Filed 3/30/11 Marriage of Wang and Cunningham CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of MARY WANG and ARCHIBALD CUNNINGHAM.	
MARY WANG, Plaintiff, v. ARCHIBALD CUNNINGHAM, Defendant and Appellant; WILLIAM PERRY, Movant and Respondent.	A124717 (San Francisco County Super. Ct. No. 753770)

INTRODUCTION

Defendant Archibald Cunningham appeals from orders of the San Francisco Superior Court declaring him to be a vexatious litigant and prohibiting him from filing new litigation in the courts of the state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed (Code Civ. Proc., § 391 et seq.)[1]; striking certain portions of Cunningham's civil complaint against movant and respondent William Perry, Ph.D., the court-appointed evaluator in an ongoing custody dispute between Cunningham and his former wife Mary Wang;

[1] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

requiring Cunningham to post a $25,000 bond to pursue that civil action; and awarding Perry attorney fees and costs.

Cunningham contends Perry lacked standing in the family law proceeding to bring a motion to have him declared vexatious. He further contends that the trial court lacked subject matter jurisdiction in the family law proceeding to declare him vexatious, to impose a prefiling order, and to strike portions of his civil complaint against Perry. He contends that the litigations relied upon by the court to declare him vexatious included matters not properly considered under section 391. Cunningham also asserts that he was not provided adequate notice or opportunity to be heard with respect to these proceedings and orders, and argues that the court violated his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel in its conduct of these proceedings while a contempt motion was pending against him. We shall reverse only the award of attorney fees as sanctions.

Perry seeks sanctions on appeal against Cunningham based on Cunningham's alleged offensive and sexist misconduct toward Perry's attorneys. We shall deny the request for sanctions at this time.

FACTS AND PROCEDURAL BACKGROUND

Custody Evaluations

Cunningham and Wang were married in 1999. Their marriage was dissolved on February 28, 2006. They had one child. Since their separation in 2003, the parties have engaged in protracted custody proceedings.[2] In the Fall of 2005, Perry was appointed to perform a child custody evaluation as the court's Evidence Code section 730 expert

[2] We described some of these proceedings in our unpublished opinion, *Wang v. Cunningham* (A118629, filed Aug. 20, 2008) (*Wang v. Cunningham I*). There, among other things, we affirmed the trial court's order of sole legal and physical custody of the child to Wang and its award of Family Code section 271 sanctions against Cunningham. In that appeal, we rejected Cunningham's challenge to the court's denial of an evidentiary hearing to explore Perry's alleged bias and lack of objectivity. (*Wang v. Cunningham I,* at p. 14) and his challenges to the trial court's admission of Perry's custody report and addendum and its refusal to allow him to depose Perry (*id.* at pp. 16-17, 21-24.)

pursuant to Family Code section 3111 et seq.[3] (*Wang v. Cunningham I, supra,* at pp. 3-4.) Perry is a licensed clinical psychologist who has served as a court-appointed expert on numerous occasions during his 20-year practice.

On June 18, 2006, Perry submitted his child custody evaluation report pursuant to the court's order. (*Wang v. Cunningham I, supra,* p. 5.) On January 2, 2007, the court authorized Perry to speak with the child's therapist and to prepare a supplemental report. (*Id.* at p. 6.) Perry did so and, on January 13, 2007, submitted an addendum to his original evaluation report, advising the court of changes he would make to his original recommendation. In May 2007, the court issued a final order for custody and visitation based on Perry's recommendations. (*Id.* at p. 8.)

On or about May 20, 2007, Cunningham filed a complaint against Perry with the state Board of Psychology. Perry asserts, and Cunningham does not deny, that this complaint was dismissed on December 7, 2007. On May 28, 2007, Perry filed a second addendum to his evaluation to inform the court of events occurring since submission of the January 13, 2007 addendum, that Perry maintained had a bearing on the best interests of the child and Perry's opinion regarding custody. Perry stated in the May 28th addendum that he had been contacted by Cunningham numerous times before the court's final order for custody and visitation, that Cunningham had left threatening, berating and demeaning messages, as well as asking Perry to change his conclusions in Cunningham's favor and threatening to file a complaint against Perry if he did not comply.

Wang's Contempt Motion Against Cunningham

On April 16, 2008, Wang filed an application for an "Order to Show Cause and Affidavit for Contempt," charging Cunningham with 36 counts of violations of various court orders. On August 12, 2008, Wang amended her application to withdraw one

[3] Evidence Code section 730 provides, in relevant part: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

count, leaving 35 counts of alleged violations of court orders. At Cunningham's request, the court appointed counsel to represent him "to defend against the Order to Show Cause Regarding Contempt" filed by Wang. On August 7, 2008, the court stayed all other custody matters until the contempt hearing was completed.[4] Although Cunningham contends *all matters* were stayed pending completion of the contempt hearing, the record indicates that the parties understood only the custody portion of the family law dispute was stayed pending outcome of the contempt case. Cunningham himself acknowledged in a declaration he filed that "all the parties, including the presiding Judge (Judge Sullivan) understood that the custody portion of this family law dispute would be 'stayed' pending the outcome of the contempt case." The court heard and decided various ex parte applications while the contempt matter was pending, including those filed by Cunningham. These did not specifically involve issues of custody, but matters such as ex parte applications filed on January 16 and 30, 2009, requesting that Wang produce an income and expense report in connection with Cunningham's request for a need-based attorney in the custody dispute.

The contempt proceeding was repeatedly delayed. M. Tilden Moschetti was originally appointed to represent Cunningham in the contempt trial. The court granted his subsequent request to be relieved as counsel on September 8, 2008. On November 13, 2008, Peter Furst was appointed Cunningham's counsel for the limited purpose of defending him against Wang's contempt order to show cause. On January 26, 2009, the court (Hon. Donna Hitchens) held a hearing to set a date for the contempt hearing. Attorney Margaret Pendergast specially appeared for attorney Furst, representing Cunningham in the contempt matter. Cunningham was also present. The court set the contempt hearing for April 10, 2009, and specially set a status conference for February 9, 2009, to identify outstanding issues on other matters pending between the parties and to set dates for determination of those issues. On March 2, 2009, Furst moved

[4] The court's "mini-minutes for August 7, 2008 state: "Exparte denied and continued to hearing, October 8, 2008 @ 1:30 pm in Dept. 414 for hearing on Contempt. [A]ll other matters are stayed until contempt hearing is completed. Matter not reported."

to be relieved as contempt counsel because Cunningham threatened to report him to the State Bar as a result of Cunningham's "strong lack of confidence in [Furst's] ability to represent him . . . ." The court granted this motion on April 2, 2009, and directed the State Bar to appoint counsel to represent Cunningham at the contempt hearing. On May 5, 2009, the court declined to appoint the attorney recommended by the San Francisco Bar Association as Cunningham's counsel, because he did not have experience representing clients in writ matters. The court directed the bar association to appoint counsel possessing the requisite skills to represent Cunningham in the contempt hearing and any related writ proceeding regarding Cunningham's insistence that he had not waived time and that the contempt matter must be dismissed.

On December 10, 2009, Wang filed a request for dismissal of her contempt action in its entirety. That request was granted on December 11, 2009, and the contempt matter was dismissed.

