Filed 9/28/06

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| In re Marriage of FLORA LINDA and WERNER GEORGE DEFFNER. | |
| FLORA LINDA DEFFNER,<br>Respondent,<br>v.<br>WERNER GEORGE DEFFNER,<br>Appellant. | G035719<br>(Super. Ct. No. 02D001206)<br>O P I N I O N |

Appeal from a post-judgment order of the Superior Court of Orange County, Frederick P. Aguirre, Judge. Affirmed.

Minyard & Morris and Ronald B. Funk for Appellant.

Gary S. Gorczyca for Respondent.

I. INTRODUCTION

The facts here, as found by the trial court, are extreme: In an ostensibly uncontested dissolution, the husband's attorney literally palmed himself off to the trial court as the wife's attorney, submitting papers in which he was listed as the wife's attorney when he was really representing the husband.

In affirming the trial court's decision to set aside the judgment, we will take our cue from *Le Francois v. Goel* (2005) 35 Cal.4th 1094. In that case, involving whether certain statutes could validly limit the authority of a court, acting on its own motion, to correct its own erroneous prior interim order, the court solved the problem by means of the canon that statutes will be interpreted, if possible, not to violate the constitution. (*Id*. at p. 1105.) In *Le Francois*, certain statutes could be read (indeed, had been read by a number of panels on the Court of Appeal) to infringe on the judiciary's "'core power to decide controversies between parties.'" (*Id*. at p. 1104, quoting *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 184.) But by distinguishing a *party's* right to seek relief from the statutes from the *trial court's* residual inherent power to correct interim orders on its own, the *Le Francois* court was able to reconcile the statutes with the inherent powers of the judiciary.

Likewise here we will uphold the trial court's order setting aside a judgment procured through fraud directly against the court by holding that that the applicable statute does not impinge on the trial court's residual inherent power to protect *itself* from fraud, a power impliedly recognized by the Legislature in section 128, subdivision (a)(8) of the Code of Civil Procedure [every court has power to control its "process and orders" to make them "conform to law and justice"].) As we explain below, while Family Code section 2122 inhibits the right of parties to have family law judgments set aside after certain time limits have expired, by its terms it does not prohibit a *court* from setting aside a family law judgment procured directly through a fraud on *it*. Indeed, the order in this case was right because the court surely had the power to protect itself from the one kind of fraud that no legal system can tolerate: the identity theft that occurs when one party's attorney impersonates the other party's attorney.

## II. HISTORY

### A. The 2002 Uncontested Judgment and Marital Settlement Agreement

This family law case began with a petition for dissolution filed in early February 2002, prepared by an attorney we shall call "Attorney V," who was, at least

ostensibly, representing the wife, Flora Linda Deffner.[1] The petition stated that while separate and community property had not yet been "determined," all such assets would be disposed of in a "Marital Settlement Agreement."

Three weeks later, in late February, husband Werner filed his own petition, as distinct from a "response." Werner was ostensibly in pro per. A month later, in March 2002, Werner filed (again in pro per) a response to the wife's petition. He filed an amended response three days later. Unlike the petition, the response and the amended response alluded to all community and separate property being disposed of by Marital Settlement Agreement.

In August 2002 Attorney V prepared an Appearance, Stipulation and Waivers form, basically stating that the matter could go uncontested, and also making the stipulation conditional on the court approving the marital settlement agreement. The form had Flora Linda signing as petitioner, Attorney V signing as attorney for petitioner, and Werner signing as both respondent and attorney for respondent.

About two months later, in October 2002, Werner submitted his income and expense declaration and Flora Linda submitted hers; Werner's was in pro per; Flora Linda's was again prepared on her behalf by Attorney V. Flora Linda signed the

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[1] We recognize that, given the gravity of the offense, there is a strong case for naming Attorney V. (See Blumberg, *Appeals Courts Fuzzy on Misconduct,* L.A. Daily Journal (Sept. 19, 2006) p. 3 ["Appellate courts have in recent years drawn criticism that they intentionally bury rulings or identifying information in those rulings that might embarrass lawyers or judges -- in the same way a newspaper might relegate a controversial story to the back pages."].) However, the issue of whether Attorney V passed himself off as the attorney for Flora Linda was factually controverted before the trial court. Indeed, at oral argument in this court, the first reaction of counsel for Werner when confronted with Attorney V's apparent fraud on the trial court was simply to deny it factually, citing the conflicting evidence supporting his client. The matter is a tough call precisely because the allegation is so serious, and Attorney V is not involved in proceedings before us now or nor was he involved in the trial court set aside proceeding. He thus would not be collaterally estopped to contest the issue in future matters, such as state bar disciplinary proceedings. While we, as an appellate court, are bound by the trial court's implied finding that Attorney V did indeed impersonate counsel for the opposite party -- there is no way we can change that for purposes of this appeal now -- it would be a grave injustice to him to name him if, for example, he were in some future context to be exonerated. Accordingly, on reflection, and since naming him is not necessary for resolution of this case, we do not name him.

document herself. Along with the declaration Attorney V prepared a schedule of assets and debts on the wife's behalf.

In early November, Attorney V prepared a declaration for uncontested dissolution, signed by Flora Linda. At the same time, Werner filed, in pro per, a declaration regarding service of declaration of disclosure, saying that his preliminary disclosure was served on Flora Linda "by personal service" and Flora Linda signed an equivalent one, but with Attorney V as preparer. At the same time, Attorney V filed a Judgment for dissolution, pursuant to a Family Code section 2336 declaration, with an attached marital settlement agreement.

On its face, the marital settlement agreement was lopsided, to say the least. Despite a thirty-year marriage, it waived all spousal support. And Werner received more than three-quarters of the community assets. The document itself recognized that Flora Linda would ordinarily have been expected to be awarded spousal support and explicitly spelled out Flora Linda's waiver: "Wife also understands that she ordinarily would be entitled to a monthly support payment in the amount of $1,800.00, payable for a term that is equal to at least one-half of the length of the marriage." It also recognized that Flora Linda was told that the agreement was lopsided: "[Attorney V] has advised both parties as to their respective rights in the property of the estate. [Attorney V] has especially advised Wife of her rights to a greater and more equitable share of the community property of the estate and the total value of the estate. Wife understands that she is entitled to a greater share than the share that she wants."

As to the actual retention of Attorney V, the agreement straddled the issue, suggesting that Attorney V was paid to represent both parties, but he was "primarily" representing Flora Linda: "Both parties have agreed to pay [Attorney V] the total sum of $5,000.00 to handle their dissolution and Marital Settlement Agreement on an uncontested basis, although the parties have agreed that said attorney shall primarily be representing Wife's interests in this matter."

Both Werner and Flora Linda signed the document on August 1, 2002, and Attorney V signed as "Attorney for Wife." The judgment and attached marital settlement agreement were signed by Judge Tam Nomoto Schumann on November 4, 2002.

B. The 2004 Set Aside Motion

More than 21 months went by. Then, in September 2004, came a substitution of attorneys, in which Flora Linda's present counsel was substituted for Attorney V. (Attorney V signed as Flora Linda's previous lawyer.) The next month, October 2004, Flora Linda's new attorney filed a motion to set aside the judgment and marital settlement of November 2002.

The core of the motion was Flora Linda's 11-paragraph declaration. As to the allegation of a ruse put over on Judge Schumann, here are the exact words from the declaration: "My former husband hired attorney [V] to handle our uncontested divorce. My husband paid Mr. [V] a $5,000 retainer fee although the Income and Expense Declaration prepared by Mr. [V] suggested I paid this fee. Since my husband received such a disproportionate share of our assets *I was advised that Mr. [V] would appear as my attorney on the paperwork so as to minimize the court's concern, if any, over the unfairness of the judgment*." (Italics added.)

