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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TIMOTHY ALAN GILROY, Plaintiff and Appellant, v. JULIA YONI STONE GILROY etc., Defendant and Respondent.	B271759 (Los Angeles County Super. Ct. No. BC466292)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Modified and, as modified, affirmed.

Ferguson Case Orr Paterson, Wendy C. Lascher and Joshua S. Hopstone for Plaintiff and Appellant.

Julia Yoni Stone Gilroy, in pro. per., for Defendant and Respondent.

Timothy Alan Gilroy (Tim) and Julia Yoni Stone Gilroy[1] had a long-term relationship, but they were never legally married. When the relationship ended, they sued each other to, in essence, settle their property rights. After a bench trial, the court awarded Julia the house the parties had lived in, immediate cash payments from Tim's retirement accounts, and an additional $5,420 which had been previously awarded to Julia. Tim appeals, contending that the court should have divided assets according to the Family Code; that the court erred by ordering him to pay Julia *from* his retirement account; and that the $5,420 award was improper. We agree only that the court's order regarding Tim's retirement account was erroneous. Accordingly, we modify the judgment and affirm it as modified.

BACKGROUND

I. Tim and Julia's relationship and this lawsuit

On August 1, 1997, Tim and Julia had a "wedding" ceremony, after which they held themselves out as married, living together and having two children. However, they were never legally married.

Tim and Julia separated and, on June 14, 2010, Tim filed a petition for dissolution of marriage.[2]

After separating, the parties began a protracted legal battle, most of which is not relevant here. Tim sued Julia for conversion, declaratory relief, an accounting, partition, breach of fiduciary duty, and fraud and deceit. He alleged that Julia

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[1] We refer to the parties by their first names to avoid confusion.

[2] The petition was dismissed in 2012.

convinced him to invest proceeds from the sale of his home and his earnings into her house in exchange for a 50 percent ownership interest in her house and that Julia misappropriated money from a line of credit. Julia cross-complained, alleging that Tim induced her to add his name to her house and to use her money to pay their expenses and fund his retirement accounts.

Tim filed a special motion to strike various causes of action in Julia's cross-complaint (Code Civ. Proc., § 425.16). The trial court granted the motion in part and denied it in part, and Tim appealed. This court affirmed the order and ordered Tim to bear Julia's costs on appeal. (*Gilroy v. Gilroy* (June 26, 2014, B243035) [nonpub. opn.] (*Gilroy I*).) The trial court thereafter awarded attorney fees and costs to Julia in the amount of $5,420.

After the trial court denied Tim's request to continue trial, the case was tried in January 2016 on Tim's complaint and on Julia's first amended cross-complaint for breach of marriage promise, fraud in the inducement, unjust enrichment, breach of oral contract, breach of the covenant of good faith and fair dealing, fraudulent concealment, and quiet title. Julia alleged, among other things, that she and Tim agreed he would provide for her in retirement and she would pay expenses and contribute to Tim's retirement account.

II. The court trial

Because the parties were not married, the issues at trial concerned their agreement about their assets, which consisted primarily of a house and retirement and bank accounts. According to Tim, after his and Julia's ceremony and honeymoon, Julia, who was a certified public accountant, suggested they wait to get a license for tax reasons. Tim never thought of the matter again, considering himself married in every respect and holding

himself out as married. His position at trial thus appeared to be that they were, for all intents and purposes, married. According to Julia, she and Tim, to save taxes, agreed to wait to get legally married until they were closer to retirement. They also agreed that Julia would pay family expenses while Tim maximized his pension so that when they retired they could live off of his fixed income. As a result of that promise, Julia did not set aside money for retirement.

At trial, Julia presented documentary evidence and expert witnesses (a pension valuator and a real estate appraiser). Tim had no witnesses other than himself. The primary assets at issue were Julia's house, Tim's and Julia's retirement accounts, joint and separate bank accounts and a home equity line of credit (HELOC).

A. *Real properties*

At the time of Tim's and Julia's 1997 ceremony, each owned a house. Tim sold his house in 2000.[3] Julia owned a house on Walsh Avenue in Marina Del Rey (the Walsh property). Tim and Julia lived at the Walsh property the entire time they were together, paying the mortgage out of a joint account. Tim persuaded Julia to add him to the title, which she did in 2001 because he promised to marry her.