Cunningham Sues Perry

In the meantime, on December 5, 2008, Cunningham filed a civil complaint against Perry in the San Francisco Superior Court, captioned *Cunningham v. Perry et al.* (Super. Ct. S.F. City and County, 2008, No.CGC-08-482617), alleging causes of action for intentional and negligent infliction of emotional distress, defamation, breach of contract, and negligence, and seeking damages and declaratory relief. The conduct complained of arose directly from Perry's two addenda to his evaluation and particularly the May 28, 2008 addendum, portions of which were included and attached to the complaint as Exhibit A.

Perry notified Cunningham via telephone that he would be filing an ex parte application for an order to show cause (OSC) why the court should not strike the confidential portions of the complaint because it attached and referred to portions of the confidential custody evaluations submitted to the court by Perry as its Evidence Code section 730 expert, adjudge Cunningham a vexatious litigant, and award attorney fees. On January 30, 2009, before Perry filed his application, Cunningham filed a "Response to Application and Declaration for Ex Parte Hearing" and requested sanctions on the

grounds that Perry had no standing in the family law matter and that the family court did not have subject matter jurisdiction to hear any applications from Perry. Perry filed his ex parte application for an OSC on February 2, 2009. Perry requested that time for service and hearing be shortened because the pending lawsuit against him would interfere with his work as a clinical psychologist, because Cunningham had disrupted therapy sessions Perry had with other clients, and because Perry feared for his safety due to threats made against him by Cunningham. On February 2, 2009, Cunningham filed a response to the OSC application arguing, among other things, that the family law court had no jurisdiction over the civil action filed in a different department of the superior court.

A hearing on Perry's request for an order shortening time for hearing of the OSC was held on February 3, 2009, and Cunningham personally appeared at that hearing. The court granted Perry's request for an order shortening time and set the OSC hearing for February 9, 2009, the same day previously set for the status conference. The court ordered that Cunningham be served with all of the motion papers by February 4th, the next day. Cunningham did not appear at the February 9, 2009 hearing. Perry was unable to serve Cunningham within that one-day period and the court rescheduled the hearing to February 23, 2009, directing that service of the reissued OSC be completed by February 18, 2009. The court also set briefing and trial dates on matters including child support and Wang's request for a restraining order and her request to adjudge Cunningham a vexatious litigant. (Wang's vexatious litigant request was separate and independent of Perry's motion and the court's subsequent grant of her request is not at issue on this appeal.) On February 9, 2009, Perry's counsel served Cunningham by first class mail with the OSC and the application for reissuance of the OSC. Counsel filed his proof of service with the court on February 17. On February 18, Perry filed a reply brief that included notice that the hearing on the motion was scheduled for February 23rd and a proof of service dated February 13, 2009, stating the brief had been served on Cunningham by first class mail.

Cunningham did not appear at the February 23, 2009 hearing. The court found Cunningham had been properly noticed. The court granted Perry's motion to strike portions of Cunningham's complaint against Perry under Family Code section 290. It granted Perry's request for sanctions in the form of attorney fees pursuant to section 128, subdivision (a), and San Francisco Superior Court Local Rule 11.16.[5] The court declared Cunningham to be a vexatious litigant under section 391.7 and ordered him to post a bond pursuant to section 391.3 to maintain his civil action against Perry. The court directed Perry's counsel to provide a list of attorney fees incurred in connection with the OSC for its determination of the amount of attorney fees as sanctions, which counsel did.

On March 5, 2009, the court filed its order awarding attorney fees of $21,590 and costs of $1,132.30 as sanctions. The court also found the causes of action against Perry barred by the litigation privilege, and therefore required Cunningham to post a $25,000 bond to continue to prosecute his action against Perry (§ 391.3).

Cunningham filed an ex parte motion to strike and to reconsider the March 5th order, on the bases that he did not receive notice and that the court did not have personal or subject matter jurisdiction to hear Perry's application for an OSC in the family court. He also sought sanctions against Perry's counsel. Cunningham next filed a request for an OSC seeking injunctive relief against Perry's counsel, "full-evidentiary hearings," a "court-appointed minor's counsel," a "new custody evaluation," "need-based fees," and an order vacating the March 5th order. On April 13, 2009, following a hearing at which Cunningham appeared, the court rejected Cunningham's claims that he did not have adequate notice of the OSC hearing and that the court did not have jurisdiction over the matter. The court denied Cunningham's motion for reconsideration and filed its findings and order reiterating the bases for its March 5, 2009 ruling.

On April 21, 2009, Cunningham filed this appeal from the orders of March 5 and April 13, 2009.

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[5] References to "Local Rule(s)" are to the San Francisco Superior Court Local Rules. References to "Rule(s)" are to the California Rules of Court, unless otherwise indicated.

On April 27, 2009, the superior court filed an "order clarifying order declaring respondent a vexatious litigant," in which it stated that Perry's motion had been granted based on the civil complaint filed against Perry, but that Wang's motion to have Cunningham declared a vexatious litigant in the family law case was still pending. "Until that motion is decided, the prefiling order [of] April 13, 2009 is meant only to prevent him from filing any new litigation. At this time he is permitted to file motions in the family law case."

By order filed May 22, 2009, this court issued an order directing the clerks of this court and the superior court to proceed with the processing of the appeal. The order states: "Because the challenged ruling arises out of the same underlying superior court action in which Mr. Cunningham was declared to be a vexatious litigant, he need not obtain permission to proceed with the appeal. [Citations]."

DISCUSSION

I. Perry's "Standing"

Cunningham combines his attack on Perry's "standing" to seek the OSC in the family law proceeding with his attack on the family court's jurisdiction to entertain such an application. Cunningham contends that as a nonparty to the family court proceedings, Perry was required to seek "joinder" according to Rule 5.150 et seq., and that the court lacked jurisdiction to "remove" the matter to the family law court. Cunningham's premise is flawed. Perry never sought to be made a "party" to the family court action. Neither did he file a "counter-claim," nor a "vexatious litigant action," as characterized by Cunningham. Nor did the trial court "remove the matter from Department 212" to the family law court. Rather, as the court-appointed custody evaluator, Perry sought the family law court's protection from Cunningham's misuse of the confidential custody evaluation in direct violation of the court order and court rules and from Cunningham's harassment and interference with Perry's practice.

On September 20, 2007, the court had issued an order granting Cunningham's ex parte request to release to him "all and every evaluation or addendum related to this case,

and prepared by . . . Dr. Perry." At that time, the court expressly ordered that "[u]se of these reports is governed by Local Rule 11.16F (10)." That local rule provides:

"10. ***Limitations on Sanctions for Dissemination of Custody Evaluations and Sanctions.*** A custody evaluation is confidential. No person who has access to, or receives a copy of, the evaluation or any part of it, may distribute it without prior Court order. Nothing in the evaluation can be disclosed to any other person without prior Court approval. Use of the evaluation is limited to the pending litigation. The evaluation must not be filed with the Court as an independent document or as an attachment to any other document filed with the Court.

"In no event may any of the information contained in the custody evaluation, or access to the evaluation, be given to any child who is the subject of the evaluation.