The only other language touching on the theme of duplicity in the legal representation was this: "I believe Mr. [V's] interests were conflicted in representing both the Respondent and me in this action. Although he claims to have 'primarily' represented me, the Judgment clearly favors my ex-husband who was awarded approximately 82% of our community estate." Then came language elaborating on the substantive lopsidedness of the agreement.

The declaration was silent as to why Flora Linda appeared to go along with the ruse except for her lack of sophistication: "I am unsophisticated in legal matters and mater [sic] of business. Throughout our marriage I was a homemaker and the Respondent handled all business and financial concerns of the family. Until reviewing the paperwork sent to me after the Judgment was filed, I had no idea we had accumulated assets worth approximately $1,000,000."

The balance of the declaration quoted portions of the marital settlement agreement, made reference to the signing of declarations regarding preliminary declarations of disclosure, made an allegation about an irregularity in a declaration of disclosure,[2] and admitted that Flora Linda "receive[d] a large packet of papers from [Attorney V] on or about November 2002."

Flora Linda's attorney finally argued that her set aside motion was timely, based solely on the irregularity involving the declaration of disclosure.

Werner's declaration opposing the set aside directly controverted the idea that Attorney V was in reality his attorney and not his wife's. "Petitioner's contention that Mr. [V] was my attorney is simply untrue. She decided on Mr. [V]. She paid him the retainer. She had every opportunity to discuss the terms of the dissolution with him at any time." And: "The comment in her moving papers, that it was decided that Mr. [V] would be 'her attorney' so that the judge would not question the property settlement, never happened. There was never any discussion between Petitioner and me about whom Mr. [V] represented. She was the party that wanted the dissolution and I assumed that she took care of the details. I was never party to a discussion about 'minimizing the court's concerns, if any, over the unfairness of the Judgment.' I did not want the divorce and I never was represented by an attorney during the action."

According to Werner, Attorney V was initially contacted by Flora Linda and *she* decided that Attorney V would represent her: "After almost 30 years of marriage, in early January 2002, Petitioner and I decided that our marriage was over. Petitioner called various attorneys to handle her case, and decided to have [Attorney V] represent her. She made the appointment with Mr. [V]. She paid him a $5,000 retainer to represent her. She signed the check drawn on our joint checking account. A copy of the check is attached hereto . . . ."

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[2] Because the trial court's order may be affirmed on the ground of the trial court's power to protect itself from the fraud of one side impersonating the other, we do not need to discuss the intricacies of the irregularity.

Werner's declaration made reference to three joint meetings in the summer of 2002 which resulted in the finalization of the uncontested divorce.

First, there was an initial joint meeting: "We both attended an initial meeting with Mr. [V], which is the first time that I ever spoke with him. At the meeting, Petitioner told both of us what she wanted from the dissolution."

After that initial meeting, there was second meeting of the couple and Attorney V "prior to August 2, 2002, when the distribution was reviewed, in detail. Mr [V] pointed out, to Petitioner, his concerns over the uneven distribution of property. Petitioner stated that she understood that and went on to say she didn't want anymore."

Finally, there was another meeting in August 2002, when "both Petitioner and I [Werner] met with Mr. [V] and went over the document together. There was no disagreement over the property division or the support terms. Both parties signed the document at that meeting." (Attorney V's own signature on that document as "Attorney for Wife" is dated the day before, July 31, 2002.)

As to motivation, Werner's declaration intimated that Flora Linda was simply desperate to get out of the marriage: "The question of spousal support was discussed at our initial meeting with Mr. [V]. Petitioner was adamant that she wanted nothing more to do with me, including monthly spousal support."

In the balance of his declaration, Werner pointed to various provisions in the MSA that indicated that Flora Linda had voluntarily given up her rights.

### C. The Trial Court's Decision in Early 2005

At a short hearing in early January 2005, the trial court granted Flora Linda's settlement motion. The shortness of the record allows us to set forth verbatim everything substantive that the trial judge said. Basically, the judge made three separate sets of comments.

The first set explained his tentative decision to grant the motion: "You know, I struggled with this. We look at *Steiner and Hosseini*[[3]] and that case clearly says just because two spouses failed to exchange final declarations does not constitute a get-a-new-trial-free card. And in addition, I know that Family Code 2123 says that notwithstanding any other provision, a judgment may not be set aside simply because the support is inadequate or there is an inequitable division of assets and liabilities. But, my God, this is a 30-year marriage and for a woman who had no income to waive her spousal support and where husband received over 80 percent of the assets and she received only 20 percent after this 30-year marriage, and where it appears that one attorney represented both parties. In the marital settlement agreement, it says that this attorney represented her. Well, I don't know if that was very proper representation to give her no spousal support after 30 years and here is this lady with no income and to give her 20 percent of the assets. It just does not strike a responsive chord in my body to, on a technical basis, to deny the motion. We are a court of equity and the equitable nature of this court is that this motion should be granted to allow the parties to come into this court and have justice done. So that's my intended. It is to grant the motion."

After hearing from Werner's counsel (whose theme was Flora Linda's accountability), the trial judge responded by saying this: "Had she been represented individually by counsel, and had Mr. Deffner been represented individually by counsel, I would have seen this in a different light. I would have said, well, therefore, if she feels that she did not get what she was thinking she was going to get and based on representations made to her by her own individual attorney, then her remedy is to sue that attorney for malpractice. But in this case, we had one attorney representing both parties with some very substantial assets, over a million dollars in assets, and a 30-year marriage with a woman with no income and a husband with substantial earnings at that point. As I've said, the technical aspects, the legal bases are not that strong based just on the failures to exchange appropriate declarations, and also because of Family Code section

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[3] Referring to *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519.

2123 in terms of the division of assets doesn't always have to be equitable and support doesn't always have to be, quote, adequate.  This case just does not sit well with me on the equities and that's -- and I feel that there are some legal bases also that cry out for justice in this case and that's why I'm granting the motion."

After hearing once again from Werner's attorney (who now asserted there was insufficient evidence of dual representation), the trial court uttered its final substantive comment:  "And I agree with you that in most cases I would uphold the marital settlement agreement.  I would say that you read it, evidently, and if you didn't read it, well, that's your fault and you're held to what is contained within the four corners of that document.  But in this case, it just strikes an egregious chord in my body that I just can't sustain the agreement in terms of the equities, so that, therefore, I'm going to grant the motion."

Werner did not request a statement of decision, nor does it appear that he would have been entitled to one in any event (see Code Civ. Proc., § 632 [request must be made before submission if "trial" is less than one calendar day]).  Since no notice of entry of the formal order granting the set aside motion was served by the court clerk or Flora Linda, Werner's notice of appeal in June was timely.  (See Cal. Rules of Court, rule 2(a)(3).)

## III.  ANALYSIS

### A.  The Standard of Review

To the degree that a trial court acts to set aside a judgment based on its inherent, residual authority to protect court processes against fraud, its decision is tested on an abuse of discretion standard, and the appellate court views "all factual matters most favorably to the prevailing party."  (*Tsakos Shipping & Trading, S.A. v. Juniper Garden Townhomes, Ltd.* (1993) 12 Cal.App.4th 74, 88-89.)

