Aug. 2, 2022

What's the Deal?

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Here's a classic appellate recipe: Add one vexatious litigant (acting in propria persona, of course) to a bitter family law dispute (divorce, of course); litigate for 17 years, mixing in 12 appeals and 7 writ petitions (all unsuccessful for the pro per appellant/petitioner, of course); blend in a voluminous record; and stir up a sprinkling of conspiracy theories (balance with sanctions). What you get is the published opinion of the June 2022 iteration in the long-running legal feast of In re Marriage of Deal (A164185, June 21, 2022).

But now you're thinking, "Why serve leftovers? We've had this dish before, too many times!" Time and again we've seen how family law litigation, especially divorce cases, brings out the worst in some people (particularly lawyers, who can't resist acting as their own counsel – or can't find a lawyer who would pursue the litigation the way they'd like to see it done).

And it's cliché to point out how pro pers on vendettas appeal everything (and pursue multiple writs) and can be declared vexatious litigants after repeated defeats. And it's trite to note how such litigants often cross the tone line, filing papers that are not merely ineffective or incomprehensible, but offensive. Here, for instance, the court notes that Mr. Deal's "briefs contained 'menacing' and 'odious' language making 'implicit threats against various members of the California judiciary and State Bar.'" And yes, there're the inevitable technical violations of the Rules of Court. Oh, and don't forget the massive appellate record (here, 15 volumes).

The outrageous history of the Deal litigation prompted the latest trial judge to wax sufficiently poetic that the Court of Appeal quoted his order extensively. In particular: "The trial court concluded with a poignant observation that Thomas [Deal] was one of many "who have gone away unhappy with the results of their divorce. Most do not allow their emotions to consume them. It is unfortunate that instead of using his skills in a productive manner, he has dedicated himself to the Sisyphean task of endlessly pursuing the impossible. [Thomas's] emotions have blinded him to the reality that our legal system has limits. Right or wrong, all issues in this divorce have been decided. The war is over. [Thomas] stands alone on the silent battleground rattling his saber. All other adversaries and observers have gone home. Whatever battles were to be fought have been fought. The little children who were the subject of custody orders are now grown adults. There is no more property or debts to divide, no more support to be ordered. The time for appealing to a higher court has expired. [Thomas] would do well

to focus his remaining energies on escaping his self-imposed poverty and using his abilities to become self-supporting."" Heady stuff!

And yet, despite the eloquent trial court order, haven't we seen this show too many times already? Surely this Exceptionally Appealing column would not devote attention to such a prosaic case. Where's the beef (i.e., meaty appellate issue)? What's the deal with Deal?

Well, the appellate set-up is as you'd imagine: After Mr. Deal asked the trial court for permission to pursue more litigation, and the court wrote, "That is not going to happen," Deal filed a writ petition (which was summarily denied, natch) and then an appeal. The Court of Appeal notified him that it was considering dismissing the appeal as frivolous, and gave him the opportunity to file written opposition and to address the issue of sanctions (obvi!) at oral argument. Deal responded to the sanctions notice in writing but waived oral argument (finally a smart move?).

The Court of Appeal's published opinion's discussion starts off with the fundamental law on vexatious litigants. See Code of Civil Procedure section 391 et seq. if you're not familiar with this already. (Basically, what you need to know is that once declared vexatious, a litigant must operate under a "prefiling order," meaning that he needs to get pre-approval from the court before filing anything.) What you're expecting next is an analysis of why the appeal is frivolous and then some fun with sanctions, right? That expected analysis and outcome appear, but come in Part II of the discussion.

Skipping ahead to Part II for the nonce (don't worry, we will return to Part I), it contains "the usual": Part II explains why Deal's appeal "fails to present an intelligible argument" and wrongfully seeks to challenge orders that have already been decided in prior appeals. And, true to form, Deal's briefing "levels ad hominem attacks" on his ex-wife and "baselessly accuses numerous bench officers who have presided over the litigation of corruption and 'criminal behavior.'" The MCLE-worthy ethics component of the decision is worth quoting:

""Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court." (In re S.C. (2006) 138 Cal.App.4th 396, 422; Malek [Media Group, LLC v. AXQG Corp. (2020) 58 Cal.App.5th 817], 837 [appellate court is not a forum for ranting about conspiracy theories]; Pierotti v. Torian (2000) 81 Cal.App.4th 17, 32 & fn. 9 [appeal deemed frivolous based in part on defendant's "attempt to

assassinate [plaintiff's] character based on facts that find no support in the record"].) We previously warned Thomas that further abuse of our process would result in an order of sanctions against him. (Deal, supra, 45 Cal.App.5th [619] at p. 617.) Thomas did not heed our warning; his latest appeal "has only served as a drain on the judicial system and the taxpayers of this state." (Malek, at p. 837.)"

No monetary sanctions are imposed, however. Instead, the Court simply asserts: "In this egregious case, dismissal is the appropriate sanction to deter Thomas from filing further frivolous appeals." Q.E.D.

Had the opinion simply contained the analysis of Part II, it would've been a momentary fun read, but ultimately a yawner. After all, dismissals of frivolous appeals by vexatious litigants are a dime a dozen. Right result; seen it all before. Keep fishing for something of interest.

Thus, had the opinion been only a dismissal of a frivolous appeal, it wouldn't merit publication.

And yet, that's not where this went. Part I of the opinion abruptly turns from the "statutory background" on vexatious litigants to whether the order at issue is appealable. Appealable judgments and orders are sprinkled throughout California's statutes, but the mother lode is Code of Civil Procedure section 904.1, which lists most of what's appealable. And guess what? As the opinion states: "An order denying a vexatious litigant's request to file new litigation is not among the appealable orders listed in section 904.1." The opinion goes on: "And there is no final judgment as no new litigation was allowed or filed." It is this appealability analysis that probably accounts for the opinion's publication, and why it attracted interest among appellate and civil procedure buffs.

Part I further dispatches Deal's arguments for appealability. The Court of Appeal rejects Deal's argument that the order is "an order made after a final judgment under section 904.1 [subdivision (a)(2)]." Nor is the order an injunction, which would be appealable under section 904.1(a)(6). To be sure, the law is clear that a vexatious litigant prefiling order is injunctive and therefore appealable. That's law set forth in an earlier Deal case, Deal, 45 Cal.App.5th 613, 619 (2020). But the order at issue here is not from the prefiling order. No, this time Deal is appealing "an order denying his request for permission to file new litigation, a request he was required to make

because he is a vexatious litigant subject to a prefiling order." The court rejects appealability of such an order because otherwise every such denial would be appealable.

Thus, the court dismisses Deal's appeal not just because it was "[w]ithout a doubt" frivolous, but also because he had no right to appeal at all. On his California Appellate Report blog entry for June 21, 2022, USD Law School Professor Shaun Martin – never one to hold back – wrote that "Part I of the opinion seems affirmatively pernicious (and wrong)." His pithy reaction to the non-appealability ruling is "Wait. What?"

His more detailed analysis is to point out that the order "practically disposes" of Deal's case, and so thus should be seen as a final (and appealable) judgment. As he puts it, "We don't generally let a single judge decide things once and for all without any right to review whatsoever." In his view, discretionary decisions that prevent litigation should not be "immune from review."

This split of authority – so to speak – between Deal and Prof. Martin is not an issue for trial judges, who needn't worry about appealability. But the issue very well could arise in a future appeal. At that point, the appellate court would have the freedom to agree with Deal or to instead adopt the reasoning set forth in the professor's blog post. Seeing that play out could be exceptionally appealing.