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REPLY TO:

Stephen D. Hamilton
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January 8, 2019

Hon. Presiding Justice Frances Rothschild
Hon. Associate Justice Helen I. Bendix
Hon. Associate Justice Victoria Gerrard Chaney
Court of Appeal of the State of California,
Second Appellate District, Division One
[via electronic filing and service]

RE: *Pont v. Pont*, B284064, filed 12/20/18

Dear Justice Rothschild & Associate Justices:

The Association of Certified Family Law Specialists (ACFLS) requests publication of this Court's opinion in *Pont v. Pont*. This request is made pursuant to Cal. Rules of Court, rules 8.1105.

DISCUSSION

Many marital settlement agreements and stipulated judgments in family law matters include a provision the prevailing party is entitled to recover fees in the event a party is required to seek court intervention to enforce the terms of the agreement or judgment. That was the factual circumstance presented in *Pont v. Pont*.

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In *Pont v. Pont*, the Appellant sought to avoid that provision by taking action outside the marital case. She instead pursued a separate civil action for fraud. This is a practice that has become increasingly common and has been identified as a problem by experienced family law counsel. The decision in *Pont v. Pont* itself notes at pp. 19-20 this was an improper attempt to circumvent the jurisdiction and authority of the family court.

Were it not for the application of the prevailing party language from the stipulated judgment, there would have been de minimis consequences to the Appellant for attempting to improperly litigate a marital dispute as a tort action. In the absence of the contractual provisions contained in the stipulated judgment, Respondent would only have been entitled to recover his costs.

That is the result of Cal. Civ. Code §1021 and its adoption of the so-called “American Rule” under which attorney fees can only be recovered by the successful party from the opposing party by contract or by statute. As set forth in *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1:

California follows the American rule, under which each party to a lawsuit ordinarily must pay his or her own attorney fees incurred in that lawsuit. (*Trope v. Katz* (1995) 11 Cal.4th 274, 278, 45 Cal.Rptr.2d 241, 902 P.2d 259; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504, 198 Cal.Rptr. 551, 674 P.2d 253.) Code of Civil Procedure section 1021 codifies this rule, providing that the measure and mode of attorney compensation are left to the agreement of the parties “[e]xcept as attorney’s fees are specifically provided for by statute.”

Attorney’s fees are not recoverable by statute for a fraud cause of action. Further, fees have been expressly denied in cases even where the fraud occurs in the context of a contractual transaction. See, e.g., *Cussler v. Crusader Entertainment, LLC* (2012) 212 Cal. App. 4th 356, 366, and *Loube v. Loube* (1998) 64 Cal. App. 4th 421, 430.

Pont v. Pont implicitly makes an important distinction between a family law contract and a non-marital contract. With the former, attorney fees are recoverable. In the latter, under the authority cited above, fees are not recoverable.

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Pont v. Pont also clarifies and explains the phrase “in connection therewith” in the context of a prevailing party clause. By expressly holding such a clause applies to litigation outside the family law matter, *Pont v. Pont* provides an important bridge between the civil and family court.

It is the opinion of ACFLS that *Pont v. Pont* therefore meets the standards for publication because it:

- Applies an existing rule of law to a set of facts which has not been addressed in previously published opinions [Rule 8.1105(c)(2)];
- Explains an existing rule of law [Rule 8.1105(c)(3)] regarding the interpretation of a contract clause,
- Advances a new interpretation and construction of existing case law [Rule 8.1105(c)(4)].

Pont v. Pont should be published because it explains how a prevailing party clause should be interpreted and applied when a party seeks to effectuate an end-run around the family court. I note in this regard I have not been able to locate a single published decision that makes that same express finding.

CONCLUSION

For the reasons set forth above, ACFLS believes the opinion in *Pont v. Pont* should be published. It is our collective belief and expectation that publication will discourage excessive and unnecessary litigation, as well as attempts to circumvent the jurisdiction of the family court.

ACFLS is a nonprofit, statewide bar association with approximately 724 members certified by the State Bar of California, Board of Legal Specialization as family law specialists. Since its founding at the inception of the certification of family law specialists by the State Bar, ACFLS has played an active public policy role when the Appellate Courts, Legislature and Judicial Council consider matters of significance to family courts, family court populations or the family law bar. ACFLS has appeared as amicus in many family law appellate cases, including cases where the organization's participation was invited by the appellate court.

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ACFLS has an active, all-volunteer amicus committee that reviews cases and makes recommendations to the Executive Committee and Board of Directors regarding letters in support of publication or de-publication of opinions, letters supporting or opposing

California Supreme Court review, and amicus curiae briefs. ACFLS has appeared as amicus curiae in approximately 16 intermediate court of appeal and California Supreme Court cases. Lawyers and family court judges throughout California bring cases to the committee for consideration. The amicus committee includes all three lawyers in the state who are dual certified as family law and appellate law specialists, as well as one of the state's foremost family law continuing education lecturers (Garrett C. Dailey) and the co-author of a major family law treatise (Dawn Gray).

The ACFLS Board of Directors and Amicus Committee members involved in this request have no direct ties to or interest in the litigants or their attorneys in this matter. Our Committee Co-Chair, E. Stephen Temko, represented the Respondent in *Pont v. Pont* and was excluded from all discussions regarding this request and the preparation of this letter.

Respectfully Submitted,

Stephen D. Hamilton

Stephen D. Hamilton

Certified Specialist in Family Law

State Bar of California, Board of Legal Specialization

cc: Diane Fetzer, ACFLS Chair
ACFLS Board of Directors

SERVICE LIST (VIA TRUE FILING)

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