

*Pont v. Pont*

Reading this case too literally can be a mistake. The Appellate Court approved a prevailing party attorney fee provision in a Judgment of Dissolution, holding the language was broad enough to cover fees incurred in defeating a separate civil action instituted by the ex-wife against husband in a different county. The separate civil suit was defeated by the sustaining of a demurrer and resulted in a clear and determinative result.

Recent case law and commentary, however, have warned of the danger of providing for a prevailing party standard in family law agreements and Judgments. Too often, it is less than clear how to determine whether or not there is a prevailing party in a family law dispute. For example, in *Karton v. Dougherty* (2014) 231 Cal.App.4th 600 (2014), in a dispute between a client and an attorney to interpret and enforce a prevailing party attorney's fee clause in a retainer agreement, the Court observed that it is well-established that the prevailing party for purposes of a contractual attorney's fee award under Civil Code section 1717 is not necessarily the prevailing party for purposes of a costs award under Code of Civil Procedure section 1032, and the two are to be analyzed separately. On the attorney fee issue, the controlling statute is Code of Civil Procedure section 1717, and the controlling case is *Hsu v. Abbara* (1995) 9 Cal.4th 863, which held that when a contract contains a provision granting either party the right to recover attorney's fees in the event of litigation on the contract, Civil Code section 1717 gives the "party prevailing on the contract" a right to recover attorney's fees. But it is often less than clear who is the prevailing party. In that instance, "[T]he trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by their pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abbara, supra*, 9 Cal.4th 863 at 876; *Marina Pacific Homeowners Association v. Southern California Financial Corporation* (2018) 20 Cal.App.5th 191.) For purposes of an award of costs, "prevailing party" is defined in Code of Civil Procedure section 1032(a)(4). Section 1033.5(a)(10)(A) authorizes attorney's fees as costs if authorized by contract. In *Karton v. Dougherty*, the Court of Appeal reversed the trial court's determination that the attorney was the prevailing party for purposes of both an award of attorney's fees and an award of costs, thus signaling that determination of the prevailing party is anything but clear.

Because disputes in family law cases are nuanced and do not always (hardly ever) lead to a clear-cut determination or victory, it is legitimate to ask whether a prevailing party attorney's fee clause is advisable. In considering drafting of these clauses, does a prevailing party provision supersede a need-based analysis and award under Family Code section 2030? (See discussion of this issue in *In re Marriage of Guilardi* (2011) 200 Cal.App.4th 770). What is the interplay between a general release clause and a prevailing party attorney fee provision in the same document? What is the relationship between a prevailing party fee provisions and sanctions under Family Code section 271 or a separate RFO under Code of Civil Procedure section 128.7?

Suffice it to say that attorney's fee provisions should not be viewed as boilerplate. They should be given careful consideration in the context of a given situation. Use of a prevailing party provision should not be used automatically, and not upon a narrow reading of the opinion in the *Pont* case.

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