



## In re Marriage of Falcone

2007 | Cited 0 times | California Court of Appeal | August 16, 2007

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In a dissolution of marriage proceeding, Kathey Fyke appeals from a judgment dissolving her marriage to Richard S. Falcone.<sup>1</sup> The judgment is a "status only" judgment. Kathey fails to show prejudice. We therefore affirm the judgment.

#### Background

The parties married in 1985. Richard filed the dissolution petition in 2003. He moved for bifurcation of status in 2004.

At a hearing in January 2005, Kathey appeared without an attorney. She made arguments opposing Richard's requests on custody, support, and bifurcation. She also asked for attorney fees from Richard so as to retain counsel. And she claimed that she had been improperly served with summons. She appeared at a continued hearing in February and moved for attorney fees and a continuance to retain counsel. In April, after retaining counsel, she moved to quash service of summons.<sup>2</sup> The trial court denied the motion in December after agreeing that Kathey had been improperly served but finding that Kathey had made a general appearance at the January hearing. Later in December, it heard the status issue. Kathey appeared with counsel and claimed that she was making a special appearance because she had requested a statement of decision on the motion to quash but the trial court's order did not constitute a statement of decision and, thus, the time for seeking writ review of the motion-to-quash order had not yet expired (or begun). The trial court overruled Kathey's objections. Richard testified, and Kathey cross-examined him. Richard's testimony, arguments about Richard's testimony, and the court file reveal that (1) Richard had served Kathey with a preliminary declaration of disclosure under Family Code sections 2104 and 2337<sup>3</sup> that Kathey considered to be incomplete and out-of-date, and (2) Richard had filed two pleadings that joined two pension plans (Gray Cary and Littler Mendelson) in the action but had not filed a joinder pleading for his current pension plan (DLA Piper) in which he enrolled after separation. The trial court rendered judgment "as to status only," reserved "all other issues," and granted all applicable provisions of Family Code section 2337. Kathey filed a notice of appeal and amended notice of appeal in February 2006.<sup>4</sup>

discussion



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"In a proceeding for dissolution of marriage, the court, upon noticed motion, may sever and grant an early and separate trial on the issue of the dissolution of the status of the marriage apart from other issues." (§ 2337, subd. (a).) "A preliminary declaration of disclosure with a completed schedule of assets and debts shall be served on the nonmoving party with the noticed motion . . . ." (Id., subd. (b).) A preliminary declaration "shall set forth with sufficient particularity" assets, liabilities, community or separate characterizations of the assets and liabilities, and a complete, current income and expense declaration. (§ 2104, subd. (c).)

The court "may" impose conditions upon a party seeking a "status only" judgment that are designed to protect the nonmoving party from potential adverse consequence from the loss of marital status which might occur during the period between termination of marital status and the time final judgment is entered. (§ 2337, subd. (c).) One of the conditions states that, before entry of judgment terminating status, the party's retirement or pension plan "shall" be joined as a party. (Id., subd. (c)(6)(A).)

"Public policy favors bifurcation for an early 'status only' judgment, because it furthers the legislative intent that marriage dissolution not be postponed simply because issues relating to property, support, custody or attorney fees are not ready for decision." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2006) § 11:479.) Consistent with this policy, "only slight evidence is necessary to obtain bifurcation and resolution of marital status. On the other hand, a spouse opposing bifurcation must present compelling reasons for denial." (Gionis v. Superior Court (1988) 202 Cal.App.3d 786, 790.)

In Gionis, the court issued a writ of mandate directing the trial court to vacate an order denying a motion to bifurcate and enter a new order granting the motion and dissolving the marriage. In the trial court, the moving spouse had submitted evidence that reconciliation was impossible and other issues would require a lengthy trial and the opposing spouse had submitted evidence of procedural defects without evidence that bifurcation would cause any prejudice.

