California Family Law Monthly

In re Marriage of Sorge

In re Marriage of Sorge provides us with both an affirmance and a reversal of a trial court ruling involving two oft-recurring and important issues, imputation of earning capacity as a basis for calculation of child support rather than actual earnings, and cessation of spousal fiduciary duty following entry of a final child support award. Let's take the reversal first.

There is a difference in the duration of the Section 721 spousal fiduciary duty between *Family Code* Sections 2102(b) and 2102 (c). Subdivision (b) deals with division of assets and liabilities, and provides that the fiduciary duty extends "until the asset or liability *has actually been distributed.*" [Emphasis added]. Subdivision (c) concerns child and spousal support; here, the fiduciary duty ends upon entry of a "valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees." Does this mean that there exists two disparate levels and tracks of fiduciary duty? What if a Judgment deals, as is commonplace, with both division of assets and liabilities and child support, spousal support and professional fees? How can the *Feldman* obligation of full disclosure both end and survive with respect to the same Judgment? Footnote 10 of the *Sorge* opinion limits the ruling to a final child support order, but doesn't address Section 2102(b) or how the duration of fiduciary duty thereunder may differ and conflict with its narrowed holding regarding child support. *Sorge* holds that Joseph had no continuing fiduciary duty to disclose to his ex-wife material information about changes in his income after a final child support order had been entered. The appellate court reversed the order imposing $75,000 in sanctions against Joseph pursuant to *Family Code* Sections 271 and 2107 for violation of that supposed fiduciary duty.

The other major part of the lengthy opinion holds that it was proper to impute income based on earning capacity rather than actual income to the husband-father, who suffered short-term losses in his start-up businesses. If the start-up business losses were included, Joseph's expert testified, Joseph had losses of $235,000 per month in 2008, but if the losses were excluded, he had a net monthly income of $229,000. Quite a swing! The trial court excluded the losses, held Joseph to an earning capacity standard...and was affirmed. Joseph decided to invest his money in companies that would operate at a loss in the short term rather than investing in income producing assets. The trial court was justified in calculating child support based on his earning capacity, not his actual income.

The *Sorge* opinion is lengthy and deals with important and frequently encountered issues, and its discussion embraces a worthwhile review of case and statutory law serving as the foundation for the court's conclusions.

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