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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of SCOTT and JENNY  
SMITH.

B232161  
(Los Angeles County  
Super. Ct. No. VD042772)

SCOTT SMITH,

Appellant,

v.

JENNY SMITH,

Respondent.

APPEAL from orders of the Superior Court of Los Angeles County, Robert B. Axel, Commissioner. Affirmed.

Law Offices of Rebekah Ryan Main and Rebekah Ryan Main for Appellant.

Law Offices of Majorie G. Fuller, Marjorie G. Fuller, Lisa R. McCall; Law Offices of Roy A. Hoff and Kathleen A. Tomeo for Respondent.

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In this marital dissolution case, Scott Smith appeals from (1) the trial court's order for him to pay \$9,000 in attorney fees to respondent Jenny Smith,<sup>1</sup> (2) the court's order denying his motion for reconsideration, and (3) its order for sanctions in the amount of \$1,000 against Jenny. Scott also requests that we disqualify the trial judge for judicial bias. We affirm the court's orders and decline to disqualify the trial judge.

## **FACTS AND PROCEDURAL HISTORY**

### ***1. Jenny's Request for Attorney Fees***

Scott and Jenny separated in 1999. They had one child born in 1985. Their marriage was dissolved on March 11, 2003, by a dissolution judgment. The judgment required Scott to pay Jenny \$1,475 a month in spousal support. On July 20, 2010, Scott filed a motion for modification of spousal support. On October 5, 2010, Jenny sought her attorney fees for opposing the modification of spousal support by way of an order to show cause (OSC).

In support of his motion for modification of spousal support, Scott filed an income and expense declaration. He had been employed in sales by the same company since 2000. He stated that his average monthly income was \$10,708, a little over half of which came from commissions, though the month before he filed his income and expense declaration (June 2010), he had earned \$6,250 in wages and \$13,242 in commissions, totaling \$19,492 for the month. He paid \$9,756 in monthly expenses. He stated that he also had assets of \$15,000 in cash, checking, or other deposit accounts, and \$7,500 in personal property.

Jenny's OSC for attorney fees was supported by a declaration stating that she was seeking fees incurred since October 2006, when Scott had filed an OSC to terminate spousal support. She averred that, by October 2008, the matter had been continued at

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<sup>1</sup> Hereafter, we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 476, fn. 1.)

least 10 times, and the parties had conducted discovery and depositions. Jenny asserted that Scott's counsel then informed her that Scott was suffering from terminal cancer and had approximately 12 to 18 months to live. She stated that they agreed to let the matter go off calendar, and Scott would reimburse her for the attorney fees she had incurred to that point -- \$4,500, which he never paid. She was seeking those fees in the amount of \$4,500, plus the additional fees she had incurred in defending the present motion for modification of spousal support.

Her OSC was also supported by an income and expense declaration. The declaration stated that she had been employed as a courier transporting samples for a laboratory since 2006, and her average monthly income from employment was \$407. Tax documentation filed with her declaration showed, however, that her gross income in 2009 was approximately \$15,702, which amounted to approximately \$1,308 per month. Her declaration further stated that she had \$1,475 a month in spousal support and earned \$56 a month in dividends/interest. Additionally, she had \$220,000 in cash or deposit accounts that was an inheritance she had received recently when her mother passed away. She had real property worth an "unknown" amount. The real property was formerly the family home, and she had paid Scott for his one-half community property share in the residence at the time of dissolution. The declaration estimated her monthly expenses as \$2,800. She had paid her attorney \$5,000 according to the declaration, and the source of this money was her inheritance. Her attorney's billing rate was \$350 per hour. She left blank the space on the declaration form that asked for the amount still owed to her attorney.

Scott filed a responsive declaration to Jenny's OSC for attorney fees wherein he declared, among other things, that he never made any agreement with Jenny regarding attorney fees. He also filed an objection and motion to strike a portion of Jenny's declaration in support of her fee request, arguing that Jenny's statements about his alleged agreement to pay her fees were hearsay.

