

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re the Marriage of Kelly and Stephen
Johnson.

STEPHEN C. JOHNSON,

Plaintiff and Appellant,

v.

KELLY A. JOHNSON,

Defendant and Respondent.

B232819

(Los Angeles County
Super. Ct. No. BD310873)

APPEAL from an order of the Superior Court of Los Angeles County.
Donna Fields Goldstein, Judge. Affirmed.

Stephen C. Johnson, in pro. per., for Appellant.

Kelly A. Moore (formerly Johnson), in pro. per., for Respondent.

Stephen C. Johnson appeals from the trial court's order awarding attorney's fees, accounting fees, and sanctions to his former wife, Kelly A. Johnson. We affirm.

FACTS AND PROCEEDINGS

Appellant Stephen C. Johnson and respondent Kelly A. Johnson married in 1984. During their marriage they had three children. In 2000, they divorced.

In August 2008, Kelly filed an order to show cause to modify child support and award attorney's fees and costs. In order to determine each other's current income and assets for calculating child support, the parties conducted discovery. Kelly sought Stephen's personal financial records. In addition, she sought the business records of Stephen's law firm, Dempsey & Johnson P.C., in which he was the managing 50 percent shareholder of his two-shareholder firm. Kelly suspected Stephen paid many of his personal expenses through the firm's accounts, constituting undeclared income to him. Stephen told Kelly that his firm's other 50 percent shareholder stood on the law firm's privacy rights and insisted that Kelly comply with discovery requirements for non-party witnesses in seeking the firm's business records. Thus, in February 2009, Kelly subpoenaed Dempsey & Johnson's records. The firm refused, however, to produce any records, ostensibly because Kelly did not provide notice to the firm's employees that she was subpoenaing the firm's consumer records.

Kelly moved to compel Dempsey & Johnson to produce its records. In September 2009, the court heard Kelly's motion. The court found Kelly's motion was untimely, but to push the proceedings closer to hearing Kelly's pending order to show cause to modify child support, the court sua sponte ordered the firm to comply with the subpoena and provide its general ledger to Kelly.¹

¹ The court based its authority on Code of Civil Procedure section 1987.1, which grants a trial court the power to sua sponte enforce a subpoena requiring the "production of books, documents, or other things before a court, or at the trial of an issue therein."

Four months later in January 2010, the court heard Kelly's motion to modify support. The court found Dempsey & Johnson had not produced its general ledger to Kelly as ordered by the court.² Based on the discovery violation by Dempsey & Johnson, the court drew an adverse inference against Stephen that the ledger would show he paid many of his personal living expenses through his firm's accounts as Kelly alleged. Relying on both the adverse inference and monthly statements documenting Stephen's use of Dempsey & Johnson's American Express card, the court imputed additional income to Stephen in calculating Stephen's child support obligation to Kelly.³

After modifying the child support order, the court set a briefing schedule and hearing for Kelly's accompanying request for attorney's fees and costs. At the March 2010 hearing on her request, the court found her motion was statutorily deficient by not having appropriate supporting documents. The court granted Kelly a 10-day extension to file a statutorily sufficient motion. Kelly thereafter filed her corrected motion as directed by the court. She sought her attorney's fees and costs under the fee-shifting provisions of Family Code sections 2030⁴ and 2032, and as a sanction for discovery abuse under

² During oral argument before us, Stephen stated Dempsey & Johnson produced what Stephen called the law firm's "general ledgers," although in the opinion of Kelly's forensic accountant those documents contained redactions making them "essentially useless." A fair reading of the trial court's comments during the January 2010 hearing is it accepted the testimony of Kelly's accountant that "he was never given access to the general ledger," which the court deemed "a violation of my discovery order and it's a negative inference that I will draw against" Stephen.

³ The court found Stephen's monthly income was \$32,670, and his net spendable income after deductions and payment of child support was \$18,438. The court found Kelly's monthly income was \$6,438 and her net spendable income after deductions and receipt of child support was \$8,209. From these figures, the court calculated Stephen's child support obligation as \$2,718 per month.

⁴ Section 2030 provides for fee shifting if needed to ensure a level playing field to the less prosperous spouse. (§ 2030 [the court shall "ensure that each party has access to legal representation . . . to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other

section 271.⁵ Stephen opposed Kelly's request on the ground she was not entitled to fee-shifting or a sanctions award.

