorneys filed notices of appeal.

The trial court considered Kramer's *Borson* motion and awarded him a fraction of the amount requested. The court considered the parties' respective financial positions, the attorney fees that each of them owed, Joan's litigation conduct, the fact that Richard would probably never collect on the equalizing payment, and that he is the sole support for the parties' daughter. The court also found that Richard could assert that Joan's conduct supported a fee offset under Family Code Section 271. Kramer appealed, and the appellate court affirmed the entire judgment.

Guided in large part by the plain language of Family Code Sections 2033-2034 and analogous case law, the appellate court held that the trial court did not err in expunging the FLARPLs. The court first considered whether the FLARPLs were automatically extinguished when the trial court awarded the burdened Bundy property to Richard. *Lezine v. Security Pacific Fin. Servs., Inc.*, 14 Cal. 4th 56, 58 (1996),

held that where a trial court awards community real property that is subject to a lien to one of the spouses in a dissolution, that spouse takes the property subject to the lien. Hence, the court concluded that the trial court's award of the Bundy properties to Richard did not automatically extinguish the FLARPLs, and Richard took it subject to that lien.

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The court then addressed the issue whether the trial court has the authority to expunge FLARPLs after they have already been recorded. Resting on the plain language of the statute, the court held that Family Code Section 2034(c) gives the trial court broad jurisdiction to resolve FLARPL disputes, and is not a part of the statutory provisions governing *ex parte* objections to FLARPLs before they are recorded.

The court held that the trial court did not err in limiting Kramer's fee award on his *Borson* motion. Responding to the contention that the lower court erred by offsetting-Family Code Section 271 sanctions against his fee award, the panel advised Kramer that the trial court discussed Section 271 and determined that while Joan's conduct warranted such sanctions, it was clear from the court's discussion that it based the award on the totality of the circumstances and did not reduce the award as a sanction. Moreover, the

court found that the lower court had not relied on Section 271, but rather on Family Code Section 2030 (need and ability to pay).

There are several lessons to be learned from *Marriage of Turkhanis and Price*:

First, when you take a FLARPL against the community interest, you take it subject to the risk that the market or the facts of the case may "eat up [your] client's interest in the property." Hence, a FLARPL does not necessarily provide security for getting paid. The lack of security may be amplified if you are the 11th attorney on a case.

Second, the trial court has the ability to reduce the amount of the requested fees without invoking Family Code Section 271. A client's conduct can be considered by the court as part of the totality of circumstances of the case and not as a sanction when making an attorney fees determination.

Third, substituting out on a case before its conclusion takes away your ability to negotiate a fee award as part of a final settlement agreement.

Fourth, when you are deciding whether to substitute in as counsel, you should first understand the parties' assets and debts so that you are not surprised when there is insufficient money to pay your attorney fees.

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