The trial court heard both Scott's motion and Jenny's OSC on December 1, 2010. At the hearing, Scott's counsel relied on an asset and debt schedule for Jenny that Scott

had received in response to discovery requests, but which was not filed and does not appear in the record. According to counsel, the schedule showed Jenny's real property was worth \$350,000 and had an encumbrance of \$130,000. Scott's counsel stated that she had also very recently received documents in response to a subpoena she had issued to a credit union where Jenny held an account. The subpoenaed documents showed an account balance of approximately \$366,465, according to counsel. Jenny stated at the hearing that she had approximately \$320,000 in liquid assets or cash. The court stated that Jenny should be obligated to earn at least four percent interest on that amount per year, and that amount should be added to her income.<sup>2</sup>

The court denied Scott's motion for modification of spousal support, stating that there had been no change in circumstances. Scott did not appeal the order denying his motion to modify spousal support.

The court briefly addressed Jenny's OSC for attorney fees at the end of the hearing. Earlier in the hearing, the court had stricken the portion of Jenny's declaration regarding the alleged agreement for Scott to pay \$4,500 of her attorney fees. Still, Jenny's counsel stated as follows at the hearing:

"We'd like \$9,000, and it is my offer of proof that my client would testify that the petitioner represented perhaps not directly to her but, et cetera, that she was certainly under the impression that he was dying of terminal cancer after putting an O.S.C. on the court's calendar in '06 saying he wanted to reduce support, and we litigated it. There were four or five continuances, et cetera, depositions and so on, and then he asked to take it off calendar because he was dying of terminal cancer, so she did with the understanding, handshake, letters back and forth to previous opposing counsel, et cetera, that he would pay the \$4500 in attorney's fees that she incurred to go through that. [¶] . . . [¶] . . . And she's not been paid. [¶] In addition to that fact, we have had

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<sup>2</sup> Four percent interest on \$320,000 amounts to \$1,066.67 per month in interest income. At the hearing, the court calculated the interest at \$1,280 per month in error.

extensive litigation going on in this order to show cause that, you know, from interrogatories and, et cetera, going back and forth. So my client's attorney's fees have mounted up in that regard."

Upon the court's inquiry, Scott's counsel stated that he had paid counsel between \$6,000 and \$7,000 in fees thus far, and she was not certain if any more was due. Scott's counsel argued there was no competent, admissible evidence that he entered into any agreement regarding Jenny's fees. She stated as an offer of proof that Scott would testify he never agreed to pay Jenny's fees and it was an utter fabrication on Jenny's part. The court ordered Scott to pay Jenny \$9,000 in attorney fees at a rate of \$400 a month. The court was "of the opinion [Jenny] doesn't have the funds, based on her income at this juncture, even with the additional money she's come into, to bear these kind of expenses."

## ***2. Scott's Motion for Reconsideration and Motion for Sanctions***

On December 30, 2010, Scott filed a motion for reconsideration of the court's rulings (1) denying his motion for modification, and (2) awarding Jenny attorney fees, based on the existence of new facts and circumstances. The newly discovered facts consisted of documents received in response to subpoenas Scott served on Jenny's banks and employer, Kiff Analytical, which Scott had not received until after the December 1, 2010 hearing. Scott argued that these documents showed Jenny had understated her income and assets. First, based on her employment records, Jenny averaged \$1,905.70 in gross monthly income in 2010. Second, based on records from the credit unions where she held accounts, Jenny had \$374,534.72 in liquid savings. Assuming a four percent rate of return on her liquid savings, which Scott argued the court was obligated to assume, her interest income from those savings should have been \$1,248.44. Thus, Scott maintained, Jenny's interest income and income from her employment, a total of \$3,154.14, actually exceeded her expenses of \$2,800, even before considering his spousal support payments.