On December 8 and 9, 2010, the court held an evidentiary hearing on Kelly's request. Stephen argued Kelly had undisclosed income which made fee-shifting inappropriate, and had committed misconduct herself which made sanctions against him improper. The trial court rejected both assertions. In its statement of decision following the hearing, the court declared: "At the hearing, Petitioner [Stephen] contended that Respondent [Kelly] failed to produce proper evidence of her income. The evidence is to the contrary. In discovery the record reflects that [Kelly] produced to [Stephen's] counsel her bank statements, responded in answers to interrogatories about her retirement and other depository accounts, provided her 1099s, and her business account ledger. . . . The Court found her business income to be approximately the same as [Stephen's] own expert based on the documents produced by [Kelly]. The Court finds no intentional misconduct by [Kelly]."⁶

party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding"]; see also § 2032.)

⁵ Section 271 permits sanctions against a party for abusive litigation tactics. (§ 271 ["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."].)

All further undesignated statutory references are to the Family Code.

⁶ The court disagreed with some of Kelly's deductions to her income, but apparently concluded she made them in good faith. The court explained, "Unlike [Stephen], [Kelly's] gross receipts from her business were produced. The deductions she claimed from her gross receipts were available to analyze. The Court found certain deductions . . . not allowable for child support purposes. This income, however, was not hidden, and [Stephen] cannot appropriately compare his deception to [Kelly's] advocacy."

Instead, the court found Stephen and his law firm Dempsey & Johnson had “engaged in excessive litigation in connection with the roadblocks” they raised against Kelly’s efforts to discover Stephen’s income and assets. The court found that Stephen lied to the court about his income by understating the personal expenses his law firm paid for him. Kelly, the court found, incurred attorney’s fees and forensic accounting costs trying to ferret out the truth about Stephen’s finances. The court thus awarded Kelly \$40,000 in attorney’s fees and \$24,702 in accounting costs under the fee-shifting of section 2030. The court additionally imposed \$50,000 in attorney’s fees sanctions against Stephen under section 271. The court’s order further provided that Stephen’s payment of the \$50,000 sanctions award would satisfy his obligation to pay the \$40,000 attorney’s fee-shifting award. The court’s order, in other words, provided for a “Total award of fees and sanctions [of] \$50,000 plus section 2030 forensic accounting fees of \$24,702.” This appeal followed.⁷

DISCUSSION

A. Court’s Sua Sponte Order to Compel Production

Finding Kelly’s motion to compel non-party Dempsey & Johnson’s production of business records under subpoena was untimely, the court turned to Code of Civil Procedure section 1987.1 to order the firm to produce its general ledger to Kelly. Stephen contends the court erred because it lacked the authority to order Dempsey & Johnson to comply with an untimely motion to compel.

⁷ Stephen filed his notice of appeal on May 5, 2011, from the “Judgment on Order to Show Cause to modify child support dated 10/7/2008 and post-judgment order to pay attorney and accounting fees under Family Code section 2030 and sanctions under Family Code section 271 dated March 8, 2011 appealable under [Code of Civil Procedure] section 904.1(a)(12).” Kelly contends the notice is untimely as to the child support order entered on January 7, 2010. Stephen does not, however, directly challenge the support order, but instead focuses his fire on the court’s March 8, 2011, order that he pay attorney’s fees and sanctions, as to which the May 5, 2011 notice of appeal is timely.

Stephen's contention is unavailing for at least two reasons. First, he mischaracterizes the court's order. The court did not grant Kelly's motion to compel; instead, the court exercised its sua sponte authority under Code of Civil Procedure section 1987.1 to enforce Kelly's subpoena for business records. To prevail, Stephen must show the court erred by relying on Code of Civil Procedure section 1987.1, which he does not do.

Second, throughout these proceedings, Stephen has steadfastly asserted the independent corporate existence of Dempsey & Johnson, of which he is the 50 percent managing shareholder, and has relied on that separate existence as a shield to thwart Kelly's attempts to discover through him the firm's financial records. Dempsey & Johnson was the aggrieved party, if any, concerning the lawfulness of the court's order that the firm produce its ledger. Stephen does not identify any legal rule that permits him to pick up Dempsey & Johnson's shield of separate existence and wield it as his own personal sword against Kelly in *his* appeal from the court's orders directed against *him*.