"Substantial sanctions may be imposed by the Court for inappropriate use of the evaluation report or any information contained in it."[6]

Cunningham violated the court order and Local Rule 11.16F(10) when he improperly disclosed portions of Perry's evaluations (including the addenda) as the basis for his lawsuit against Perry. The May 28, 2007 second addendum filed by Perry was covered by the court's September 2007 order. As recognized in the leading California treatise on family law, a confidential report must include, but is not limited to "[a]ny other information the evaluator or investigator believes would be helpful to the court in determining what is in the child's best interests." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2010) ¶ 7:257.17, p. 7-91, citing Fam. Code,

[6] We note that the Local Rule is consistent with Family Code section 3111, subdivision (d), effective January 1, 2010, which states as follows:

"If the court determines that an unwarranted disclosure of a written confidential report has been made, the court may impose a monetary sanction against the disclosing party. The sanction shall be in an amount sufficient to deter repetition of the conduct, and may include reasonable attorney's fees, costs incurred, or both, unless the court finds that the disclosing party acted with substantial justification or that other circumstances make the imposition of the sanction unjust. The court shall not impose a sanction pursuant to this subdivision that imposes an unreasonable financial burden on the party against whom the sanction is imposed. **This subdivision shall become operative on January 1, 2010.**" (Bolding added.)

§ 3118, subd. (b)(6)(H).) Consequently, as it was prepared as part of Perry's ongoing service as the court-appointed Evidence Code section 730 evaluator, and was required to be released to Cunningham under the September 2007 order, the second addendum, as well as the original evaluation and addendum, was covered by the confidentiality provision of the order, and by the local rule.

A court-appointed expert such as Perry necessarily has "standing" to seek the protection of the family court in a pending proceeding where a party or counsel engages in harassing and abusive conduct directed at the expert and raising a substantial danger of either obstructing the proceedings or interfering with the expert's work. We note that Perry was the *third* evaluator appointed by the court, the two previous evaluators appeared to have been dismissed due to various actions and allegations by Cunningham. (*Wang v. Cunningham I, supra,* at p. 21.) In its March 5, 2009 order, the court found the time expended by Perry's counsel to be "reasonable in light of the issues raised and the need for Dr. Perry to proceed in both the civil case and this action to preserve the confidentiality of the Family Court matter at issue and to halt any interference with Dr. Perry's work as an Evidence Code Section 730 expert."[7]

Cunningham relies upon cases involving "standing" with respect to parties to litigation and upon the statutory requisite that, "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (§ 367.)

" 'Standing is typically treated as a threshold issue, in that without it no justiciable controversy exists.' [Citation.] *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297 summarized the general requirement of standing: " 'As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator.

[7] The action taken by Perry is analogous to that taken by a witness or expert seeking protection of the court from a party's unreasonable or oppressive subpoena demands by moving for a protective order or to quash pursuant to section 1987.1.

[Citations.] To have standing, a party must be beneficially interested in the controversy; that is, he or she must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." [Citation.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical. A complaining party's demonstration that the subject of a particular challenge has the effect of infringing some constitutional or statutory right may qualify as a legitimate claim of beneficial interest sufficient to confer standing on that party. [Citation.]' ([*Holmes v. California Nat. Guard, supra*, 90 Cal.App.4th] at pp. 314-315.)" (*CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273, 286 (*CashCall, Inc.*).)

" 'Without standing, there is no actual or justiciable controversy, and courts will not entertain such cases. [Citation.]' (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 751.)" (*CashCall, Inc., supra,* 159 Cal.App.4th at p. 286.)

As we have said, Perry did not seek to become a party to this litigation. The cases cited by Cunningham are inapplicable. Both involved the attempt by plaintiffs who lacked standing to prosecute actions, because they were not "beneficially interested" in the outcome. *CashCall, Inc., supra,* 159 Cal.App.4th 273, involved class action plaintiffs who alleged a lender had illegally monitored conversations between its employees and borrowers. However, the named plaintiffs were not among the customers whose calls had been monitored. (*Id.* at p. 279.) In *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, the court held that a board member of an administrative agency had no standing to challenge the legality of action taken by the board where she did not qualify as a "party beneficially interested" to bring a writ of mandate under section 1086, where the board member was neither seeking a psychology license nor in danger of losing any license she possessed under the rule adopted by the board. (*Id.* at pp. 796-797.)

Although not a party to the family law proceeding, as a court-appointed expert who was on the receiving end of inappropriate conduct by a party to the proceeding, Perry had a clear interest in obtaining the court's protection from harassment and from disclosure of his confidential evaluations.

Were we to agree with Cunningham that Perry had no "standing" to seek the OSC, we would nevertheless determine that the trial court properly could on its own motion protect its process and enforce its orders in the face of the conduct engaged in by Cunningham, and could properly consider whether Cunningham should be declared a vexatious litigant, required to post bond or obtain court permission before proceeding with his civil action against Perry.

II. Subject Matter Jurisdiction

Cunningham contends the court was without subject matter jurisdiction to entertain the OSC against him, to strike portions of his complaint against Perry, to impose sanctions, or to declare him a vexatious litigant. We reject Cunningham's claim that the court lacked subject matter jurisdiction. However, the award of attorney fees to Perry as monetary sanctions for Cunningham's misconduct cannot stand as it was not authorized by statute.

Judgments and orders made or entered under the Family Code are enforceable by the family court "as the court in its discretion determines from time to time to be necessary." (Fam. Code, § 290.) "Thus, the Family Code generally confers on the trial court broad discretion to select appropriate enforcement remedies and terms; and, in exercising that discretion, to take the equities of the situation into account . . . . [Citation.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 18:1.5, p. 18-1.) This broad discretion does not empower the family law court to bypass other express statutory requirements or limitations. (*Id.* at ¶ 18:1.6, p. 18-2; *Cal-Western Reconveyance Corp. v. Reed* (2007) 152 Cal.App.4th 1308, 1318.) Contrary to Cunningham's premise, there is no separate family court jurisdiction: "In practice, the superior court exercising jurisdiction under the Family Code is known as the 'family court' (or 'family law court'). But there is no separate 'family court' per se. Rather, 'family court' refers to the activities of superior court judicial officers handling litigation arising under the Family Code. The 'family court' is 'not a separate court with special jurisdiction, but is instead the superior court performing one of its general duties.' [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 3:3.10,

p. 3-3.) "The superior court's jurisdiction in a domestic relations case extends to *all matters* that are necessary incidents of the parties' family rights and obligations." (*Id.* at ¶ 3:4, p. 3-3.) "Claims stemming directly from a family law case (whether pre- or postjudgment) belong in the *family court* rather than on the general civil side of the superior court. This is so even though the claims could be pleaded as general civil causes of action . . . . [Citations.]" (*Id.* at ¶ 3:22.5, pp. 3-14 to 3-15.) As recognized in *Neal v. Superior Court* (2001) 90 Cal.App.4th 22, 25-26, "[a]lmost all events in family law litigation can be reframed as civil law actions if a litigant wants to be creative with various causes of action. It is therefore incumbent on courts to examine the substance of claims, not just their nominal headings." (Accord, *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 393-394.)

At the February 23, 2009 hearing on the OSC and the April 13, 2009 hearing on Cunningham's motion for reconsideration, the court stated its reliance on section 128, subdivision (a)(4) and (5), Family Code section 290, and Local Rule 11:16. At the latter hearing, it relied upon Rule 5.140, as well.

The court specifically found that it had jurisdiction to hear the matter, as in accord with section 128 it had the power to enforce its own orders and to control its ministerial officers and all other persons connected to the proceedings before it. Section 128 provides: "(a) Every court shall have the power to do all of the following: [¶] . . . [¶] (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein. [¶] (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto."