On March 7, 2011, Scott also moved for sanctions against Jenny in the amount of \$12,805.81, which constituted his attorney fees and costs, on the ground that Jenny

engaged in obfuscation, misrepresentation, and delay when she failed to disclose her true financial picture. His request for sanctions was based on two statutes, Family Code sections 3667 and 271.<sup>3</sup>

On March 30, 2011, the court denied Scott's motion for reconsideration, suggesting that the new income numbers for Jenny that Scott presented amounted to a difference of only a few hundred dollars a month and were thus not material. The court granted Scott's request for sanctions against Jenny, finding that she "was not totally forthright and candid in her disclosure of assets." The court imposed sanctions of \$1,000 against Jenny. When Scott asked for clarification, the court stated that the sanctions did "not include fees or costs for making [the] motion. It's a monetary sanction based on what was done." The court then told Scott that if he had "a request for attorney's fees and costs over and above that," it would hear the request. Scott indicated that he had requested fees and costs as a sanction under section 271. The court questioned how much in fees Scott had incurred up that point on the motion, and Scott indicated that he did not have that number immediately at his disposal. The court then stated: "Why don't we do this since you don't have it available, submit an attorney fee request including costs and I'll consider it. *I'll take that portion of that under submission.* You need to get that in within ten days of today's date and I'll make a ruling." (Italics added.) The docket indicates that Scott filed a declaration several days later, on April 5, 2011, but no such document appears in the record, nor does any order by the court denying Scott's request for additional sanctions in the form of his attorney fees.

Scott timely appealed from the orders awarding Jenny attorney fees, denying his motion for reconsideration, and awarding sanctions.

### **STANDARD OF REVIEW**

We review an award of attorney fees and costs in a dissolution proceeding for abuse of discretion. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) We

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<sup>3</sup> All further statutory references are to the Family Code unless stated otherwise.

will reverse the trial court's order only if, considering all the evidence viewed most favorably in support of the order, no reasonable judge could make the order. (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1523.) "Abuse of discretion [in granting or denying fees] is never presumed but must be affirmatively established in order to justify interference by an appellate court." (*Price v. Price* (1963) 217 Cal.App.2d 1, 10.) "[U]nless the sum allowed is plainly and palpably exorbitant and such as shocks the conscience of an appellate court, the determination of the trial court will not be disturbed." (*Rosenthal v. Rosenthal* (1961) 197 Cal.App.2d 289, 300.)

We also review a trial court's ruling on a motion for reconsideration for abuse of discretion. (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) "Sanctions under section 271 are [also] committed to the discretion of the trial court . . . ." (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1524.)

## **DISCUSSION**

### ***1. The Trial Court Did Not Abuse Its Discretion in Awarding Jenny Attorney Fees***

Scott argues that the trial court erred in awarding Jenny attorney fees because the record did not establish her need and the court failed to consider the parties' relative circumstances. Additionally, he argues, the evidence did not support the sum of \$9,000 in fees. We disagree.

"In a proceeding for dissolution of marriage, . . . and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation . . . to preserve each party's rights . . . ." (§ 2030, subd. (a)(1).) To this end, the court may, "if necessary based on the income and needs assessments, [order] one party . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding." (*Ibid.*) "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties'

respective abilities to pay.” (§ 2030, former subd. (a)(2).)<sup>4</sup> The making and amount of the award of attorney fees must be “just and reasonable under the relative circumstances of the respective parties.” (§ 2032, subd. (a).)

In determining what is just and reasonable, “the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately . . . .” (§ 2032, subd. (b).) Further, the court shall consider, to the extent relevant, the circumstances that it would consider in determining spousal support. (§§ 2032, subd. (b), 4320.) Among these circumstances are the parties’ earning capacities and their obligations and assets, including the separate property, of each party. (§ 4320, subds. (a), (c), (e).)

The fact that the party requesting an award of attorney fees has resources from which the party could pay his or her own fees is not itself a bar to an award. (§ 2032, subd. (b).) “[A] *disparity* in the parties’ respective circumstances may itself demonstrate relative “need” even though the applicant spouse admittedly has the funds to pay his or her fees.” (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167.) Moreover, “[f]inancial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.” (§ 2032, subd. (b); see also *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1056 [§ 2032 “not only requires that the court consider the financial resources of each party, but also requires a broader analysis of the parties’ relative circumstances”].)