The latter aspect of appropriate factual resolution is particularly important here, since there was a direct conflict in the evidence before the trial court, and the absence of a formal statement of decision means that all reasonable findings must be implied to support the trial court's ruling.  (See generally *In re Marriage of Arceneaux*

(1990) 51 Cal.3d 1130, 1134 [if no statement of decision, appellate court "will imply findings to support the judgment"].)[4] Thus, we must imply any findings, otherwise established by the evidence, that will support the trial court's decision. And we must draw all reasonable inferences from those findings.

So what do we have? First, there was this statement from Flora Linda's declaration: "My former husband hired attorney [V] to handle our uncontested divorce." The reasonable inference here is that Attorney V really was Werner's attorney, acting as a kind of double agent on Werner's behalf.

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[4] It has been established for more than 30 years, going at least as far back as *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, that family law courts adjudicating family law OSCs have not been required to take any oral testimony. (See also Hogoboom, et al. Cal. Practice Guide: Family Law (The Rutter Group 2005) ¶ 5:492, p. 5-186 (hereinafter "Rutter Family Law Guide") ["Except for OSCs re Contempt, the court generally is not required to take oral testimony or receive additional evidence, but may exercise its discretion to grant or deny relief solely on the basis of the written application, response, supporting and opposing declarations and memoranda of points and authorities" (original italics deleted)].) The "Reiflerization" of family law OSC practice creates the anomaly that if there is a factual conflict in the paperwork, on appeal the court must resolve the conflict in favor of the *winning* party -- the exact opposite of what would happen on a motion for summary judgment. But while anomalous, the dichotomy is not necessarily inconsistent. In the civil summary judgment context, conflicts in declarations must be resolved in favor of the losing party lest a litigant's constitutional right to a *jury* trial be effectively denied. By contrast, there is no constitutional right to jury trial in family law, given its English roots in what was fundamentally ecclesiastical adjudication. (See *Wuest v. Wuest* (Nev. 1882) 30 P. 886, 886 ["In England the jurisdiction of divorce cases was committed to the ecclesiastical courts."].) On top of that, as Justice King has specifically pointed out, the streamlined procedure of resolution of family law OSCs only on the paperwork expedites the crowded dockets of family courts in urban areas. (See *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1059; *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1427.)

There are, of course, some checks on the family law procedure. The court must review all timely submitted written evidence (*Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1319) and cannot rely on non-evidence, such as an attorney's unsworn statements (*County of Alameda v. Moore, supra*, 33 Cal.App.4th at p. 1427) or make an order based on informal chambers discussion of the case (*In re Marriage of Dunn-Kato* (2002) 103 Cal.App.4th 345, 348). And some areas of family law (e.g., child custody move away cases) are considered so important that they trump the need for expedition; the parties have a right to a full evidentiary hearing. (*In re Marriage of Campos* (2003) 108 Cal.App.4th 839, 843-844.) Moreover, there is an escape valve in ordinary family law OSCs that the declarations may be "supplemented as necessary by offers of proof," and even, in the trial judge's discretion, "occasionally by oral testimony." (*County of Alameda v. Moore, supra*, 33 Cal.App.4th at p. 1427.)

For our purposes, the salient fact is that despite a glaring factual conflict in the paperwork, Werner's counsel did not request an evidentiary hearing to resolve the clear conflict between the two stories. Therefore, on appeal we must accept the version of events that is most consonant with the trial court's ruling, which makes Attorney V and Werner the villains of the piece.

Then there is the statement that Werner paid Attorney V "a $5,000 retainer fee." While that statement is directly contested by Werner, who included a copy of a check signed by Flora Linda, we must resolve the conflict in Flora Linda's favor. It is not unreasonable to infer, for example, that Werner arranged for the $5,000 payment and directed Flora Linda to sign it so it would *look* like she was hiring him.

Then there is the more direct statement, "Since my husband received a disproportionate share of our assets I was advised that Mr. [V] would appear as my attorney on the paperwork so as to minimize the court's concern, if any, over the unfairness of the judgment." (Italics added.) Taken as a whole, this statement suggests that there was a scheme to have Werner's real lawyer "appear" as Flora Linda's lawyer in order to deceive the court about the lopsided judgment.

B. Family Code Section 2122

Apart from the operation of Family Code section 2122, it is relatively easy to set aside a family law judgment for mistake, obviously even easier for fraud, if the motion is brought within the six month period for set asides set forth in section 473 of the Code of Civil Procedure. (See *In re Marriage of Stevenot, supra*, 154 Cal.App.3d at pp. 1070-1071 ["The Legislature has determined that during the time frame provided by Code of Civil Procedure section 473 there is a strong public policy in favor of allowing litigants their day in court."]; accord, Fam. Code, § 2121, subd. (a) [tracking section 473 of the Code of Civil Procedure, and providing that the "court may, on any terms that may be just, relieve a spouse from a judgment" based on the "grounds" of section 473 and within the time limits of section 473].) As one might expect, a trial court's decision under section 473 or section 2121 is accorded a high level of deference. (Cf. *In re Marriage of Stevenot, supra*, 154 Cal.App.3d at p. 1073 [emphasizing trial court's relative "broader" powers to set aside judgments within the six months allowed by section 473].)

But what about, as in the case before us, motions after six months have passed? Before the passage of section 2122 in 1993, if more than six months had expired, a marital settlement agreement could be set aside only if the settlement was obtained by

extrinsic fraud, and a “strong showing of extrinsic fraud” at that. (See *In re Marriage of Stevenot, supra*, 54 Cal.App.3d at p. 1071 [“a strong showing of extrinsic fraud is required to set aside a marital settlement agreement once relief is unavailable under section 473”]; see also *In re Marriage of Heggie* (2002) 99 Cal.App. 4th 28, 32.)

However, determining what constituted extrinsic fraud proved to be particularly troublesome, as the *Stevenot* opinion itself documents. (See *In re Marriage of Stevenot, supra*, 154 Cal.App.3d at pp. 1060-1068 [tracing history of extrinsic fraud doctrine and noting difficulties both Supreme Court and appellate courts had had with it].)

Accordingly, the Legislature enacted sections 2120 through 2129. This statutory scheme was clearly intended to rationalize what it perceived as the somewhat chaotic case law in the area. (See § 2120, subdivision (d) [noting inconsistent decisions of trial and appellate courts].) The point was: Instead of fumbling around with a fuzzy common law distinction for extrinsic fraud, litigants would be confined to the orderly template set out in section 2122. (See *In re Marriage of Heggie, supra*, 99 Cal.App. 4th at p. 32 [“After the six months pass, the litigant is limited to just the grounds specified in Family Code section 2122 . . . .”].)[5]

Section 2122 reads:

“The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following:

“(a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.

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[5] To the same effect is *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 686, where the court held that a suit to set aside a marital property agreement must be based on one of the five exclusive grounds specifically set forth in section 2122. Mere inequitable distribution due to attorney negligence, for example, is not one of the grounds and therefore not sufficient. (*Rosevear, supra*, 65 Cal.App.4th at p. 686.)

"(b) Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury.

"(c) Duress. An action or motion based upon duress shall be brought within two years after the date of entry of judgment.

"(d) Mental incapacity. An action or motion based on mental incapacity shall be brought within two years after the date of entry of judgment.

"(e) As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties, mistake, either mutual or unilateral, whether mistake of law or mistake of fact. An action or motion based on mistake shall be brought within one year after the date of entry of judgment.

"(f) Failure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply." (Italics added.)