In addition, Family Code section 290 provides: "A judgment or order made or entered pursuant to this code may be enforced by the court by execution, the appointment of a receiver, or contempt, or by any other order as the court in its discretion determines from time to time to be necessary." Section 290 gives the court "broad discretion" to fashion orders enforcing Family Code judgments and orders, so long as they do not

conflict with express statutory requirements and limitations. (*Cal-Western Reconveyance Corp. v. Reed, supra,* 152 Cal.App.4th at p. 1318; *In re Marriage of Schofield* (1998) 62 Cal.App.4th 131, 135.) A family court order will not be disturbed on appeal unless, considering all of the evidence in the light most favorable to the order, no reasonable judge would have made the order. (See *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866 [order awarding attorney fees and costs].)

Local Rule 11:16F prohibits the disclosure of confidential evaluations in a manner inconsistent with its provisions and further authorizes the court to impose "[s]ubstantial sanctions . . . for inappropriate use of the evaluation report or any information contained in it." (Italics omitted.)

Rule 5.140, entitled "Implied procedures," provides: "In the exercise of the court's jurisdiction under the Family Code, if the course of proceeding is not specifically indicated by statute or these rules, any suitable process or mode of proceeding may be adopted by the court that is consistent with the spirit of the Family Code and these rules."

Together, section 128, Family Code section 290, Rule 5.140 and Local Rule 11:16F, provide ample authority for the court's exercise of subject matter jurisdiction to protect the court's own processes (including protection of its appointed expert) from the conduct engaged in by Cunningham here.

Cunningham has failed to show the trial court abused its discretion under Family Code section 290 or Rule 5.140 in ordering the confidential information and the addendum exhibit to be stricken from the complaint or in declaring Cunningham to be a vexatious litigant.

As stated in *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267: "We have often recognized the 'inherent powers of the court . . . to insure the orderly administration of justice.' [Citations.] Although some of these powers are set out by statute (§ 128, subd. (a)), it is established that the inherent powers of the courts are derived from the Constitution (art. VI, § 1 [reserving judicial power to courts]; [citations], and are not confined by or dependent on statute [citations]." (See *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 287-291 [trial court had the inherent power

to control the litigation before it and the discretion to preclude evidence in order to prevent the disclosure of confidential information and ensure a fair trial].)

Although the trial court had subject matter jurisdiction over the OSC motion and the relief sought, it abused its discretion in awarding Perry his attorney fees as a sanction for Cunningham's misconduct, because no statute cited by the court or of which we are aware provided for attorney fees as sanctions in the circumstances before the court at the time it made the award. Such express statutory authority was required. (See *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804 (*Olmstead*); *Bauguess v. Paine* (1978) 22 Cal.3d 626 (*Bauguess*).)

In *Olmstead*, *supra*, 32 Cal.4th 804, our Supreme Court reiterated that attorney fees as sanctions may only be awarded pursuant to statute or agreement. "In *Bauguess* [, *supra*,] 22 Cal.3d 626 . . . , we held that *trial courts may not award attorney fees as a sanction for misconduct under the general supervisory authority of the courts or unless they do so pursuant to statutory authority* or an agreement of the parties. (*Id.* at pp. 634-639.) Although *Bauguess* acknowledged that trial courts possess inherent powers to supervise judicial proceedings, our decision placed limits on these powers to avoid the 'serious due process problems' that would arise if trial courts had unfettered authority to award fees as sanctions. (*Id.* at pp. 637-638.) Hence, *Bauguess* prohibited a trial court from using fee awards to punish misconduct unless the Legislature, or the parties, authorized the court to impose fees as a sanction." (*Olmstead*, at p. 809, italics added.)

No statute relied upon by the family court specifically authorized the award of attorney fees as sanctions at the time the court awarded them. Family Code section 3111, subdivisions (d) and (e), authorizing sanctions against a party who makes "unwarranted" disclosure of a written confidential custody evaluation report and which would have authorized the sanctions imposed here, became operative on January 1, 2010, 10 months after the sanctions were awarded. (See Fam. Code, § 3111, subd. (d).) Local Rule 11:16F could not authorize attorney fees as sanctions where such sanctions were not

available pursuant to existing statute. (Cf., *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1345, 1351-1352.)[8]

The court below did *not* rely upon Family Code section 271, apparently recognizing that that statute supports such sanctions *as between the parties* to the litigation. (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 14:236, p.14-62 [Family Code section "271 contemplates that fee-shifting sanctions occur *exclusively as between the parties to the action.* [Citations.]"]) As Perry was not a party to the family law proceeding, he was not entitled to attorney fees as sanctions under that statute.[9]

At oral argument, Perry relied upon the vexatious litigant statute itself (§§ 391-391.7) as providing independent statutory authority for the court's award of attorney fees as a sanction, citing *Singh v. Lipworth* (2005) 132 Cal.App.4th 40 (*Singh*) as authority. In *Singh*, the Third Appellate District held that the vexatious litigant statute authorized the trial court to require the plaintiff to post security to pay the defendants' attorney fees without requiring an additional, independent statutory basis. (*Id.* at pp. 43, 47.) The court concluded that "section 996.460[[10]], when read in conjunction with sections 391,

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[8] *Elkins v. Superior Court*, *supra*, 41 Cal.4th 1337, held that trial courts were without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council or that are inconsistent with the Constitution or case law. (*Id.* at pp. 1345, 1351-1352.) Although the Supreme Court noted that its conclusion did not affect hearings on motions (*id.* at fn. 1, p. 1345), it would seem to preclude a local rule inconsistent with binding Supreme Court authority such as *Olmstead.*

[9] We note that Cunningham also argues that he was not provided proper notice of the amount of sanctions being imposed pursuant to section 128.7. This claim must fail as sanctions were not imposed under section 128.7.

[10] Section 996.460 was enacted "to centralize the procedural provisions governing bonds and undertakings . . . ." (*Singh, supra,* 132 Cal.App.4th at p. 47.) It provides:

"(a) Notwithstanding Section 2845 of the Civil Code, a judgment of liability on a bond shall be in favor of the beneficiary and against the principal and sureties and shall obligate each of them jointly and severally. [¶] (b) The judgment shall be in an amount determined by the court. [¶] (c) A judgment that does not exhaust the full amount of the bond decreases the amount of the bond but does not discharge the bond. The liability on

subdivision (c), 391.1 and 391.3, authorizes an award of attorney fees in favor of a defendant *from the security posted* by the unsuccessful vexatious litigant without requiring an additional statutory or contractual basis for the award. . . . [¶] We are persuaded that the vexatious litigant statute, both by its terms and history, provides an independent statutory basis for awarding attorney fees to a defendant in an action prosecuted by a vexatious litigant, as such supports the court's decision to require security from plaintiff." (*Id.* at p. 47, italics added.) The *Singh* decision addressed the authority for the award of attorney fees from the security posted by the vexatious litigant in the event the vexatious litigant pursued the action that the security guaranteed. The case did not address the award of attorney fees as sanctions apart from the posted security. In this case, the court not only ordered Cunningham to post security of $25,000 to continue to prosecute his action against Perry, but it also awarded attorney fees of $21,590 and costs of $1,132.30 as sanctions against Cunningham. This latter type of award of attorney fees as sanctions—apart from recourse to the posted security—was not addressed by *Singh.*

