88 Cal.App.4th 398
Court of Appeal, Fourth District, Division 3, California.

In re MARRIAGE OF Ahmad and Sherifa SHABAN.
Ahmad Shaban, Appellant,
v.
Sherifa Shaban, Respondent.

Nos. G024572, G025498.
|
April 11, 2001.
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As Modified on Denial of Rehearing May 9, 2001.
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Review Denied July 11, 2001.

In a marital dissolution proceeding, husband sought to introduce document that he claimed was a prenuptial agreement. After refusing to allow husband's expert to testify that certain language in document indicated parties' intention to have marriage governed by "Islamic law," the Superior Court, Orange County, No. 97D007410, Jonathan H. Cannon, J., held that there was no prenuptial agreement and applied state community property law to parties' earnings and acquisitions. Former husband appealed, and former wife was awarded attorney fees in connection with appeal. The Court of Appeal, Sills, P.J., held that: (1) phrases "in Accordance with his Almighty God's Holy Book and the Rules of his Prophet" and "two parties [having] taken cognizance of the legal implications" bore too attenuated a relationship to any actual terms or conditions of a prenuptial agreement to satisfy the statute of frauds, and (2) former wife was entitled to award of attorney fees in connection with appeal.

Judgment affirmed; orders affirmed.

West Headnotes (9)

[1] **Evidence**
Technical, trade, or local terms

Parol evidence may be received to interpret a term of art used within a contract.

1 Cases that cite this headnote

[2] **Frauds, Statute Of**
Admissibility of evidence to aid memorandum

Independent of the parol evidence rule, the statute of frauds requires that the contract itself not be the product of parol evidence.

Cases that cite this headnote

[3] **Husband and Wife**
Validity of settlement in general

worth some $3 million, Sherifa had so many assets that she didn't *need* any money for attorney fees. The argument fails for three reasons:

First, the nature of Ahmad's position in this appeal was that the property division in the judgment was incorrect. Had Ahmad prevailed on that point-indeed, if he yet prevails assuming that the Supreme Court were to reverse today's judgment-the assets that he now claims are his wife's to use to pay attorney fees could end up being his.

Second, just because Ahmad had a legal right to bond around a judgment doesn't mean that the court could not compensate Sherifa for her effective lack of liquidity to finance the defense of the judgment on appeal. (See *Hunter v. Hunter* (1962) 202 Cal.App.2d 84, 92–93, 20 Cal.Rptr. 730 [upholding attorney fees for appeal in case where wife was without funds to pay appellate counsel].) Unless there was an award of fees prospectively, Sherifa would have been without means to present her case in this court.

Third, the record contains some evidence of Ahmad's recalcitrance in transferring various assets to Sherifa. The trial court thus had evidence, in addition to the bond staying execution of the judgment, that Ahmad was determined to wage the litigation in such a way as to deprive Sherifa of liquid assets pending the appeal.

[7] The *amount* of the fee award for defending this appeal is, in our judgment, reasonable as well, but this issue requires a little more explication. Ahmad doesn't really argue that the amount is excessive in terms of the combination of traditional factors such as time spent, difficulty of subject matter, or experience and expertise of counsel. (See generally *In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296, 149 Cal.Rptr. 918.) Instead, he makes this, rather remarkable argument: It was excessive because "most of the work that would have to be done by appellate counsel on appeal had already been done in connection with the trial."

It is a contention the members of this panel, or any appellate or reviewing court, are particularly situated to reject out of hand. So let us do so.

Appellate work is most assuredly not the recycling of trial level points and authorities. Of course, the orientation of trial work and appellate work is ***409** obviously different (see generally Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2000) ¶ 1:12, pp. 1–2 to 1–3 [noting difference between determination of case on merits and examination for error]), but that is only the beginning of the differences that come immediately to mind.

For better or worse, appellate briefs receive greater judicial scrutiny than trial level points and authorities, because three judges (or maybe seven) will read them, not just one judge. The judges will also work under comparatively less time pressure, and will therefore be able to study the attorney's "work product" more closely. They will also have more staff (there are fewer research attorneys per judge at the trial level) to help them identify errors in counsel's reasoning, misstatements of law and miscitations of authority, and to do original research to

uncover ideas and authorities that counsel may have missed, or decided not to bring to the court's attention.

Additionally, because there is no "horizontal stare decisis" within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937) is not absolutely binding on a different panel of ****871** the appellate court. So, in appropriate and rare cases, appellate court precedent is open for reexamination and critical analysis. Along the same lines, appellate counsel must necessarily be more acutely aware of how a given case fits within the overall framework of a given area of law, so as to be able to anticipate whether any resulting opinion will be published, and what effect counsel's position will have on the common law as it is continuously developed.

Then there is the simple matter of page limitations. Appellate courts are more liberal than trial courts as to the number of pages counsel are allowed. (Cf. Cal. Rules of Court, rule 313(d) [limit of 15 or 20 pages for trial level points and authorities without necessity of obtaining permission to exceed limit] with rule 15(e) [limit of 50 pages for appellate briefs without necessity of obtaining permission to exceed limit].) Granted, the extra length of the "briefs" in appellate and reviewing courts is not always a good thing (cf. 9 Witkin, Cal. Procedure (4th ed.1997), Appeal, § 600, p. 634, quoting *King v. Gildersleeve* (1889) 79 Cal. 504, 507, 21 P. 961 [" 'the learned counsel may not have had *time* to prepare a *short* brief' "]), but the difference does mean that appellate counsel will have much more freedom to explore the contours and implications of the respective legal positions of the parties. Part of that exploration may mean additional research that trial counsel simply will not have had the time to do.

Finally, because the orientation in appellate courts is on whether the trial court committed a prejudicial error of law, the appellate practitioner is on ***410** occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal authorities. The instant case is a perfect example, involving as it does the complex interrelationship between the parol evidence rule and the statute of frauds, and the limits placed by the statute of frauds on the concept of incorporation by reference.

The upshot of these considerations is that appellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product.[7] Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value. Ahmad's appellate counsel's notion that opposing appellate counsel's task was merely to "simply change the trial points and authorities into an appellate format" is not well taken.

7 "Substandard," however, does not necessarily mean "below the applicable standard of care." No doubt