We will take it as a given that Flora Linda qua *herself* had no right to relief under section 2122 based on the fraud committed against the court by Werner and Attorney V, since she was at least somewhat aware of the fact of that fraud while it was being perpetrated (in August of 2002). (Ironically enough, we are in agreement with the dissent on this point.) However, the question still arises as to whether the order of the court might yet be affirmed if the trial court had the authority, not otherwise directly barred by statute, to set the earlier judgment aside in order to protect its own processes from fraud. As Witkin has noted, "If the decision of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the court reached its conclusion." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 340, p. 382.) If the court had the power acting for its own sake to set aside the judgment, we must still affirm. That point is all the more relevant under the facts here,

where the ruse concerning the identity of the party really being represented by Attorney V was clearly a major -- probably the major -- factor in the court's actual decision. (We have also afforded the parties the opportunity to submit supplemental briefing directly on the question to which the judgment may be affirmed based on the trial court's residual authority.)

### C. The Fraud Against the Court Itself

#### 1. *The Context of an Uncontested Divorce*

We will begin with the premise that the masquerade of Attorney V as wife's attorney, when he really wasn't, actually meant something. And that something was the successful sneaking in of a lopsided marital settlement agreement under the trial court's radar. Thus, as the paperwork would have crossed the desk of Judge Schumann in November 2002, she might otherwise have raised an eyebrow over the substance of the agreement, but would have been immediately reassured by the fact that it was Flora Linda who had counsel, not Werner. "Well," Judge Schumann might have reasoned to herself, "if the lady wants out of a 30-year marriage that badly, who am I to deny her what she wants when she has a lawyer looking out for her interests?" And the judge might further have thought, "Besides which, if her own attorney hasn't explained the property she is giving up in this settlement, she can always sue him for malpractice -- he is, after all, *her* attorney."

The scenario is not that far-fetched. Default judgments of dissolution entail an affirmative duty on the court to "require proof" from the parties "of the grounds alleged" (Fam Code § 2336, subd. (a)). Indeed, even if the parties are proceeding by affidavit the trial court may require a personal appearance by an affiant if, for example, a "proposed child support order is less than a noncustodial parent is capable of paying" or even, more generally, if a "personal appearance of a party or interested person would be in the best interests of justice." (Fam. Code § 2336, subd. (b)(3) and (b)(4).) As the Rutter Family Law Guide notes, "In practice, § 2336 affidavits are ordinarily screened by

a court commissioner for determination whether there appear to be any issues requiring proof." (Rutter Family Law Guide, *supra*, ¶ 12:47, p. 12-15.)

Thus, had the paperwork clearly told the trial court that Flora Linda was the *unrepresented* party, we may presume that the trial court would not have routinely processed the judgment, but would have inquired as to whether Flora Linda really wanted to enter into the agreement, and perhaps told her of her right to obtain counsel. Indeed, the court probably wouldn't have approved the agreement *but for* the falsehood that she had counsel; we have already quoted the recitation in the settlement agreement to the effect that Flora Linda had been advised by *her* attorney that she was entitled to more than she was receiving. That recitation is effectively worthless if the attorney wasn't really her attorney at all.

We take judicial notice of the fact that family law judges not uncommonly set a matter for actual hearing when one party did not have an attorney and a stipulation was presented that appeared grossly unfair to that party. The purpose is to ascertain whether that party understood his or her right to an attorney, including the right of that party in certain circumstances to have the attorney paid for by the other party, before proceeding. Such a procedure is consistent with Code of Civil Procedure section 128, subdivision (a)(8) which empowers the court "to amend and *control its . . . orders* so as to make them conform to law and justice." (Italics added.) We assume that Judge Schumann would likewise have ordered a hearing before she approved the judgment except for the fact that the paperwork showed (falsely) that Flora Linda already had her own attorney.

2. *The Issue of Setting Aside Judgments Procured Through A Direct Fraud on the Court*

Let us now review the dynamics of the issue of a court's power to set aside judgments procured through direct fraud against it by examining the leading case on the topic, the United States Supreme Court decision in *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944) 322 U.S. 238. The facts in *Hazel-Atlas* are quite remarkable,

culminating in a direct fraud on a federal intermediate appellate court. The ultimate Supreme Court opinion emphasized the public interest in the integrity of the administration of justice in directing that intermediate court to set aside the judgment procured via direct fraud against it.[6]

The matter began with the attempt by a manufacturer to obtain a patent on a device used in glass making. To do so, the manufacturer cooked up a scheme to deceive the patent office. It arranged to have its own attorneys and employees write an article about glass machinery for a trade journal from the point of view of a union official. The manufacturer finally found a compliant union official -- the president of a glass workers' union -- who was willing to sign the article as his. The article was subsequently published in the trade journal, which fact prompted the patent office to grant its patent application. But that wasn't the fraud on the court.

Soon the manufacturer sued the defendant company for infringing on its patent. It did not, at that point, emphasize the spurious trade journal article. But the manufacturer lost in the trial court, which concluded that no infringement had been proved. So the manufacturer appealed to the Third Circuit, and it was here that it committed a direct fraud on the court.

The manufacturer's brief on appeal directed the court's attention to the fake trade journal article, and the appellate court bought the ruse wholesale. The court's opinion quoted "copiously from the article" to show that "'labor organizations of practical workmen recognized'" the importance of the manufacturer's process. (*Hazel-Atlas, supra*, 322 U.S. at p. 241.) The effect was an opinion holding that the patent was valid, infringed, and directing judgment in favor of the manufacturer by the trial court. (*Ibid*.)

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[6] *Hazel-Atlas'* language on the federal procedural question of whether "appellate leave" was required before a district court could reopen a case that had previously been reviewed on appeal was ultimately held "unpersuasive" in *Standard Oil Co. of California v. United States* (1976) 429 U.S. 17, 18, but that is another point.

The scheme came to light about nine years later when certain expense accounts were unearthed in a separate action (an anti-trust suit). Even so, the defrauded Third Circuit refused to set aside the judgment because of, among other reasons, the proposition that the fraud had not been discovered recently enough. (*Hazel-Atlas, supra*, 322 U.S. at pp. 243-244.) The Supreme Court, however, reversed the appellate court's decision and ordered that the judgment be set aside despite the lapse of nine years.

The federal high court noted that the fraud was not just against the defendant company, but against the Third Circuit itself. (*Hazel-Atlas, supra*, 322 U.S. at p. 245 ["we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals"].) And it elaborated on the theme that interests were at stake that transcended those of the defrauded defendant. "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, *institutions in which fraud cannot complacently be tolerated consistently with the good order of society.* Surely it cannot be that *preservation of the integrity of the judicial process* must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpful victims of deception and fraud." (*Id.* at p. 246.)

We may merely, apropos *Hazel-Atlas'* comment about the need to preserve the integrity of the judicial process, that the identity theft of parties -- and surely an attorney for one side purporting to represent the other fits that bill -- is the one kind of fraud that no judicial system can tolerate. Allow *that*, and nothing is certain. It is like a high school student hacking into a school computer and changing his or her transcripts. The legitimacy of the system itself is at stake.

It is also important to note, if one closely reads *Hazel-Atlas*, that the Supreme Court did not rest its decision in a constitutional power that would, in effect, trump a directly contrary directive of the legislature's. The power that the Third Circuit had to set aside the judgment procured by direct fraud against it had its origins in equity

(see *Hazel-Atlas, supra*, 322 U.S. at pp. 244, 248), that is, judicially originated. And the contrary rule against which the power was juxtaposed was itself judicially originated, i.e., the lack of power of a federal district court to re-examine a judgment after its "term" expires. (See *id*. at p. 255 (dis. opn. of Roberts, J.); see also maj. opn. at p. 249 [remarking on the anomalousness of a rule that would preclude relief even though fraud was on the court "itself"].)