Luckett v. Keylee (2007) 147 Cal.App.4th 919 (*Luckett*), supports our determination that the attorney fee award in this case lacked the requisite independent statutory basis. In *Luckett*, the Second Appellate District held that where the vexatious litigant failed to post the required bond and the matter was dismissed, the court was *not* authorized to award attorney fees under the vexatious litigant statute. The court recognized that *Singh* interpreted "the vexatious litigant statutes as an independent and self-executing basis for awarding fees from previously posted security whenever a vexatious litigant pursued and lost an action that had been found to lack merit under sections 391 through 391.4" (*Luckett*, at pp. 924-925.) According to *Luckett* at page 926, "even though *Singh* held that attorney's fees could be paid from the unsuccessful

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the bond may be enforced thereafter from time to time until the amount of the bond is exhausted. [¶] (d) The judgment may be enforced by the beneficiary directly against the sureties. Nothing in this section affects any right of subrogation of a surety against the principal or any right of a surety to compel the principal to satisfy the judgment."

vexatious litigant's bond at the conclusion of the litigation, it said, albeit by way of dicta, that such fees were not available when a vexatious litigant's action was dismissed for failing to post any bond at all. [¶] Nothing in section 391.7 or the rest of the vexatious litigant statutes authorizes payment of a defendant's attorney's fees when the plaintiff's action was dismissed for his failure to post security. Instead, the statutes authorize dismissal of the action (§§ 391.4, 391.7, subd. (c)), and the possibility of a civil contempt proceeding for filing an action in disobedience of a prefiling order. (§ 391.7, subd. (a).)" (*Ibid.*) However, *Luckett* also held that because the action was dismissed in the defendants' favor, they were the prevailing parties and were entitled to their costs in the dismissed action pursuant to section 1032, subdivisions (a)(4) and (b) [prevailing party is entitled to costs as a matter of right, and a defendant in whose favor a dismissal is entered is a prevailing party]. (*Luckett*, at p. 927.)

Perry also argues that Cunningham has waived any claim relating to the lack of an independent, statutory basis for the attorney fee award, as this basis for overturning the award was never raised by appellant either in the trial court or in his appellate briefs, citing *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776-777 (*Children's Hospital*) [issue "doubly waived" where challenged neither in the trial court nor in the opening or reply briefs, but only in postbriefing submission requested by the court]. In *Children's Hospital*, we recognized that the specific belated challenge to a fee award as " 'beyond the court's jurisdiction' " was that the court determined the plaintiffs were entitled to their attorney fees before plaintiffs had filed their formal written fee motion and that "an award of attorney fees under section 1021.5 [(the private attorney general doctrine)] may only be made 'upon motion . . . [citation]." (*Id.* at p. 776.) We observed that "[h]ad it been presented [to the trial court], and had the court agreed, the problem could easily have been rectified, which may be the reason the argument was never raised." (*Ibid.*) Here, the only way the defect could have been rectified was by not awarding the attorney fees.

Cunningham challenged the fee award as sanctions on appeal, albeit on other grounds, contending the court lacked jurisdiction to issue any sanctions and that notice

was inadequate. Perry acknowledged that Cunningham has appealed from the portion of the March 5th order granting Perry's request for sanctions in the form of attorney fees and argued in his respondents' brief that Cunningham failed to show an abuse of discretion in awarding such fees and that the court had express authority to impose fees for violations of Local Rule 11.16 and section 3111, subdivision (d), as well as broad authority under Family Code section 290 and Code of Civil Procedure section 128 to enforce its own orders. The question of waiver in this instance is one committed to our discretion. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2010) ¶ 9:21, p. 9-6.) In the circumstances, we shall not deem the issue waived.

Perry also argues that affirming the attorney fee sanction award will not prejudice Cunningham, "since an anti-SLAPP motion would clearly have been granted, if such motion had been brought, and the anti-SLAPP statute specifically states that a prevailing defendant 'shall be entitled to recover his or her attorneys fees and costs.' [(§ 425.16, subd. (c)(1).)]" The short answer is that Perry did not respond to Cunningham's action with an anti-SLAPP motion and we shall not speculate on what might have happened had he done so.

Cunningham next contends that the court below abused its discretion in conducting a vexatious litigant proceeding in the family law proceeding. We disagree.

First, Cunningham argues that the court violated its own "stay" order by conducting the vexatious litigation proceeding. As we have described in the facts, the stay of August 7, 2008 stayed *custody* matters until the contempt hearing was completed. Although the "mini-minutes" state that "all other matters are stayed until contempt hearing is completed," the matter was not reported and the parties—including Cunningham—and the court treated the stay as affecting *only* the custody portion of the family law dispute pending outcome of the contempt case. The court did not violate its "stay" order by entertaining the vexatious litigant motion.

Cunningham further argues that section 391 et seq. "does not suggest that it has expanded the limited jurisdiction of the family court or probate courts to permit 'vexatious litigation' in those courts." He argues that the family court's jurisdiction over

vexatious litigant proceedings is limited to requiring one already adjudged a vexatious litigant in another civil proceeding to comply with a prefiling order before filing new litigation in the family court. He further contends this limitation is consistent with the jurisdictional limitations on the family law court, found in Local Rule 11.2,[11] and Rule 5.104.[12] The argument is without merit.

Family Code section 210 expressly includes the vexatious litigant statutes as among the rules of practice and procedure applicable in family court. The statute provides: "Except to the extent that any other statute or rules adopted by the Judicial Council provide applicable rules, the rules of practice and procedure applicable to civil actions generally, *including the provisions of Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure*, apply to, and constitute the rules of practice and procedure in, proceedings under this code." (Fam. Code, § 210, italics added.) Hogoboom and King recognize that, in addition to various sanctions remedies, "a *pro per litigant* who repeatedly files unmeritorious petitions, applications or motions (other than a discovery motion) in a Family Code proceeding is subject to the 'vexatious litigant' statutes applicable in general civil actions. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 1:500, p. 1-124.13, citing §§ 391.7, subd. (d), 391, subd. (b), and Fam. Code section 210.) Nothing in section 391 et seq., or any other statute or rule cited by Cunningham, restricts the court from declaring a person to be a vexatious litigant. (See *In re R.H.* (2009) 170 Cal.App.4th 678, 696-698 [in sua sponte declaring the father to be a vexatious litigant and subject to a prefiling order based on his history of meritless appeals in pro per, the appellate court rejected father's argument that he could not be declared vexatious where no specific provision applied the vexatious

[11] Local Rule 11:2 provides: "All matters arising under the California Family Code are assigned to the Family Law Division."

[12] "Neither party to the proceeding may assert against the other party or any other person any cause of action or claim for relief other than for the relief provided in these rules, Family Code sections 17400, 17402, and 17404, or other sections of the Family Code." (Rule 5.104.)

litigant law to dependency cases].) Appellant's convoluted reading of section 210 to exclude the family court from determining that one is a vexatious litigant must fail.

III. Vexatious Litigant Determination Under Section 391 et seq.

A. *Section 391*

Cunningham contends the court erred in determining he was a vexatious litigant under section 391 et seq.[13] Initially, he argues he was a "defendant" in the family law

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[13] Section 391 defines terms used in the vexatious litigant law as follows:

"(a) 'Litigation' means any civil action or proceeding, commenced, maintained or pending in any state or federal court.

"(b) 'Vexatious litigant' means a person who does any of the following:

"(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

"(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

"(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

"(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

[¶] . . . [¶]

"(d) 'Plaintiff' means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona.

"(e) 'Defendant' means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained."