Stephen contends *Unzipped Apparel, LLC v. Bader* (2007) 156 Cal.App.4th 123 is "almost on point" in illustrating the court's error. He is mistaken. That decision holds that a court may not grant against a non-party an untimely motion to compel. (*Id.* at p. 129.) The decision does not, however, discuss whether someone other than the aggrieved non-party may, as Stephen attempts here, appeal from an order directed against the non-party.

B. *Adverse Inference*

Stephen contends the court erred by drawing an adverse inference against him from Dempsey & Johnson's failure to produce firm records to Kelly. (See Evid. Code, § 413 ["In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's . . . willful suppression of evidence [against him]."].) According to Stephen, the adverse inference punished him for another's actions. Stephen summarizes the court's error as "[T]he

Court had no jurisdiction to hold [Stephen] Johnson responsible for any wrong committed by D[empsey] & J[ohnson].” We disagree.

The trial court respected Dempsey & Johnson’s separate corporate existence. For example, it instructed Kelly to use non-party discovery mechanisms, such as a subpoena, to obtain information from Dempsey & Johnson. (See *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 715 [spouse entitled to discover records of business in which other spouse has ownership interest].) But the court did not indulge the fiction that Dempsey & Johnson had a mind of its own. Professional corporations such as law firms act through their shareholders. Stephen was the managing 50 percent shareholder of Dempsey & Johnson. The court found that Stephen “and his law firm that he manages engaged in excessive litigation,” and it was Stephen who was calling the shots. Stephen contends the court erred by concluding he controlled Dempsey & Johnson, but that is primarily a factual question which we do not reweigh. (*Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 849; accord *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811 [alter ego relationship between shareholder and corporation is fact intensive].) Because the court concluded Dempsey & Johnson at Stephen’s direction obstructed discovery, the court’s adverse inference arose from Stephen’s own misconduct. (See *Schnabel v. Superior Court, supra*, at p. 715 [spouse has fiduciary duty to other spouse to cooperate in obtaining production from business in which first spouse has ownership interest]; accord *Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 459 [“A trial court . . . could draw adverse evidentiary inferences . . . against a litigant who benefitted from a third party’s spoliation when a sufficient relationship existed between the litigant and third party.”].) The court was thus not punishing Stephen for something someone else did.

Stephen also contends the court’s “issue sanctions” were premature because the court had not tried lesser sanctions first. Stephen mischaracterizes the court’s ruling because the court did not impose an issue sanction; the court drew an adverse inference. An issue sanction is different from an adverse inference. (Compare Evid. Code, § 413

[adverse inference] to Code Civ. Proc., § 2023.030, subd. (b) [issue sanction].) Stephen's contention is thus unavailing.

C. *Family Law Section 271 Sanctions*

The court imposed \$50,000 in attorney's fees and costs as sanctions against Stephen. We review the sanctions order for abuse of discretion. (*Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 398; *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 180.)

Stephen notes that a court may not impose section 271 sanctions without a noticed hearing. (*In re Marriage of Duris and Urbany* (2011) 193 Cal.App.4th 510, 513; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 369) Stephen contends he did not receive before the sanctions hearing notice of the conduct for which the court contemplated sanctioning him. He is mistaken. In January 2010 during the child support modification hearing, Kelly's forensic accounting expert testified about the difficulties he endured trying to get business records from Stephen's law firm, Dempsey & Johnson. At the end of the hearing, the court set a briefing schedule to consider attorney's fees. In March 2010, Kelly filed a procedurally deficient motion for attorney's fees under, among other grounds, section 271. The court directed Kelly to file a procedurally correct motion, and she did 10 days later. She attached to her motion a memorandum of points and authorities in which she argued, "Given how vigorously [Stephen] opposed the production of corporate records – which were crucial to determining his true gross cash flow available for support – Respondent [Kelly] had no choice but to continue to litigate to obtain these records. In the final analysis, all of the hurdles placed by [Stephen] (he was unable to produce 'corporate' records, he had not 'personal expenses' paid by his law firm, etc.) created on-going litigation and enormous fees and costs." Specifically in support of section 271 sanctions, Kelly argued "[Stephen's] extraordinary delays providing discovery (particularly the law firm's general ledgers and income statements) has risen to the level of sanctionable conduct."