Here, the court did not abuse its discretion in awarding attorney fees to Jenny. Although Jenny has a substantial sum in the bank that she inherited upon her mother’s death, there is also a substantial difference in the parties’ earning capacities and income.

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<sup>4</sup> The trial court heard and ruled on Jenny’s OSC for fees in December 2010. The Legislature amended subdivision (a)(2) of the relevant statute, section 2030, effective January 1, 2011. The portion of subdivision (a)(2) we quote is the version that was in effect in December 2010.



Jenny stated that she earned \$407 a month on average from her job as a courier for a laboratory. With her spousal support and investment income of \$56 a month, she was still \$862 short of covering her monthly expenses of \$2,800. If we attribute a higher amount of income to Jenny -- that is, wages of \$1,308 a month according to her 2009 tax documentation, and interest income of \$1,066.67 a month, based on the four percent interest the court assumed she should earn -- she comes out with an excess of approximately \$1,050 after her monthly expenses are paid. But Jenny's greatest source of monthly income was her \$1,475 spousal support payment, which is made to defray living expenses "and should not be considered in determining financial ability to maintain a proceeding." (*In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1220.) Scott, by contrast, stated that he had an average monthly income of \$10,708, and with monthly expenses of \$9,756 that he paid, he was in the black by approximately \$952. Moreover, Scott, who is in sales and is compensated partially based on commissions, has the potential to earn much more per month, as demonstrated by his earnings in June 2010 -- \$19,492. There was a definite disparity in the parties' relative circumstances based on their wages, and while Jenny had a good deal of savings thanks to her inheritance, she also lacked Scott's earning capacity, and will likely need to rely on her savings in the future. We also note that, despite the court's assumption that she should be earning four percent interest on her savings, there is no indication she was actually doing so. All of these circumstances appear in the record in connection with Scott's motion to modify spousal support, if not Jenny's OSC for attorney fees. The court's decision to award fees to Jenny was thus supported.

Likewise, the amount of fees awarded did not exceed the court's discretion. "[W]hen the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value." (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 300.) "Direct evidence of the reasonable value of an attorney's services need not be introduced 'because such evidence is necessarily before the trial court which hears the case.'" (*In re Marriage of McQuoid* (1991) 9 Cal.App.4th 1353, 1361; see also *Frank v. Frank* (1963) 213 Cal.App.2d 135,

137 [“The knowledge and experience of the trial judge afford a sufficient basis for fixing the amount of a lawyer’s fee,” even if there is no specific evidence on the subject].) In determining the amount that is reasonably necessary for fees, the court may consider ““the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney’s efforts, his learning, his age, and his experience in the particular type of work demanded [citation]; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed.”” (In re Marriage of Keech (1999) 75 Cal.App.4th 860, 870.)

The amount of fees Jenny sought in this case, \$9,000, was expended over the course of several years, beginning when Scott filed the OSC to terminate spousal support in October 2006. Jenny declared that, by October 2008, the parties had conducted depositions and other discovery and had continued the matter many times. Scott did not dispute that such discovery had occurred. The docket shows that, indeed, Scott filed an OSC in October 2006, and that proceeding was continued several times. Of course, the court would have also been aware of the filings in connection with the present motion to modify spousal support and the OSC for attorney fees -- Jenny’s responsive declaration, her OSC for fees and declaration in support thereof, and her income and expense declaration. Jenny’s counsel additionally made an offer of proof that discovery had occurred with respect to Scott’s motion, including interrogatories. And again, Scott did not dispute that more discovery had occurred. Jenny indicated in her income and expense declaration that her counsel’s rate was \$350 per hour, and with \$9,000 in fees, the implication is that counsel performed between 25 and 26 hours of work for the earlier spousal support proceedings and the present proceedings. The foregoing was sufficient evidence to inform the court of the nature and extent of the services performed. The

court's implied finding that \$9,000 was a reasonable value to place on the services was not an abuse of discretion.<sup>5</sup>