Section 391.3 authorizes the court to require the filing of a bond as follows: "If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish,

proceeding and that only a "plaintiff" in the pending action may be declared vexatious and that the application to declare a person to be a vexatious litigant must be made by the "defendant" in that pending case. The courts have recognized that "the vexatious litigant law has been both broadly written and interpreted . . . ." (*In re R.H., supra*, 170 Cal.App.4th at p. 693.) Such willingness to apply the law broadly stems at least in part " 'from the statute's *broad definitions* for the terms "litigation," "plaintiff" and

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for the benefit of the moving defendant, security in such amount and within such time as the court shall fix."

Section 391.7, requiring in propria persona vexatious litigants to seek prior court approval before filing new actions, provides as follows:

"(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

"(b) The presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

"(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.

"(d) For purposes of this section, 'litigation' includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

"(e) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefiling orders and shall annually disseminate a list of those persons to the clerks of the courts of this state."

"defendant." ' (*McColm* [*v. Westwood Park Assn.* (1998)] 62 Cal.App.4th [1211,] 1215, emphasis added.)" (*In re R.H.*, at p. 692.)

Section 391, subdivision (b), does not limit the definition of "vexatious litigant" to a "plaintiff." Rather, as relevant here, it defines a vexatious litigant as "*a person* who does any of the following (italics added):

"(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

"(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

"(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

If Cunningham met the above definition, he was properly declared to be a vexatious litigant by the court.

Section 391.1 provides:

"In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."

Certainly Perry was the "defendant" in plaintiff Cunningham's pending civil action against him and was entitled to seek an order requiring Cunningham to furnish security pursuant to section 391.1.

B. *Qualifying "Litigations" Under Section 391*

In determining whether a person is a vexatious litigant, the trial court exercises its discretion. We shall uphold the ruling if it is supported by substantial evidence. On appeal, we presume the order is correct and infer findings necessary to support the judgment. We review questions of statutory interpretation de novo. (*Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1169.)

Cunningham argues that the court erred in finding that he met the definition set forth in section 391, subdivision (b)(1), as a person who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing."

The court declared him a vexatious litigant "based on the civil complaint [he] filed against Dr. Perry (case No. CGC-08-482617) and other pleadings filed in this Court, the First District Court of Appeal and the California Supreme Court." The court found he had "lost in four legal matters, which were not small claims matters, during the last four years," and that he had "also filed eight unsuccessful writs of mandamus in this matter."

In *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216-1217, the court broadly construed the vexatious litigant statute to encompass appeals and writ petitions as within the definition of "litigations" under the statute. Were we to count all of the writ proceedings brought by Cunningham in this court, the total would far exceed the minimum five litigations required by section 391. Recently, however, the Court of Appeal in *Fink v. Shemtov, supra*, 180 Cal.App.4th 1160, held that the summary denial of a writ petition was not necessarily final and on the merits for purposes of the vexatious litigant statute (§ 391, subd. (b)(1)), where the record contained no evidence regarding the nature of the writ proceedings relied upon by the trial court to declare the plaintiff a

vexatious litigant. The court observed: "In *Leone v. Medical Board* (2000) 22 Cal.4th 660, 669, the California Supreme Court explained, 'a summary denial of a writ petition on a pretrial issue does not establish the law of the case.' The Supreme Court distinguished 'writ petitions challenging pretrial superior court rulings that could also be reviewed on appeal from the judgment ultimately entered in the action' from 'situations in which a writ petition was the only authorized mode of appellate review.' (*Id*. at p. 670.) . . . [¶] As to the latter type of writ petitions, discussed in *Leone v. Medical Board*, constituting the *exclusive* means of obtaining appellate review, the Supreme Court explained, 'an appellate court must judge the petition on its procedural and substantive merits, and a summary denial of the petition is necessarily on the merits. [Citations.] An appellate court that summarily denies a writ petition for lack of substantive merit or for procedural defect thereby fulfills its duty to exercise the appellate jurisdiction vested in it by the state Constitution's appellate jurisdiction clause.' (*Leone v. Medical Board, supra*, 22 Cal.4th at p. 670.)" (*Fink v. Shemtov*, at p. 1172.) The Court of Appeal identified "a ruling on a motion to disqualify a judge under section 170.3, subdivision (d)" as the first of several "[e]xamples of instances in which appellate review may be obtained only through a writ petition . . . ." (*Ibid.*)

Here, in each case of the trial court's denial of Cunningham's numerous section 170.6 motions to disqualify judges below, a statutory writ petition was the exclusive method of obtaining appellate review. Consequently, this court's denials of the various writ petitions by which Cunningham sought review of court orders denying his 170.6 disqualification motions properly may be counted as "litigations" in determining whether the court erred in determining him to be a vexatious litigant.

We conclude the following "litigations" provided a proper basis for the vexatious litigation finding:

(1) *Cunningham v. Superior Court* (Super. Ct. S.F. City and County, No. CGC-07-463042, filed May 3, 2007). The complaint was against the Honorable Judge Donald Sullivan, who previously had been assigned to the marital action. A dismissal was filed September 27, 2007. Notice was given to all parties to show cause why the case should

not be dismissed on the court's own motion and, there being no objection, the case was dismissed pursuant to Rule 3.1385 on September 19, 2007. Appellant argues the matter was not adversely decided against him, but that he "agreed" to the dismissal. Whether or not he "agreed" to dismissal does not appear in the record. The matter was finally determined adversely to him. Cunningham has failed to overcome the presumption of correctness by providing this court with an adequate record demonstrating the alleged error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

(2) *Cunningham v. Kieu Kenyon* (Super. Ct. S.F. City and County, No. CCH-06-565617, filed Nov. 17, 2006). Cunningham sought an injunction prohibiting alleged harassment by Kenyon. Cunningham asked for a hearing only, but no appearances were made at the December 1, 2006 hearing. The case remained open and no one had requested a hearing in the subsequent two years. Appellant contends the court "dismissed" this matter two weeks after it was filed. Appellant has failed to support this assertion and it is irrelevant, in any event. Whether his action was dismissed or remained open more than two years, the matter was properly counted as litigation.

(3) *Cunningham v. Marc Kenyon et al.* (Super. Ct. S.F. City and County, No. CGC-06-453069, filed June 12, 2006 by Cunningham in propria persona). This complaint for specific performance, breach of contract, damages, negligence and declaratory relief was filed by Cunningham against his tenant in common owner of certain property. Judgment was entered in favor of Kenyon. Cunningham contends that he was represented by an attorney at some point during the litigation and that the attorney secured a settlement of the action. The settlement agreement to which appellant refers is dated July 2007. The matter continued in the superior court with Cunningham, appearing in propria persona, bringing a motion for breach of the settlement agreement. Cunningham has failed to refute the showing that he was in propria persona during this time. The Register of Actions in the proceeding reflects that the court entered judgment in favor of Kenyon, awarding him total judgment of $1,292.55 from Cunningham. This constituted a litigation finally determined against Cunningham.

Appellant also filed the following petitions for writ review of the superior court's denials of his section 170.6 disqualification motions:

Cunningham v. Superior Court (A117130, filed March 21, 2007). On April 12, 2007, we denied Cunningham's writ petition challenging the court's denial of his section 170.6 disqualification motion.

