

[Breach of Fiduciary Duty by Spouse Results in Fee Award](#)

February 10, 2011 by [David J. McMahon](#)

The [Second District California Court of Appeal](#) reversed the ruling of the trial court concerning a fee award in a case captioned, [In re Marriage of Fossum](#), 2011 DJDAR 1692 (2011).

In 1994, Edward and Sandra Fossum were married, but agreed to a separation in 2002. Divorce proceedings commenced in early 2003. Prior to their separation, Sandra misappropriated \$24,000 in community property assets and deposited it in her personal bank account. She did not disclose that fact to her former husband.

Based on the surreptitious cash advance taken by Sandra, the trial court found that she violated her statutory fiduciary duties set forth in [Family Code Section 721](#). However, the court ruled her violation did not rise to the level of an award of attorney fees as sanctions. She was ordered to reimburse half the sums which had been misappropriated. The court denied the separate request for attorney fees.

The Court of Appeal reversed. The court noted that spouses owe fiduciary duties to one other, particularly as to community property. Pursuant to Section 721, the statute sets forth mandatory remedies where a spouse breaches their fiduciary duty to the other spouse. The statute requires reimbursement of 50 percent of any undisclosed assets plus attorney fees and costs.

The court specifically concluded that Sandra breached her fiduciary duty to Edward by taking the money. The Court of Appeal concluded that the trial court lacked discretion to deny Edward attorney fees because the statute mandated that the aggrieved spouse be reimbursed the funds plus attorney fees and costs. This was evidenced by the statute's use of the word "shall," connoting mandatory action. For these reasons, the court ruled that the trial judge lacked discretion to deny Edward's fee request.