### 3. *The Preference for a Solution By Means of Statutory Construction*

Thus *Hazel-Atlas* should not read as upholding a general inherent judicial power to set aside judgments, even though procured through direct fraud against a court, as against the strong acid of a *directly contrary* statute. The court simply was saying that, under federal procedural law, one judicially derived value (the integrity of the judicial system) trumped another judicially derived value (the stability of judgments beyond the close of the "term"[7]).

On the other hand, *Hazel-Atlas* surely *does* stand for the idea that the need to protect the integrity of the judicial process itself is of paramount value absent a statute directly contrary. With that in mind, let us now study our own high court's recent exposition of the judiciary's inherent powers.

Unlike the highly unusual facts in *Hazel-Atlas*, *Le Francois v. Goel, supra,* 35 Cal.4th 1094, arose out of a fairly common place situation: The question of whether a trial court, having made an interim ruling (such as denying a motion for summary judgment), could change its mind. The question was acute because, as noted above, amendments to two California procedural statutes could be read to forbid the trial court to do so.

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[7] The reference is to the old common law rule that trial courts could not amend judgments after adjournment of the term in which they were rendered. (See *Bank of U. S. v. Moss* (1848) 47 U.S. 31, 34 ["The like general rule is settled in England. During the same term, judgments are amendable at common law, -- being then in paper, in fieri, in the breast of the court. Afterwards, they are amendable under the Statutes of Amendments or Jeofails."].)

With the enactment of those amendments, a schism had arisen in the intermediate appellate courts. The first set of cases read the statutes as not affording the trial courts any *jurisdiction* to consider a motion that violated either statute, i.e., one seeking correction of judicial error without new facts. (See *Le Francois, supra*, 35 Cal.4th at p. 1099.)

A second set of cases, however, concluded that at least to some extent the statutes themselves "violate separation of powers principles" or would do so "if interpreted to limit the trial court's power to act." (*Le Francois, supra,* 35 Cal.4th at p. 1100.) This second set of cases fell into two groups -- one saying that the statutes could validly limit a *party's power* to ask for reconsideration, but could not validly limit the *court's own power* to reconsider its ruling on its own motion (*ibid.*) while the other held that the distinction between court and party was not meaningful, and therefore the court had the inherent power to consider its prior interim orders either on its own motion or motion of a party. (*Id*. at p. 1101.)

The *Le Francois* court explicitly recognized the constitutional problem, in broad terms striking this balance between legislature's power to regulate court procedure and the judiciary's own inherent powers based on its core function of deciding cases: "Only if a legislative regulation truly defeats or *materially impairs* the courts' core functions, including, as relevant here, their ability to resolve controversies, may a court declare it invalid." (*Le Francois, supra,* 35 Cal.4th at p. 1104; cf. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 [trial judges lack power to issue local rules in conflict with statute].) That balance, combined with the traditional judicial reluctance to decide matters on constitutional, as distinct from statutory grounds (see *id*. at p. 1105), allowed the court to thread its way to a solution to the problem: The statutes were construed -- and granted, given their text, that was not hard to do -- to apply only to parties' written motions for reconsideration or make repeat summary judgment motions, *but not to limit the court's own authority*. That is, at least absent directly contrary statute, there is a residuum of inherent constitutional authority in the judiciary to correct its own interim rulings on its own motion. Because the statutes in question were susceptible of

an interpretation that did not impinge on that constitutional authority, the court found it unnecessary to consider what would happen if they did impinge on it. (See *id*. at p. 1105.) With that solution in mind, we will now return to section 2122 and surrounding statutes in the Family Code. (As to the problem of what might prompt a court to take action, we will address that in a moment.)

4. *Application of Le Francois*

As noted above, the 1993 legislation of which section 2122 is a part was intended to rationalize the "unpredictable and inconsistent" jurisprudence to which the intrinsic-extrinsic fraud distinction had given rise. (See § 2120, subd. (d).) The Legislature struck its own balance between the need for finality of family law judgments and public interest in ensuring equitable results (see § 2120, subd. (c)) essentially by extending the "time limits for a motion to set aside a judgment," (§ 2122), with actual fraud being one year from discovery by the "defrauded party."

As with the procedural statutes interpreted in *Le Francois*, there is nothing in the Family Code statutes before us here that directly addresses the ability of a court, on its own motion, to set aside a judgment where it -- the court itself -- is the "defrauded party." As far as we are aware, though, no decision has addressed the question of whether section 2122 (and specifically subdivision (a), referring to fraud) was ever intended to inhibit a trial court's inherent power to protect itself against fraud.

In supplemental briefing directed at the issue, Werner contends that the "fraud" mentioned in section 2122, subdivision (a) is fraud -- *any* fraud, in the "general sense" -- as distinct from fraud on a party. Along that line he asserts that *fraud on the court* is simply a subspecies of all fraud, which section 2122 was intended to control. The idea is that section 2122 should be construed to include the power of a court acting on its own to protect itself against fraud.[8]

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[8] Though the two best cases he adduces for that idea, *In re Olivia A.* (1986) 181 Cal.App.3d 237 and *County of Alameda v. Clifford* (1960) 187 Cal.App.2d 714 both involved situations where a public agency was not notified of proceedings which had the effect of terminating one party's duty to support another. Neither one involved a case where a party or its attorney impersonated an adversary.

We cannot agree -- the idea is not compatible with the statutory text. The statute begins by setting forth the "grounds and time limits for a motion," which right off the bat points to litigant-initiated behavior. And the first sentence of subdivision (a) refers to "Actual fraud where the defrauded party was kept in ignorance" and the second sentence refers to "the complaining party." This language indicates that the focus of the statute is the litigant, not the court. Courts are not "parties" to litigation. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1066 ["the usual, ordinary meaning of the word 'party' as used in the Code of Civil Procedure refers to the litigants in the underlying matter and does not include the individual judge"]; *Ng. v. Superior Court* (1997) 52 Cal.App.4th 1010 [trial judge had no standing to oppose a party's writ petition].[9]) We therefore conclude that, whatever constraints the statute puts on litigants, it does not (in parallel with *Le Francois*) constrain the courts, acting in their own right.

What about the alternative rationale of considering a court the "defrauded party" under the statute, since the trial court here certainly set aside the judgment within one year of *its* first discovery of the fraud perpetrated against it, and in that sense complied with section 2122, subdivision (a)? The problem is that such a solution (which would, though, be sufficient to uphold the trial court's order) is just too out of step with the statutory language. Section 2122 is about motions brought by parties, not courts acting on their own to protect the peculiar institutional interest of the judicial system.

We also construe section 2122 against the backdrop of the Code of Civil Procedure section 128, subdivision (a)(8), which recognizes that every court has the power to control its process to conform to law and justice. The two statutes can be harmonized, in the manner of the *Le Francois* analysis, by recognizing that section 2122, applying to parties, does not curtail the residual power of the court otherwise set forth in section 128.

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[9] Ironically, dicta in *Ng* arguably leaving the door open door a crack for a trial court to participate in disqualification proceedings at the appellate level (see *Ng, supra*, 52 Cal.App.4th at p. 1019) was disapproved in *Curle*, which firmly shut the door. (See *Curle, supra*, 24 Cal.4th at p. 1069.)