Cunningham v. Superior Court (A123942, filed Feb. 4, 2009.) We denied this writ petition on February 6, 2009, with an order stating: "The petition for writ of mandate is denied. Petitioner attempted to challenge two judges in one challenge under Code of Civil Procedure section 170.6. That section, however, allows for a party to only challenge one judge. [Citation.] Thus, the challenge filed by Petitioner was invalid on its face."[14]

Although unnecessary to our determination, we believe that the trial court's ruling was also supported by section 391, subdivision (b)(3), in that it could properly find that Cunningham "acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (§ 391, subd. (b)(3).) These include at least five motions to disqualify judicial officers that were denied by the court. In addition, in accordance with *Fink v. Shemtov*, *supra*, 180 Cal.App.4th 1160, we have not considered the numerous writs petitions that this court has summarily denied to be "litigations" under section 391, subdivision (b)(1), except where the petitions related to section 170.6 motion denials. However, we believe the court could properly consider these summarily denied writ petitions under subdivision (b)(3) in determining that appellant was vexatious.

[14] Because we have concluded the court's denomination of Cunningham to be a vexatious litigant was supported by the above litigations, we need not consider whether the court properly considered writ petitions seeking to stay contempt proceedings and the underlying family law proceeding.

IV. Adequacy of Notices

Cunningham contends that notice of the OSC and vexatious litigant proceeding was inadequate on several bases.

Cunningham contends he was not afforded legal notice of the vexatious litigant hearing as required by sections 415.10 et seq. (relating to service of summons and complaint) and Family Code section 215, due to improper service of process. He urges that notice by mail was inadequate. He argues that although he was present at the February 3 proceeding and he *knew* of the February 9 status conference and chose not to attend, he was unaware that the court would reissue the OSC at that time without providing notice that it was doing so. He further argues that Family Code section 215 does not provide for service by mail of postjudgment orders to show cause. We disagree.

At the outset, we reject Cunningham's suggestion that Perry's OSC constituted a "new action" against him and required notice that Perry was being added as a party to the litigation and/or service of process and issuance of a summons and complaint. Our rejection of this suggestion necessarily follows from our previous determinations that Perry had "standing" to bring the OSC, but was not a "party" to the underlying proceeding and that the court had subject matter jurisdiction to consider the OSC in the family law proceeding. The matter was not a "new action" requiring service of process or compliance with statutes or rules relating to "joinder."

The notices Cunningham received of the order shortening time, the OSC, and the vexatious litigant proceeding complied with California law and provided notice comporting with due process. Cunningham was aware that Perry was requesting the OSC and requesting to shorten time. He appeared at the February 3rd hearing on Perry's request to shorten time at which the court granted the request to shorten time and scheduled the hearing on the OSC for February 9th. On February 9th, the court found Cunningham had been advised of the hearing and necessarily had been directed to be there because it also was a statutes conference. The court noted Cunningham had filed opposition. Because Perry had been unable to serve Cunningham with the OSC in the one-day period originally ordered, the court reissued the OSC, rescheduled the hearing

for February 23, and ordered Cunningham be served with the OSC by February 18. Perry served Cunningham with the OSC and all the other moving papers by mail, on February 9, and proof of service was filed on February 17. On February 18, Perry filed and served a reply in further support of his application, which also included notice that the hearing was scheduled for February 23rd. Cunningham failed to appear at the February 23rd hearing. The court had not specified the manner of service, but at the hearings held February 23rd and April 13th, the court found proper notice had been provided.

As the trial court found, service by mail was appropriate here and was accomplished in a manner that satisfied California statutes. Sections 1012,[15] and 1019.5[16] permit service of motions and orders by mail.

We reject Cunningham's claim that due process was violated by the shortened notice and by serving him with the reissued OSC by mail. "[D]ue process of law does not require actual notice, but only a method reasonably certain to accomplish that end. [Citations.]" (*Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958, 967.) Where service is made by mail in compliance with the manner set forth in the statute, it is the addressee's burden to prove he or she did not receive notice. (*Id.* at p. 973.) Appellant has failed to satisfy his burden. Cunningham's excuse for failing to appear was that he was on vacation when the OSC was served and "had no reason to open the letter or do so in post-haste." He admits he received a "letter" from Perry's counsel, but chose not to open it. The court could properly reject his explanation, because, among

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[15] "Service by mail may be made where the person on whom it is to be made resides or has his office at a place where there is a delivery service by mail . . . ." (§ 1012.)

[16] "(a) When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order shall be given by the prevailing party to all other parties or their attorneys, in the manner provided in this chapter, unless notice is waived by all parties in open court and is entered in the minutes.

"(b) When a motion is granted or denied on the court's own motion, notice of the court's order shall be given by the court in the manner provided in this chapter, unless notice is waived by all parties in open court and is entered in the minutes." (§ 1019.5.)

other reasons, the letter had been served on February 9th and Cunningham's vacation was not scheduled to begin until February 13th. Moreover, having received the letter, his refusal to open it promptly could properly be found to be in bad faith and in willful avoidance of service.

Cunningham contends that the trial court's February 9th reissuance of the OSC on shortened notice violated sections 1005, subdivision (b),[17] 415.10 through 415.40 (regarding the manner of service of summons), Rules 5.22 (providing 30 days to respond to a summons and complaint in a family law matter) and 5.156 (pertaining to applications for joinder), Family Code section 215,[18] and his due process rights.

Section 1005, subdivision (b), specifically authorizes the court to prescribe a shorter period for notice, which the court here did when it reissued the OSC on February 9. Further, Rule 3.1300, consistent with the statute, expressly permits the court to shorten the time for notice otherwise required by section 1005. (Rule 3.1300, subd. (b).) (We note here that Perry complied with subdivision (c) of this rule by filing his proof of service more than "five court days before the time appointed for the hearing." (Rule 3.1300, subd. (c).)) Cunningham cites no case or statutory authority holding that section 1005, subdivision (b), authorizing the court to shorten time, is not intended to apply to motions to strike portions of a complaint, or to declare a person to be a vexatious litigant. (See *Eliceche v. Federal Land Bank Assn. of Yosemite* (2002) 103 Cal.App.4th

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[17] "Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing. . . . However, if the notice is served by mail, the required 16-day period of notice before the hearing shall be increased by five calendar days if the place of mailing and the place of address are within the State of California . . . . [¶] *The court, or a judge thereof, may prescribe a shorter time*." (§ 1005, subd. (b), italics added.)

[18] "After entry of a judgment of dissolution of marriage . . . or after a permanent order in any other proceeding in which there was at issue the visitation, custody, or support of a child, *no modification of the judgment or order, and no subsequent order in the proceedings, is valid unless any prior notice otherwise required to be given to a party to the proceeding is served, in the same manner as the notice is otherwise permitted by law to be served, upon the party*. For the purposes of this section, service upon the attorney of record is not sufficient." (Fam. Code, § 215, italics added.)

1349, 1365 [the trial court had the power to shorten the time for hearing on a motion for discretionary dismissal]; *Western Steel & Ship Repair, Inc. v. RMI, Inc.* (1986) 176 Cal.App.3d 1108, 1116 [despite the lack of specific authority for immediate ex parte relief, trial court had the power to shorten time on debtor's noticed motion to quash a writ of attachment and to vacate an improvidently issued ex parte attachment].)

None of the rules upon which Cunningham relies were violated by the shortened notice or by service by mail in this case.