Via expert witness Colin Wellman, Julia offered different appraisals of the Walsh property. As of June 14, 2010, when the parties separated, the value of the property was $825,000. In November 2015, just before trial, the property was valued at

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[3] The trial court found that the $54,000 proceeds from the sale were not used to remodel Julia's property as Tim claimed and instead went to Tim.

$1,275,000. Julia presented *Moore/Marsden*[4] calculations of the property's value based on different scenarios. One scenario calculated Tim's interest in the Walsh property based on the date they separated, June 14, 2010. Under that scenario, Tim's interest in the Walsh property totaled $97,857.

B. *Retirement accounts*

1. Tim's retirement accounts

Tim has worked for Los Angeles County as a contract program auditor since 1991. He still worked for the County at the time of trial although he was eligible to retire. Tim had three retirement or pension accounts: (1) a defined-benefit pension with Los Angeles County Employees Retirement Association (LACERA), (2) a Deferred Compensation and Thrift Plan (Thrift Plan), and (3) a Savings Plan.

Trina Reddall, a dissolution retirement expert, testified for Julia. Reddall prepared valuations of Tim's LACERA pension.[5] Tim had 24 years 2 months of service, and he bought four years of service credit, thereby increasing his service credit years to 28.17. To finance the purchase of service credits, Tim withdrew $52,301 from his Savings Plan and $35,000 from his Thrift Plan, for a

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[4] The *Moore/Marsden* rule is that community contributions to maintaining or improving separate real property are reimbursable to the community, a pro tanto interest. (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 371-372; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 436-440.)

[5] A LACERA member's age at retirement, amount of service credits, and final compensation determines the amount of a member's benefits. (*In re Marriage of Peterson* (2016) 243 Cal.App.4th 923, 927; *In re Marriage of Sonne* (2010) 48 Cal.4th 118, 121.)

total of $87,301. If Tim retired as of January 1, 2016, his monthly LACERA benefit would be $4,995. Using a numerator of 12.87 (years of "marriage") and a denominator of 28.17 (years worked), Reddall calculated that the "community" had a 45.69 percent interest in the pension, the present value of which was $426,000 to $428,000. Thus, one-half of the community interest was $213,000 to $214,000.

As to Tim's other two plans, Reddall did not have sufficient information to do a "full tracing analysis," but she was able to ascertain that Tim's participation in both accounts began in 2000, after the parties' wedding ceremony. As of the date the parties separated, Tim had $52,306.65 in the Thrift Plan and $63,643.68 in the Savings Plan, for a total of $115,950.33. Deducting the $87,301 Tim withdrew to buy service credits left a community interest of $28,649.33 as of May 2011 in the two accounts. At a 6 percent rate of return, the estimated community value of the accounts was $37,500 as of December 31, 2015.

2. Julia's Disney 401K

After the wedding ceremony, Julia worked at the Walt Disney Company (Disney) for seven years. While there, Julia contributed to a 401K plan, which she described as "de minimis," amounting to a distribution of $100 per month but "no more than a $150, $200 a month."

C. *Bank accounts/HELOC*

In 2008, Tim and Julia opened the HELOC in the amount of $200,000. According to Tim, the HELOC was for emergency purposes, but, by the end of 2009, $110,000 had been drawn. By the time Tim decided to draw the remaining credit, only $14,100

remained. According to Julia, they took out the HELOC to pay off credit card debt.

III. The statement of decision and judgment

The trial court issued a statement of decision and found that there was no valid marriage between Tim and Julia. However, the parties held themselves out as husband and wife from August 1, 1997 through June 14, 2010, the date of separation. The court found Julia's testimony, which documentary evidence supported, believable. That is, the parties agreed to marry legally just before Tim retired, at which time they would jointly benefit from Tim's retirement income. "Tim offered no evidence to refute Julia's reliance on Tim's promise to legally marry and provide for her from his retirement income." In reliance on Tim's promise, Julia deeded the Walsh property to Tim and refrained from contributing to her retirement accounts. The parties' conduct bore out their promises, as Tim maximized his contributions to his retirement accounts, while Julia stopped contributing to her retirement plan once she left Disney.

