THE PERILS OF CREATIVE SOLUTIONS IN DIVORCE MEDIATION

By Franklin R. Garfield

Prospective clients sometimes tell mediators they are interested in creative solutions to their problems. In its most benign form, this statement may be no more than an acknowledgment that the options for resolving the parties' situation are not obvious to them; hence the need for professional assistance. However, it is sometimes the case that the parties have a creative solution to their problems in mind and need that solution to be documented – either in the form of a postnuptial agreement or a stipulated judgment of dissolution of marriage.

A recent case illustrates why mediators must explore the parties' motivations instead of just helping them to accomplish their shared goal.

In *Aghaian v. Minassian,* _____ *DJAR* _____ (December 31, 2020), plaintiffs sued Shahen Minassian for $105,000,000 in damages resulting from actions he took pertaining to trust properties located in Iran starting in 1996. The trial took place in September, 2017. In November, 2018, the court issued its final statement of decision awarding plaintiffs $34,506,989.

At the time of the action, Shahen and his wife Alice owned two houses in Sherman Oaks as "husband and wife as joint tenants." Prior to trial, Shahen and Alice transferred title to the two houses to Alice alone. Alice also filed a petition for the dissolution of her marriage on September 26, 2016.

According to the dissolution petition, Shahen and Alice separated on April 1, 1991 – a date preceding the events that gave rise to the action against Shahen. Notwithstanding the dissolution proceeding and purported separation, Shahen and Alice continued to live together and hold themselves out as husband and wife. In June, 2017, Arthur, who had been appointed Shahen's *guardian ad litem,* and Alice stipulated to a division of property in the dissolution case that allocated the two houses to Alice. Shahen assumed the entire obligation to pay any judgment against him. Arthur executed quitclaim deeds conveying Shahen's interest in the two houses to Alice. Alice sold the one in which the parties did not live and used net proceeds of at least $500,000 to purchase a condominium for Arthur.

In a separate action, plaintiffs sued Shahen and Alice alleging that the transfers were fraudulent; the plaintiffs also sued Arthur for aiding and abetting his parents. According to the plaintiffs, Arthur concocted the entire scheme to hinder, delay or defraud Shahen's creditors (the plaintiffs in particular) by transmuting community property into Alice's separate property. Arthur devised the divorce strategy and came up with the 1991 date of separation to justify an argument that plaintiff's judgement against Shahen was his separate property debt.

After demurrers were sustained to two of the four causes of action, plaintiffs dismissed the remaining causes of action without prejudice; the court entered a judgment of dismissal; and

plaintiffs appealed.

The Uniform Voidable Transfer Act provides that a transfer of property by a debtor is voidable if the debtor made the transfer "[w]ith actual intent to hinder, delay or defraud a creditor of the debtor." *Calif. Civ. Code* section 3439.04(a)(1). The act applies to property transfers made pursuant to a marital settlement agreement incorporated into a judgment of dissolution. *Mejia v. Reed*, 31 Cal.4th 657, 668 (2003). The debtor's intent is a question of fact. Among other so-called "badges of fraud" indicating such intent, the fact finder may consider whether (1) the debtor made the transfer to an insider; (2) the debtor retained possession or control of the property after the transfer; (3) the debtor had been sued before making the transfer; (4) the debtor removed or concealed assets; (5) the value of consideration received by the debtor; and (6) the transfer occurred shortly before or short after a substantial debt was incurred.

The Court of Appeal concluded that the plaintiffs had alleged the existence of several badges of fraud, that the complaint stated valid causes of action, and that on remand the demurrers should be overruled. The court also noted that Shahen and Alice never separated and continued to live together in the house they purchased in 2004.

The court rejected Arthur's claim that the cause of action against him was barred because he had immunity for actions he took as Shahen's guardian *ad litem*. On the one hand, a guardian *ad litem* has immunity from liability for "acts within the scope of the guardian's authority." *McClintock v. West*, 219 Cal.App 4th 540, 552 (2013). On the other hand, appointment as a guardian *ad litem* is not a "get-out-of-jail-free card" that provides blanket quasi-judicial immunity. Arthur was deemed culpable because he concocted the entire scheme to defraud, orchestrated a sham divorce proceeding, and signed the quitclaim deeds outside the scope of authority he had as Shahen's guardian *ad litem*.

The court's disposition of the cause of action against Arthur for aiding and abetting the fraud by Shahen and Alice is a cautionary tale for divorce mediators.

Divorce mediators also enjoy quasi-judicial immunity. *Howard v. Drapkin*, 222 Cal.App.3d 843 (1990). There are no reported cases in California in which a divorce mediator has successfully been sued for professional negligence. However, there is a fine line between facilitating an agreement between the parties and aiding and abetting a scheme to defraud creditors.

In addition to the badges of fraud identified by the Court of Appeal, divorce mediators should pay attention to warning signs that the parties may have an extralegal agenda that goes beyond dissolving their marriage and dividing their property. Those warning signs include:

A date of separation that seems inconsistent with the facts. In this instance, for example, why would parties who purchased a residence as husband and wife in 2004 and lived in that residence continuously for a period of more than ten years claim to have been separated in 1991?

Another warning sign: Why would the parties divide their assets so that one party received all of the liabilities along with assets that were out of the reach of a judgment creditor? In this

instance, Shahen received assets purportedly worth millions of dollars that were located in foreign countries. In the typical case, it is more likely that one party would receive all of the liabilities and retirement assets that were exempt from levy. Either way, the effect of the division is to hinder community creditors.

The single most important warning sign that a creative solution may be enabling the parties to commit fraud is the existence of a significant community liability that the parties are attempting to avoid.

Mediators are understandably proud of their neutrality, but there are limits – both legal and ethical. As an ethicist recently put it in another context: "As a general rule, if someone enlists your assistance in doing something of which you rightly disapprove, you're complicit to some degree in what they are doing."

The problem with creative solutions in general is that no one knows how they will turn out. There may be unanticipated problems, or one of the parties may simply have a case of buyer's remorse. When a mediated agreement affects the rights of third parties, the situation becomes more complicated. Divorce mediators should not run the risk that their role in facilitating an agreement between the parties may be characterized as aiding and abetting a scheme to defraud creditors.

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