No particular form of notice is required so long as a party knows he is at risk of suffering sanctions. “[S]ection 271 does not specify the form of notice to be provided. [Case law] expressly states, ‘the only procedural requirement’ is ‘notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.’ ” (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1529.) Here, Stephen knew, or should have known, the court was contemplating section 271 sanctions. (*In re Marriage of Petropoulos, supra*, 91 Cal.App.4th at p. 178 [“Wife was well aware that she was subject to such sanctions even if the trial court did not expressly say so.”].) His claim of no notice thus fails. In any case, Stephen appears not to have objected at the hearing to inadequate notice, thus waiving the point on appeal. (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 346.)

Stephen contends the court imposed section 271 sanctions against him for Dempsey & Johnson’s misconduct. Not so. The court imposed sanctions after finding Stephen lied about the income he drew from his law firm for which he was the managing 50 percent shareholder. The court found Stephen “intentionally misrepresented his income for child support purposes denying that any personal expenses were paid by his law firm. He is responsible for the substantial cost to [Kelly] necessary to prove this representation false.” Stephen’s reliance on *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519 is misplaced because it is distinguishable. In *Schulze*, the family law court sanctioned an adult-son because his parents, who were his employers in their family-owned business, distributed company stock to reduce his income at the outset of dissolution proceedings in a way that frustrated settlement of the proceedings. On review, the appellate court reversed the sanctions because no evidence existed that the son had any role in his parents’ decision to distribute the stock. (*Id.* at p. 531.) Here, in contrast, the trial court found Stephen was the man behind the curtain directing Dempsey & Johnson’s discovery obstructionism.

D. *Fees and Sanctions and Ability to Pay*

Stephen contends the court erred in awarding attorney's fees and imposing sanctions without regard to his ability to pay the amounts ordered, and in not considering Kelly's income and assets. We disagree.

In ordering fee-shifting under section 2030, the trial court must consider the parties' financial circumstances. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1313-1314 [fee award must take into account each spouse's financial circumstances]; *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 255.) Stephen contends Kelly did not produce accurate and complete records of her income and assets. He further contends the court ignored Kelly's assets. He also contends the sanctions award was financially ruinous, which the law prohibits. Stephen's contentions involve factual disputes that we may not reweigh. In any event, the record does not support him:

- Complaining that the court ignored Kelly's assets, he argues Kelly had a "family marital and [sic] trust with considerable value. . . . The court refused to include these assets in her determination of the need for fees." But Stephen does not mention why the court did not include those assets in assessing Kelly's financial condition. The court explained, "A good part of [Stephen's] discovery focused on discovery of [Kelly's] husband's separate property Trust and her father's property. Her Husband's deposition was taken, and his trust documents were produced. The Court is satisfied that [Kelly's] husband's trust property and income *are his separate property* owned prior to their marriage and the Court declines to attribute any income or assets from this property to [Kelly]." (Italics added.)

- Stephen also complains that the court erroneously stated it could not consider Kelly's equity in a home she owned separately from her new husband, but Stephen's record citation does not support his complaint. The cited portion of the record shows the trial court explaining to Stephen that the court did not intend to address in the court's statement of decision each one of the purportedly controverted issues which Stephen had fashioned as interrogatories to the court. That explanation does not contain a statement

by the court that the law prohibited the court from considering Kelly's equity in her house.

- During the January 2010 child support modification hearing, the court told the parties it wanted them to submit updated declarations of their income and expenses for the upcoming fee hearing. Stephen complains that Kelly merely resubmitted her November 2009 declaration from two months earlier, but he does not cite in the record an objection by him, thus waiving the point on appeal. (*In re Marriage of Fossum, supra*, 192 Cal.App.4th at p. 346.)

- Stephen notes that the trial court must not impose financially ruinous section 271 sanctions. (§ 271, subd. (a).) Stephen contends the court acknowledged he lacked the ability to pay the sanctions award, but Stephen is not quite right. The court observed that Stephen lived beyond his means. The court calculated, however, that “a reduction in nonessential life style will afford [Stephen] the ability to pay [the] fees that he has caused [Kelly] to incur.”

DISPOSITION

The March 8, 2011 fee and sanctions order is affirmed. Respondent Kelly Johnson to recover her costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.