But now we must wrestle with the question of what exactly prompts a court to take action, to which *Le Francois* devoted considerable analysis. Does the fact that Flora Linda initiated the motion which led to the set aside necessarily require reversal?

While *Le Francois* would ultimately disapprove those appellate cases that had held the distinction between litigant-initiated action and judicially-initiated action was immaterial (*Le Francois, supra*, 35 Cal.4th at p. 1107), it did not lay down a strict rule that a court could never correct its own error precipitated by some prompting from a litigant. The *Le Francois* court noted, for example, that a party could ask the court at a status conference to correct its own error. (*Id*. at p. 1108 ["If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief. For example, nothing would prevent the losing party from asking the court at a status conference to reconsider a ruling."].)

Then again, *Le Francois* was also clear that a *party* "may not file a written *motion* to reconsider that has procedural significance if" it did not otherwise satisfy the requirements of the relevant statute. (*Le Francois, supra*, 35 Cal.4th at p. 1108, original italics.) A court presented with such an (improper) written would be under no compunction to rule upon it, and "without more" the adversary party would be under no compunction to respond to it. (*Ibid.*) Thus *Le Francois* concluded that unless the statutory requirements were "satisfied," any formal action to correct a prior interim order must begin with the court itself. Then the court should inform the parties of its concern, "solicit briefing, and hold a hearing." (*Ibid.*) Only then would a party have any duty to respond to the court's sua sponte inclination to rethink its prior ruling. Such a "procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders." (*Id*. at p. 1109.)

The question we thus face is whether the trial court here, considered as acting to protect the integrity of its own processes, could set aside the judgment even

though the initial formal precipitant of the action was a litigant (and one, we should recognize, otherwise barred from obtaining relief under section 2122[10]).

Applying *Le Francois* to the case at hand, however, requires a recognition of the differences as well as similarities in the two cases. The most striking difference, of course, is the epistemological one: In a case like *Le Francois*, where a judge by definition has made a prior interim ruling, he or she will necessarily be conscious of the fact of the prior decision, and have some inkling of any potential for error.[11] By contrast, in a case where there is a scheme to deceive the court itself by means of an attorney masquerading as the lawyer for the adverse party, by definition no court will be aware of deception until someone brings it to light, and, practicably, that someone will only be the adversely affected party. Unlike the situation in *Le Francois*, here by definition that court could not redress the fraud perpetrated against it without litigant-initiated action.

Finally, in that regard, the relative importance of the public interests involved are different than in *Le Francois*. *Le Francois* involved a fairly commonplace scenario -- whether a trial court may correct its own interim errors, which (at least in most cases, i.e., where the litigant objected at the trial level) would be in any event correctable on appeal. This case, however, involves one of the most horrendous frauds

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[10] We wholly agree with our dissenting colleague that Flora Linda herself was entitled to no relief under section 2122. Where we join issue is on the question of whether the order in this case may be affirmed based on powers conferred on the court not otherwise directly curtailed by section 2122. We need only add that today's opinion applies in the extraordinary (perhaps bizarre would be a better word) narrow circumstances where someone masquerades as an attorney for a party when he or she is the attorney for an adversarial party. That's a far cry from a "new battleground" focused on "whether the alleged fraud deceived the adversarial party or the court." (Dissent, slip opn. at p. 10.) Just to make matters clear, though, this opinion should *not* be read as countenancing any set aside based on (mere) deception of the adversarial party or the court. We note, in that regard, that our decision today would not even stretch to cover the facts of *In re Marriage of Park* (1980) 27 Cal.3d 337, where an attorney was asked to represent a party by the party's previous attorney (who had just been appointed a court commissioner) without informing that party (who was out of the country at the time). The case was an easy set-aside under the old extrinsic fraud rules, but it did not, as the case before us does, involve the kind of masquerade which cuts to the core of the systemic integrity of the entire legal system -- unlike the case before us there was no "masquerade" by an adversary, only someone filling in for another without a client's consent.

[11] And even if another judge, for example, has been assigned to the case, the prior interim ruling and relevant paperwork is at least in the court file.

on the court imaginable -- nothing less than, as noted in *Hazel-Atlas*, the very "preservation of the integrity of the judicial process." And it involves a fraud that, unlike any error in the *Le Francois* scenario, could never be corrected in any context unless a litigant brought it to the court's attention. Under these facts, the preservation of the integrity of judicial process was thus sufficient *by itself* to justify the trial court's set aside order.

To be sure, had the trial court done things exactly right, it would have explicitly engaged in a two-step process. It first would have determined whether Flora Linda's motion could be granted under section 2122. It would have found the answer to be no. (Our dissenting colleague would have had the trial court stop there.) But, secondly, the trial court would have looked strictly at whether the protection of the institutional integrity of the judicial system from the fraud of one side's attorney masquerading as the other side's attorney merited *its* setting aside the judgment based strictly on the interests of the judicial system, totally independent of the party's. And the answer to that matter, under these facts, is indisputable; it is impossible to imagine the trial court acting in any other way having determined that papers ostensibly prepared by the attorney for one party were really prepared by the attorney for other party.

Thus in regard to the proper disposition, the astounding facts in this case are distinguishable from those in *Le Francois*. *Le Francois* involved the interests of private parties concerning the proper disposition of a summary judgment motion in what appeared to be a garden-variety business dispute. Accordingly, the court could not know what would have happened if the trial court had done things exactly right: "We do not know what would have occurred if [the trial court] had done so [i.e., give the parties an opportunity to be heard after informing them "that it might change its previous ruling on its own motion"]." (*Le Francois, supra*, 35 Cal.4th at p. 1109, fn. 6.) By contrast, under the arresting facts before us, the rule on which Justice Kennard's concurring and dissenting opinion in *Le Francois* was based is applicable -- the court got the right result, even if it made a procedural error. (See *id*. at p. 1109 (conc. & dis. opn. of Kennard, J.) ["Although the trial court here erred insofar as it purported to act on a party's motion

rather than on its own motion, this procedural error does not affect the judgment's validity."].) Flora Linda was only the incidental beneficiary of trial court's action which may be justified solely on the basis of protecting the legal system itself.

IV. DISPOSITION

The order is affirmed. Respondent shall recover her costs on appeal.

SILLS, P. J.

I CONCUR:

RYLAARSDAM, J.

Aronson, J. dissenting.

May a party who knowingly participates in a fraud on the court obtain relief from the resulting judgment, despite a statutory bar to obtaining that relief? The answer should be no, particularly where that party has offered no excuse for either her participation in the fraud or neglect in waiting some 21 months to seek relief. In reaching the opposite conclusion, the majority's decision not only rewards a culpable and dilatory party, but resurrects the confusion that reigned before the Legislature's enactment of Family Code section 2120 et seq.[1] Accordingly, I dissent.

A. *Section 2122 Bars Flora Linda's Motion to Vacate the Judgment*

Before 1993, motions to set aside judgments dividing marital property and awarding support were governed by Code of Civil Procedure section 473 if brought within six months of the judgment's entry. A party moving to vacate a judgment beyond six months could obtain relief only if the judgment had been obtained through extrinsic, but not intrinsic, fraud. (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32.) Often, however, the line between extrinsic and intrinsic fraud was not clear, and "proved to be a 'repetitively troublesome issue in the family law field.'" (*Ibid.*)

In 1993, the Legislature added a chapter to the Family Code entitled "Relief From Judgment" to resolve the confusion. (§§ 2120-2129.) Key to this chapter is section 2122, which establishes the specific grounds entitling a party to relief, and the time limits in which the court may act. In adopting the Relief from Judgment chapter, the Legislature sought to balance "the public policy of assuring finality of judgments" with "the public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct." (See § 2120, subd. (c).) To achieve this

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[1] All statutory references are to the Family Code unless otherwise noted.

goal, the chapter placed strict limits on a litigant's ability to obtain relief from marital judgments.