Rules 5.22 (providing 30 days to respond to a summons and complaint in a family law matter) and 5.156 (pertaining to applications for joinder) were inapplicable. Cunningham maintains that Family Code section 215 mandates "personal service" of "post-judgment" orders to show cause and does not allow service by mail. To the extent that Family Code section 215 might apply here at all where the OSC did not seek to modify any previous order, the statute required service on Cunningham, rather than his attorney, but did not mandate the method of service other than requiring service "in the same manner as the notice is otherwise permitted by law to be served, upon the party." (Fam. Code, § 215.) As Hogoboom and King, recognize: "In *postjudgment* motion and OSC proceedings, the moving papers must be served personally **or by mail** *on the opposing party;* service on opposing counsel will *not* suffice. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 5:359, p. 5-137, original italics, bolding added.) Cunningham has failed to show that the notice procedures followed here did not comport with statutory requirements. Nor does he show that they violated his due process rights.

V. Fifth & Sixth Amendment Claims

Cunningham contends the court violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel when it denied his right to court-appointed counsel at "critical stages" of the proceedings, including the February 9, 2009 status conference and hearing on Perry's application for an OSC at which the court reissued the OSC.

The court appointed counsel for Cunningham for the limited purpose of representing him in the contempt proceeding initiated by Wang. Cunningham was not entitled to court-appointed counsel at proceedings unrelated to that contempt matter. We fail to see how Cunningham's appearance without counsel at the February 9, 2009 status conference or at hearings on Perry's OSC application would violate his Fifth or Sixth amendment rights. The only arguably contempt-related proceedings were those at which the court set trial dates for the contempt matter. On January 26, 2009, the court attempted to schedule the contempt proceeding. However, appellant was not unrepresented with respect to the contempt matter at that January 26, 2009 hearing, as he was represented by Margaret Pendergast who appeared specially "for attorney Peter Furst on behalf of Mr. Cunningham." On April 13, 2009, the court indicated it had reviewed the record in connection with the contempt proceeding and had concluded that Cunningham had waived his speedy trial rights under Penal Code section 1382. Cunningham argued he had revoked his waiver some months before—a proposition rejected by the trial court. He sought dismissal of the contempt action, which the court denied. Cunningham refused on April 13th to state whether he wished to continue to waive time until new counsel could be appointed. The trial court vacated the April 10th trial date and set the contempt matter for May 13, 2009.

Assuming, without deciding, that the setting of the contempt trial was a "critical proceeding" at which Cunningham was entitled to the presence of court-appointed counsel, any of the asserted violations of his Fifth and Sixth Amendment rights with regard to the contempt matter were rendered moot by the subsequent dismissal of Wang's contempt action against Cunningham in its entirety on December 11, 2009.

" 'An appellate court will not review questions which are moot and which are only of academic importance.' [Citations.] A question becomes moot when, pending an appeal . . . events transpire that prevent the appellate court from granting any effectual relief. [Citations.]" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 419; see e.g., *In re Anna S.* (2010) 180 Cal.App.4th 1489.) Furthermore, " '[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.' [Citation.]"

(*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860.) Thus, appellate courts regularly decline invitations to issue them. (See, e.g., *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 53; *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1015.)

Dismissal of the entire contempt action renders the issues moot since any decision on this issue would have no practical impact. Nor would it provide Cunningham with effective relief.

VI. Perry's Motion for Sanctions on Appeal

Perry has moved for monetary sanctions in the amount of his costs and/or terminating sanctions against Cunningham in connection with this appeal. The basis for the motion is that Cunningham had repeatedly engaged in "inappropriate conduct" toward Perry's attorneys. Specifically, in a declaration accompanying the motion, Nikki S. McKennedy, counsel for Perry, states that in a telephone conversation where she refused to stipulate to further extensions of time beyond 60 days, Cunningham "started speaking in a low, fast, threatening manner," accused her of not acting in good faith, and "promised that he would be a 'hard ass' and/or an 'asshole' the next time [she] needed any courtesy from him." Thereafter, in a request to correct omissions in the clerk's transcript, Cunningham filed a proof of service under penalty of perjury dated January 8, 2010, purporting to show that the pleading was served by U.S. mail to "Nikki McKennedy." However, the original handwritten envelope in which the request arrived at counsel's office was addressed to "Ms. Nitty McKitty." On January 15, 1010, McKennedy received a second pleading entitled "application for extension of time to file brief (civil case)" from Cunningham. Again, the proof of service purported to show the pleading was served by mail to "Nikki McKennedy." Again, the original handwritten envelope in which the pleading arrived was addressed to "Nitty McKitty" at McKennedy's lawfirm's address. In a supplemental declaration, McKennedy states the same pattern happened again on January 20, 2010 when she received a "Notice of Motion to Augment the Record" from Cunningham.

Perry seeks as sanctions the $1,782 in attorney fees it cost to bring the motion for sanctions. He also seeks an order requiring Cunningham to refrain from further inappropriate behavior and requests terminating sanctions in the caption of his motion.

Cunningham's version of the phone conversation differs from McKennedy's. He admits use of the term "hardass." He states he has not called her office since that conversation and maintains that his "behavior, however inappropriate, has been limited to the incidents cited." He "acknowledges that his actions in mislabeling the envelopes evinced a lapse of judgment on his part," but argues they do not warrant sanctions.

Cunningham's behavior in signing under penalty of perjury and filing a proof of service untruthfully representing how the pleadings were addressed constituted a violation of Rule 5-200 of the Rules of Professional Conduct.[19] His demeaning address of opposing counsel, which he appears to minimize as "a misdirected attempt at levity," was both unprofessional and contrary to the "California Attorney Guidelines of Civility and Professionalism," promulgated by the State Bar in 2007 (Guidelines). (See *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 702, fn. 10.) These guidelines reflect that "attorneys have an obligation to be professional with . . . other parties and counsel, [and] the courts . . . ," which obligation "includes civility, professional integrity, . . . candor . . . and cooperation, all of which are essential to the fair administration of justice and conflict resolution." (Guidelines, Intro., p. 3.)[20] Section 4 of the Guidelines

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[19] Rule 5-200 (A) and (B) of the Rules of Professional Conduct provide: "In presenting a matter to a tribunal, a member: [¶] (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law . . . ."

[20] Section 4 of the Guidelines provides in relevant part: "An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court. [¶] For example, in communications about the legal system and with adversaries: [¶] . . . [¶] c. An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue. [¶] . . . [¶] f. An attorney should avoid hostile, demeaning or humiliating

further counsels that, "[a]n attorney should avoid hostile, demeaning or humiliating words."

Nevertheless, we have decided to forego awarding sanctions at this time. Should Cunningham persist in this or similar behavior in the trial court—conduct that he now acknowledges was a "lapse in judgment"—the trial court is well placed to cite him for contempt and impose sanctions. Should this type of conduct recur in connection with this or future proceedings in this court, we shall not hesitate to impose monetary or other appropriate sanctions. (Rules 8.54, 8.276(a).)

DISPOSITION

The orders from which Cunningham appeals are reversed insofar as they award attorney fees to Perry as sanctions. In all other respects, the orders of March 5, 2009 and April 13, 2009, striking portions of Cunningham's complaint against Perry (*Cunningham v. Perry et al*, *supra*, No. CGC-08-482617), declaring Cunningham to be a vexatious litigant, prohibiting him from filing new litigation in the courts of the state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed (§ 391 et seq.), and requiring that he file a $25,000

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words." (California Attorney Guidelines of Civility and Professionalism, *supra*, § 4, pp. 4-5.)

bond to proceed with *Cunningham v. Perry*, are affirmed. Perry is awarded his costs in connection with this appeal.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.