Scott cites as support *In re Marriage of Keech*, *supra*, 75 Cal.App.4th at page 870. Our holding is not contrary to the approach taken in that case. There, the court held that the trial court abused its discretion in ordering the husband to pay \$25,000 for the wife's attorney fees incurred over a four-month period. (*Id.* at pp. 865, 870.) But the court was not "apprised of the nature and extent of the services rendered," and the clerk's transcript in the case did not reflect legal work in that amount over the time period in question. (*Id.* at p. 870.) The court thus "could not determine [the services'] reasonable value based upon its own expertise." (*Id.* at p. 870.) As we discuss in the foregoing, it was not the case here that the trial court was unaware of the nature and extent of the services rendered. The trial court did not abuse its discretion in awarding Jenny \$9,000 in attorney fees.

## ***2. The Trial Court Did Not Abuse Its Discretion in Denying the Motion for Reconsideration***

Scott contends that the trial court erred in denying his motion for reconsideration because he presented new facts that required reconsideration, and moreover, those new facts materially changed the parties' relative circumstances such that the court should have reversed its earlier order for him to pay Jenny's fees. We disagree.

"After an order is granted by a court, any party affected by the order may seek reconsideration based upon a showing of new or different facts. (Code Civ. Proc., § 1008, subd. (a).) The party seeking reconsideration must provide not just new evidence

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<sup>5</sup> Scott asserts that the court erred in awarding Jenny \$4,500 of the fees based on his alleged promise in 2008 to pay that amount. The court struck the portion of Jenny's declaration relating to that alleged agreement. Having done so, we can only assume the court did not rely on that alleged agreement to justify the fee award. Regardless of whether the parties agreed Scott would pay that amount, the court's award of fees was supported.

or different facts, but a satisfactory explanation for the failure to produce it at an earlier time.” (*Glade v. Glade, supra*, 38 Cal.App.4th at p. 1457.)

“An order denying a motion for reconsideration is interpreted as a determination that the application does not meet the requirements of [Code of Civil Procedure] section 1008. If the requirements have been met to the satisfaction of the court but the court is not persuaded the earlier ruling was erroneous, the proper course is to grant reconsideration and to reaffirm the earlier ruling.” (*Corns v. Miller* (1986) 181 Cal.App.3d 195, 202.)

Scott argues that, at a minimum, the court should have granted his motion for reconsideration based on new facts, and then reaffirmed the earlier ruling if it was inclined to do so. Assuming for the sake of argument that he presented new facts and a satisfactory explanation for failing to produce them earlier, we will not reverse on this procedural technicality. It is clear from the transcript of the hearing that the court denied the reconsideration motion after examining the merits of the newly proffered evidence. In other words, the court’s intent was to reaffirm the earlier ruling on the merits. To reverse and remand for the trial court to grant the reconsideration motion and then reaffirm its earlier ruling would be futile and a waste of judicial resources. (*Charles H. Duell, Inc., v. Metro-Goldwyn-Mayer Corp.* (1932) 128 Cal.App. 376, 385 [“[I]t remains a rule of appellate procedure that a reviewing court will not remand a case where further proceedings therein would be futile.”].)

Moreover, we find no abuse of discretion in the trial court’s de facto reaffirmance of its earlier ruling. According to the motion for reconsideration, Jenny’s monthly income from wages was approximately \$597 more than the \$1,308 on which the earlier ruling was ostensibly based, and her monthly investment income should have been approximately \$181 more than the \$1,066.67 on which the earlier ruling was based. These differences are not trivial, but they did not entirely negate the continuing disparity in the parties’ relative circumstances. Jenny still had a relative need when compared to Scott, and the award of fees to Jenny remained just and reasonable.

### ***3. Scott Does Not Establish Error Regarding His Request for Sanctions Under Section 271***

Section 271, subdivision (a) provides in pertinent part as follows:

“Notwithstanding any other provision of this code, the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction.”