The trial court also found Julia's testimony about the HELOC more credible. The court found that the parties used the HELOC to pay family expenses until they separated, at which time Tim withdrew $14,000 to pay legal fees and Julia withdrew the approximate $75,000 balance. The court placed responsibility for HELOC payments on Julia from June 14, 2010 going forward. The court therefore found that Tim did not satisfy his burden of proving that Julia converted Tim's assets or defrauded him.

As to the Walsh property, the trial court found that the parties paid for expenses relating to it from a joint account and Tim contributed to paying the mortgage. The court also found that Julia put Tim on the title because he told her they would be

together for life and that he would legally marry her in the future. Using the parties' date of separation, the court found that Julia's interest in the property was $605,043 and Tim's was $97,857. The court placed responsibility for mortgage payments on Julia from June 14, 2010 going forward.

As to Tim's retirement accounts, the trial court adopted Reddall's valuation of the LACERA account premised on the August 1, 1997 date of " 'marriage' " and the June 14, 2010 date of separation. Based on those dates and Tim's 28.17 years of service, the community had a 45.69 percent interest in the LACERA pension, or $426,000 to $428,000, and Julia had a 22.84 percent interest in the pension, or $213,000 to $214,000. The court valued Tim's other two retirement accounts at $115,950.33 but deducted the amount Tim withdrew ($87,301) to buy service credits for his LACERA pension, leaving a community interest in the amount of $26,649.33 as of May 16, 2011, when the $87,301 was withdrawn. Although the court acknowledged that Reddall did not have sufficient information to trace the accounts' investment performance, the court adopted Reddall's proposed 6 percent rate of interest as the "most reasonable in light of the inability to establish any higher rate." At that rate of return, Julia's interest in the accounts was $37,500 as of December 31, 2015, the date of Reddall's analysis. The court noted that Tim offered no testimony about how to value Julia's interest in the two accounts.

As to Julia's Disney 401K plan, the trial court cited Julia's testimony that the plan would pay her approximately $100 per month and noted that Tim provided no testimony regarding the plan's value or his interest in it. Accordingly, the court found the asset to be "de minim[i]s and awards the Disney 401K to Julia."

Based on these findings, the trial court: (1) awarded the Walsh property to Julia as her sole and separate property, (2) cancelled the quitclaim deed to the Walsh property,[6] (3) awarded $97,857 to Tim plus interest from June 14, 2010 for his interest in the Walsh property, (4) awarded $213,500 to Julia "from Tim's LACERA account," (5) awarded $37,500 to Julia from Tim's Thrift Plan and Savings Plan, and (6) awarded $5,420 to Julia for attorney fees and costs from the prior appeal.[7] In its subsequent judgment, the court ordered Tim to "execute such documents as are necessary to transfer monies from [his LACERA] account to Julia" within 30 days of notice of entry of judgment.

CONTENTIONS

Tim contends that the trial court erred by (1) awarding Julia 100 percent of various "community" assets, (2) ordering an immediate cash payment from his LACERA account, (3) depriving him of a fair hearing, and (4) awarding $5,420 to Julia.

DISCUSSION

I. The Family Code, *Marvin a*ctions and the division of property

Before addressing Tim's specific contentions about the assets at issue, we first address his general, overarching

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[6] At trial, the court granted Julia's motion to amend her pleading to allege a cause of action to void the quitclaim deed she executed in June 2010 putting Tim on the title.

[7] The court also made orders, not relevant here, regarding burial plots and wedding rings.

contention that the Family Code applies to this action. It was undisputed that Julia and Tim were never legally married. Thus, the Family Code, including Family Code section 2550 mandating equal division of community property, did not govern their relationship. (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 681; *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1175.) Instead, courts will enforce an express agreement between an umarried couple or, in the absence of an express contract, courts should look to the parties' conduct to determine whether it demonstrates an implied contract or implied agreement of partnership or joint venture or other understanding. (*Marvin*, at p. 684; *Velez*, at p. 1175; *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 883.) This, therefore, was a *Marvin* action.