Kathey contends that the judgment should be reversed because (1) Richard did not properly serve her with summons, (2) she did not generally appear at the "status only" hearing given Code of Civil Procedure section 418.10, subdivision (e)(1) (generally providing that a party "is not deemed to have generally appeared" until 10 days after denial of a mandate petition challenging denial of a motion to quash), (3) the case was not at issue until she filed her response long after the "status only" hearing (ante, fn. 3), and (4) Richard failed to serve a complete, current preliminary declaration of disclosure and join the DLA Piper pension plan.

These points fail to demonstrate prejudice resulting from a "status only" judgment. The most that Kathey urges (based on an augmented record of postjudgment proceedings) is a claim that Richard had rolled over his Gray Cary pension plan into the DLA Piper pension plan. But, if Richard did so, it is a simple matter to join DLA Piper. Kathey's point poses a procedural issue--whether DLA Piper



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should be joined with or instead of Gray Cary--rather than a compelling substantive issue-- whether Richard is secreting community property. As for Kathey's argument that Richard's preliminary declaration of disclosure was insufficient, her remedy was to file a motion for further response pursuant to section 2107, subdivision (b)(1).<sup>5</sup> In any event, Kathey fails to identify how the judgment following the supposed absence of Richard's complete, current disclosure statement prejudiced her given that all issues that such a statement could raise are before the trial court and yet to be litigated. (In re Marriage of Steiner & Hosseini (2004) 117 Cal.App.4th 519, 525-528.) As for Kathey's claims of due process transgressions stemming from the improper service of process and the subsequent "status only" hearing held before resolution of the motion to quash, we observe that the bottom line is that Kathey made a general appearance in January 2005 notwithstanding Code of Civil Procedure section 418.10. Had Kathey later prevailed on her writ petition, the trial court would have been compelled to vacate the "status only" judgment. (Santa Monica Rent Control Bd. v. Pearl Street, LLC (2003) 109 Cal.App.4th 1308, 1320; Allen v. Smith (2002) 94 Cal.App.4th 1270, 1284.) But, as it stands, Kathey is now before the court with all issues except status ready for discovery and litigation. There is no conceivable prejudice to Kathey resulting from the "status only" judgment.

### Disposition

The judgment of dissolution (status only) is affirmed.

WE CONCUR: Rushing, P.J., Elia, J.

1. "As is customary in family law cases, we will refer to the parties by their given names for purposes of clarity and not out of disrespect." (In re Marriage of Nelson (2006) 139 Cal.App.4th 1546, 1549, fn. 1.)
2. Kathey also moved to disqualify Richard's counsel, the trial court denied the motion, Kathey appealed from the order, and we affirmed the order (In re Marriage of Falcone and Fyke (Mar. 22, 2007, H029424) [nonpub. opn.]).
3. Further unspecified statutory references are to the Family Code.
4. It is manifest that trial-court error cannot be predicated by reason of any matter occurring subsequent to the appealable judgment or order and an appellate court will not entertain any evidence of such subsequent matters. (In re Francisco W. (2006) 139 Cal.App.4th 695, 706.) For context and because we have the record, however, we note that the trial court filed a statement of decision regarding Kathey's motion to quash in February 2006, the parties then argued about Kathey's objections to the statement, the trial court ultimately overruled Kathey's objections, the trial court filed its order in August 2006, Kathey sought writ relief from us, and we summarily denied Kathey's writ petition in October 2006. Kathey asserts in her opening brief that only then did she file a response to Richard's dissolution petition.
5. It is true that section 2107, subdivision (d), states the following: "If a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error." But this provision does not logically apply



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to a "status only" judgment absent an adjudication under section 2107, subdivision (b)(1), that a party "failed to comply with all disclosure requirements." (Id., subd. (d).) This follows because section 2337, subdivision (b), only requires that a preliminary declaration be "served" before a "status only" hearing- - it neither requires that the preliminary declaration be "filed" nor provides for litigating the sufficiency of what was served within the "status only" hearing.