Scott contends that the trial court abused its discretion by refusing to consider and rule upon his request for attorney fees as sanctions pursuant to section 271. He argues that there was no need for him to submit a separate attorney fees request when the matter was already pending at the March 30, 2011 hearing and was supported by his filings at that point. This argument is without merit.

The record suggests that, contrary to Scott’s assertions, the court considered his request for fees under section 271. The court plainly stated it wanted more information and was taking the issue under submission at the March 30, 2011 hearing. The court never indicated that it was refusing to rule on this issue. Scott has not cited any authority to establish that the court abused its discretion in taking the issue under submission, rather than ruling on it when Scott wanted.

To the extent that Scott is challenging the court’s ruling after it took the matter under submission, he has presented a record that is deficient and we therefore reject the contention. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [rejecting the defendants’ claim because they failed to provide the court with a record adequate to evaluate the contention].) Jenny’s brief indicates that the court ruled on April 22, 2011, that each party should bear his or her own fees and costs. Scott’s notice of appeal indicates that he was appealing from orders dated March 30, 2011 and *April 22, 2011*. Still, Scott did not include in the record his additional filing after the March 30 hearing or the April 22 order. He chose instead to focus on the court’s alleged refusal to

consider and rule on the issue. As we have discussed, this is not an accurate characterization of what occurred. Scott has not demonstrated an abuse of discretion here.

#### ***4. The Trial Judge Should Not Be Disqualified for Judicial Bias***

Scott lastly contends that we should disqualify the trial judge for “apparent judicial bias.” (Boldface omitted.) We decline to do so.

Code of Civil Procedure section 170.1, subdivision (c), provides: “At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.” The power of the appellate court to disqualify a trial judge under section 170.1 “should be exercised sparingly, and only if the interests of justice require it.” (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303.) “The interests of justice require it, for example, where a reasonable person might doubt whether the trial judge was impartial [citation], or where the court’s rulings suggest the ‘whimsical disregard’ of a statutory scheme.” (*Ibid.*)

Scott’s evidence of judicial bias consists of: (1) the asserted abuses of discretion in the court’s rulings, including the alleged willingness to ignore relevant facts and argument in favor of Jenny’s unsubstantiated arguments; (2) a familiarity with and preference for Jenny’s counsel, displayed by the court’s use of counsel’s surname a dozen times during the reported proceedings; and (3) a bias against Scott, manifested by sarcastic comments to his counsel and the appearance that the court had predetermined the issues against him.

Our discussion in the foregoing parts makes clear that the court did not “whimsical[ly] disregard” the law in its rulings, and moreover, the transcripts of the proceedings show that the court was engaged, considering the facts before it, and asking questions of both parties, rather than having predetermined the issues. That the court ruled against Scott is not by itself evidence of bias. Similarly, the court’s apparent familiarity with Jenny’s counsel is not evidence that the court lacked impartiality. Day in

and day out, courts encounter familiar advocates -- advocates who have appeared before the courts in the past -- especially in a field as specialized as family law. A reasonable person would require more than familiarity with an advocate to doubt a judge's impartiality. Finally, the few comments that Scott characterizes as sarcastic are not sufficient to doubt the trial judge's impartiality. While the comments may have reflected some frustration on the part of the court, or a desire to move the proceedings along, we cannot say that a reasonable person would see a bias.<sup>6</sup> The court's comments at times could have been characterized as expressing frustration with *both* parties, particularly when their arguments went overlong or veered into areas the court felt were irrelevant. We are not persuaded that this is one of the rare instances when we should disqualify a trial judge for bias.

#### **DISPOSITION**

The judgment is affirmed. Respondent to recover costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.

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<sup>6</sup> For instance, at the end of the March 30, 2011 hearing, when the court ordered \$1,000 in sanctions against Jenny, Scott's counsel asked: "May I ask the court to clarify its ruling with regard to it's worth \$1,000 in sanctions?" The court replied: "How much clear[er] can I be, counsel? \$1,000, you want me to spell it out?"