"Section 2122 sets out the *exclusive grounds* and time limits for an action or motion to set aside a marital dissolution judgment." (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 684, italics added.) The limiting nature of section 2122 is echoed in section 2121, which provides: "In proceedings for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, *based on the grounds, and within the time limits, provided in this chapter*." (Italics added.) Similarly, section 2121, subdivision (b), stipulates: "In all proceedings under this chapter, before granting relief, *the court shall find* that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief."

The majority suggests Flora Linda's failure to demonstrate grounds for relief under section 2122 renders the statute inapplicable. But section 2122 unambiguously stipulates: "The *grounds* and time limits for a motion to set aside a judgment, or any part or parts thereof, *are governed by this section and shall be one of the following*: . . . ." (Italics added.) Consequently, Flora Linda's failure to satisfy section 2122's requirements meant the court should not have granted *any* relief.

The majority concedes Flora Linda was not entitled to seek relief under section 2122, but construes the statute to allow the court to grant relief on its own motion. The majority's construction disregards the Legislature's purpose in enacting the Relief from Judgment chapter.

Marriage is a matter of public concern, whose regulation is entrusted to the Legislature. (*In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1061.) Thus, in the arena of marriage and divorce, "[w]e construe the . . . statutes as a matter of law to

ascertain their purposes and to effectuate the intent of the Legislature. [Citations.]" (*Ibid.*)

In adopting the Relief from Judgment chapter, the Legislature sought to (1) end the "considerable confusion" concerning when courts could their equitable powers to set aside judgments, and (2) strike a balance between finality and fairness in marital dissolution judgments. (§ 2120, subds. (c) & (d).) It sought to achieve these goals by establishing the sole grounds and time limits upon which the court could grant relief from a final judgment. Granting relief in the present case frustrates these legislative goals.

As the majority notes, Flora Linda knew from the beginning the attorney appearing on her behalf did not actually represent her interests. She thus *participated* in the fraud that now gains her relief from the judgment. Ironically, had she been unaware that her attorney of record secretly represented her husband in the dissolution proceedings and first learned of the fraud the day after entry of judgment, her 21-month delay before seeking to vacate the judgment would have foreclosed relief under the one-year time period specified in section 2122, subdivision (a). But the majority provides relief for a more culpable and less diligent litigant — one who did nothing to protect her interests either at the hearing or for 21 months thereafter. This result frustrates the Legislature's purpose in adopting section 2122.

B. *Le Francois Does Not Support the Majority's Disregard of Section 2122*

To sidestep section 2122, the majority misapplies the California Supreme Court's decision in *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*) in two ways.

First, *Le Francois* dealt exclusively with a court's inherent constitutional power to correct *interim* rulings. Thus, the court avoided a potential separation of powers conflict by construing statutes dealing with reconsideration motions as affecting only the

parties' right to seek relief, and not the court's ability to issue relief sua sponte. Because the present case centers on a court's ability to grant relief from a final judgment, and not an interim order, the concerns in *Le Francois* simply are not present here. Indeed, the court in *Le Francois* expressly cautioned against engrafting its analysis to final orders, stating: "What we say about the court's ability to reconsider *interim* orders does not necessarily apply to *final* orders, which present quite different concerns." (*Le Francois, supra,* 35 Cal.4th at p. 1105, fn. 4.)

The Supreme Court recognized the difference between interim and final rulings in *People v. DeLouize* (2004) 32 Cal.4th 1223 (*DeLouize*). The court observed: "Generally speaking, courts may correct judicial error in the making of interim orders or in limine rulings until pronouncement or entry of a judgment. [Citations.] [Fn. omitted.] *On the other hand, judicial error in the making of a final order or judgment 'may not be corrected except pursuant to statutory procedures' or on the limited grounds available for a collateral attack*."[2] (*Id.* at p. 1231, italics added.) *DeLouize* explained that the importance of finality limited a trial court's ability to modify or vacate final judgments. "Orders and judgments are deemed final in the superior court, and not subject to reconsideration by that court, to preserve confidence in the integrity of judicial procedures and to avoid the delays and inefficiencies associated with repeated examination and relitigation of the same facts and issues. . . . This court has recognized that '[e]ndless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice . . . .' [Citations]." (*Id.* at p. 1232.)

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[2] In *DeLouize*, the court considered whether a trial court, after granting a new trial motion in a criminal case, could change its ruling and deny the new trial motion and reinstate the judgment even though the time for the prosecution to appeal the initial new trial ruling had expired. The court acknowledged that a trial court lacks authority to grant a new trial after it has denied a new trial motion. (*DeLouize, supra,* 32 Cal.4th at p. 1228.) Nonetheless, the court determined that an order granting a new trial motion did not preclude the court from reinstating the jury verdict, because an order granting a new trial, unlike one denying a new trial, is not a final ruling.

Second, *Le Francois* considered the Legislature's intent when construing the statutes at issue. Specifically, *Le Francois* determined that Code of Civil Procedure section 1008 prohibited parties from seeking reconsideration, but did not prevent the court from sua sponte reconsidering its own interim rulings. In reaching that conclusion, the court found the Legislature enacted section 1008 to conserve judicial resources by protecting the trial court from repetitive motions for reconsideration. (*Le Francois, supra,* 35 Cal.4th at pp. 1106-1107.) The court recognized these concerns are not germane when the trial court on its own reconsiders earlier rulings.

In contrast, nothing indicates the Legislature enacted the Relief from Judgment chapter to protect courts against repetitive motions to vacate family law judgments. Instead, the statute clearly expresses the Legislature's intent to balance finality of judgments and fairness in marital dissolution judgments, and to dispel prevailing confusion concerning the courts' exercise of their equitable powers. Obviously the Legislature's purpose in adopting section 2122 is frustrated when a court vacates a family law judgment on grounds not authorized by the statute.

C. *Code of Civil Procedure Section 128 Does Not Support the Trial Court's Order*

Eschewing a clear legislative directive, the majority bases its decision on the "residual power of the court" under Code of Civil Procedure section 128, subdivision (a)(8), which provides that courts have the power "[t]o amend and control its process and orders so as to make them conform to law and justice." This authority, however, does not stretch nearly as far as the majority suggests.

Indeed, the power to amend and control process and orders embodied in Code of Civil Procedure section 128, subdivision (a)(8) is "limited to correction of clerical errors, setting aside judgments or orders inadvertently made and not the result of an exercise of judgment, prevention of the wrongful use of process rightfully issued, and other powers inherently necessary for the court to make its judgments speak the truth and

to insure that its orders are carried out in accordance with the court's intentions. *Thus, the power to set aside a judgment for extrinsic fraud or mistake clearly could not be derived from Code of Civil Procedure section 128.*" (*Smith v. Superior Court* (1981) 115 Cal.App.3d 285, 291, italics added, citing *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 148 (*Bloniarz*).)

D. *The Legislature Validly Limited the Trial Court's Equitable Power to Set Aside a Final Judgment*

Family courts, like all courts of general jurisdiction, possess equitable powers. These powers are, however, subject to legislative limitation. Specifically, "the power to set aside judgments obtained through extrinsic fraud and mistake is within the equity jurisdiction of a court. [Citation.] *Unless limited by statute*, this power is a necessary incident of the constitutional grant of general jurisdiction." (*Bloniarz, supra,* 70 Cal.2d at p. 147, italics added.) When the Legislature enacts statutes limiting rights, "'certain cases which courts of equity once entertained can no longer arise. [The equity power of courts] was not intended as a limitation upon the power to legislate upon the rights of persons.'" (*Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 728.)

By enacting the Relief from Judgment chapter, the Legislature unmistakably curtailed the courts' equitable powers to vacate family law judgments. In section 2120, subdivision (d), it observed: "The law governing the circumstances under which a judgment can be set aside, after the time for relief under Section 473 of the Code of Civil Procedure has passed, has been the subject of considerable confusion which has led to increased litigation and unpredictable and inconsistent decisions at the trial and appellate levels."

Even if the Relief from Judgment chapter did not expressly state the Legislature's intent to curtail the court's equitable power, equity still must follow the law.

"[W]hen the law determines the rights of the respective parties, a court of equity is without power to decree relief which the law denies." (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 134.) Similarly, "[t]he court's inherent equitable power may not be exercised in a manner inconsistent with the legislative intent underlying a statute . . . ." (See *Kraus v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116, 131, fn. 14.) Thus, the trial court erred in exercising equitable power to grant relief expressly denied under section 2122.

E. *Even under Equitable Principles, the Trial Court's Order Was an Abuse of Discretion*

Even assuming the trial court retained equitable power to vacate a final judgment in a family law case, Flora Linda failed to demonstrate any basis for equitable relief.

Before enactment of the Relief from Judgment chapter, the Supreme Court set the following guidelines for a court's exercise of equitable power: "After the time for ordinary direct attack has passed [citation], a party may obtain relief from an erroneous judgment by establishing that it was entered through extrinsic fraud or mistake. [Citations.] To warrant relief on this ground, the moving party must establish: (1) facts constituting extrinsic fraud or mistake; (2) a substantial defense on the merits; and (3) *diligence in seeking relief from the adverse judgment*." (*In re Marriage of Damico* (1994) 7 Cal.4th 673, 688, italics added.) The Supreme Court applied the diligence requirement even in situations when it determined the trial court itself had been defrauded.

*In re Marriage of Park* (1980) 27 Cal.3d 337 (*Park*) is instructive. There, the wife had been arrested and involuntarily deported to Korea while dissolution proceedings were pending. The wife's attorney requested another attorney to represent her at the dissolution hearing. The wife never agreed to representation by the new

attorney, and the new attorney never spoke to the wife. At the hearing, the new lawyer did not ask for a continuance, challenge the husband's testimony, or present any evidence on the wife's behalf. (*Id.* at p. 341.) The husband knew his wife had been deported but did not inform the court. The wife first learned of the judgment when she returned to the United States over three years later. She promptly moved to set aside the judgment, but the trial court denied her motion.

The Supreme Court reversed, finding the husband's failure to inform the court of his wife's predicament not only defrauded the wife, but "perpetrated a fraud upon the court . . . ." (*Park, supra,* 27 Cal.3d at p. 343.) The court's determination that the divorce court had been defrauded, however, did not end its analysis. After recognizing the wife did not receive a fair hearing, the court observed: "However, a motion to vacate a judgment should not be granted where it is shown that the party requesting equitable relief has been guilty of inexcusable neglect or that laches should attach." (*Id.* at p. 345.) On this point, the court noted the wife's diligence in seeking relief: "The speed with which Mrs. Park moved to vacate the judgment of dissolution once she learned of its entry also shows diligence. Less than a month after she learned for the first time that a judgment of dissolution had been entered against her, she employed an attorney to file a motion to vacate the judgment. Despite her problems with the language and culture, Mrs. Park attempted to challenge the court's action in her absence. This can scarcely be denominated inexcusable neglect." (*Id.* at p. 346.)

In contrast, Flora Linda has provided no evidence of diligence in either protecting her rights or pursuing relief. At the time of the judgment, Flora Linda apparently knew Attorney V did not represent her interests, but failed to seek independent legal counsel until some 21 months later. She claims she was unaware of certain irregularities in some of the legal documents provided to her in November 2002, and did not discover this until her new attorney reviewed them in August 2004. But she offers no excuse why she failed to protect her interests at the outset. Indeed, she executed a

property settlement agreement which declares on the page where her signature appears: "Wife acknowledges and understands that Husband is receiving a far greater share of the estate by this Agreement and Wife has been advised that if she is not content with her representation by [Attorney V] that she has the opportunity to seek alternate independent counsel to advise her as to the equitableness of this Agreement. However, Wife has agreed to waive independent representation and wishes to ratify each and every aspect of this Agreement *despite the Agreement's lack of equality in distribution of the community property of the estate*." (Italics added.)

Flora Linda states in her declaration she is an unsophisticated homemaker. This is true of many family law litigants and does not justify her lack of diligence. Thus, even if we were to completely disregard section 2122 — as the majority does — Flora Linda still was not entitled to relief under previously existing equitable principles.

F. *The Trial Court's Order Is Not Justified by a "Fraud on the Court" Theory*

The majority bases its decision in part on *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944) 322 U.S. 238 (*Hazel-Atlas*), a decision involving what the majority terms "highly unusual facts." Although *Hazel-Atlas* did authorize a federal district court to set aside a judgment obtained by a fraud perpetrated on the court, the case is inapposite for several reasons.

In *Hazel-Atlas,* the court balanced equitable principles against a "court-made rule . . . that judgments should not be disturbed after the term of their entry has expired." (*Hazel-Atlas, supra,* 322 U.S. at p. 248.) The Supreme Court merely exercised its supervisory powers to overturn a court-created rule of procedure. Nothing in *Hazel-Atlas* authorized a court to exercise equitable principles to disregard a *statute* expressly designed to limit a court's equitable powers to grant relief from judgment. Moreover, *Hazel-Atlas* is a federal case dealing with patents. Marriage and divorce are state law issues, governed by the Legislature and our own Supreme Court.

In an effort to bring the present case outside of unambiguous statutes and established judicial precedent, the majority relies on hyperbole, asserting the present case "involves one of the most horrendous frauds on the court imaginable," and implicates "the very 'preservation of the integrity of the judicial process.'" (Maj. Opn. *ante*, at p. 23.) In truth, the fraud at issue here is far less "horrendous" than in Park, where the court was defrauded both by a stranger masquerading as the wife's attorney, and by the husband's concealment of his wife's deportation.

The dignity of the court is not enhanced by granting relief otherwise barred by statute to a complicit and dilatory party. Indeed, the majority's opinion undermines the principle of finality and the public's confidence in the integrity of established judicial procedures.

G. *Conclusion*

In enacting the Relief From Judgment chapter, the Legislature recognized that motions to set aside family law judgments had "been the subject of considerable confusion which has led to increased litigation and unpredictable and inconsistent decisions at the trial and appellate levels." (§ 2120, subd. (d).) The majority's decision resurrects this confusion. Instead of wrangling over intrinsic versus extrinsic fraud, the new battleground will focus on whether the alleged fraud deceived the adversarial party or the court. The result will inevitably be "increased litigation and unpredictable and inconsistent decisions at the trial and appellate levels."

The majority concludes its analysis by declaring: "Flora Linda was only

the incidental beneficiary of the trial court's action . . . ." Because the majority opinion undermines legislative authority and confidence in the integrity of judicial procedures, I must conclude that *the only* beneficiary of the majority's decision is Flora Linda.

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ARONSON, J.