Tim, however, cites imprecise language the parties and the trial court used to further his argument to the contrary, that the Family Code and community law principles regarding the equal division of property governed the case and, hence, the court should have divided all assets equally. He cites, for example, Julia's vague characterization of her and Tim's relationship as a "pro forma marriage." Similarly, Reddall, in her pension valuations, referred to hypothetical "community" interests. And the court, in its statement of decision, referred to Tim's oral promise to marry Julia and Julia's reliance on that promise, even though there is no cause of action for breach of a promise to marry.[8] (Civ. Code, § 43.5.)

The totality of the record nonetheless shows that this was a *Marvin* action, that this was Julia's essential theory of the case, and that the trial court understood it had to determine whether

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[8] Julia also purported to state a cause of action for breach of promise to marry.

there was an agreement between the parties and the substance of it. Thus, Julia, during trial and in response to the court's request that she state "a legal basis for your claim that you're entitled to a portion of his pension," said that "Tim promised to marry me. He said, . . . we're going to live together" and "I'm going to put as much as I can to maximize my pension because I have a really good pension." The court said it understood Julia's theory: "Your theory is [that] you relied to your detriment on a promise to marry and on a promise that he would share the pension, and as a result you did not set aside money for your own pension."

The trial court also cited *Marvin* in its statement of decision, noting that the "fact of no[n]marital cohabitation is not itself a barrier to the judicial recognition and enforcement of express and implied agreements between the parties. They have the same right to enforce contracts and assert equitable rights and interests as do any other unmarried persons. And courts may also look to a 'variety of other remedies' in order to protect the parties['] lawful expectations." The court then found that the "parties made express promises to one another, namely[,] that if Julia put Tim's name on title to the Walsh property, that they would eventually marry legally and that they had a lifetime commitment. Further, Tim promised that if he maximized his retirement contributions and Julia forbore from depositing money into her retirement, instead using that money to support the family[,] that he would legally marry her before he retired and they would live on his retirement income." The court and the parties therefore treated this as a *Marvin* action and the court found that the parties had an express agreement governing their relationship and various assets.

True, the parties and the trial court might have employed some community property principles to divide various assets, in particular Tim's retirement account. We fail, however, to see why this should operate as some sort of agreement that the Family Code would apply to the division of all assets. To the contrary, there was no discussion or stipulation that community law principles would universally apply to the division of all assets.

That being said, even if Tim is correct that all assets should have been divided under the Family Code, Tim has not shown prejudicial error. He has not shown how applying the Family Code to this case would have changed the outcome regarding, for example, his LACERA retirement account. Nor could he have so shown, having failed to introduce any counter evidence regarding damages. He therefore has not satisfied his burden on appeal of demonstrating prejudicial error. (See generally *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [judgment or order of a lower court is "presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness"]; see also *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 [appellant bears burden of showing prejudicial error].)

Having rejected Tim's overall premise that the court was obligated to apply the Family Code, we now turn to Tim's specific claims of error as to his Thrift Plan and Savings Plan retirement accounts, Julia's Disney 401K and the Walsh property.

A. *The Thrift Plan and Savings Plan accounts*

Tim merely repeats his argument that the trial court was obligated to divide his retirement accounts 50-50. But, as we have said, the court had to divide them according to the parties'

agreement. That agreement, as found by the court, was that Tim would contribute to his retirement accounts while Julia would not contribute to hers, using her income instead to pay family expenses. Tim fails to explain why the trial court's division of the retirement accounts was not in accord with this agreement.

He instead suggests there was insufficient evidence that the Thrift Plan and Savings Plan had a community value of $37,500. " ' "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." ' [Citations.] ' "[W]e have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." ' [Citations.] Our role is limited to determining whether the evidence before the trier of fact supports its findings." (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Contrary to Tim's argument that there was insufficient evidence of the accounts' value, Reddall testified about their value based on the information she had, and she offered varying rates of return (6, 8 or 10 percent). Tim offered neither an alternative method of valuation nor evidence in response. Reddall's testimony therefore supported the trial court's selection of the most conservative rate of return of 6 percent.

B. *Julia's 401K*

Tim also argues that the trial court should have awarded 50 percent of Julia's 401K to him. The problem with this argument is there was no evidence that the parties had any

agreement regarding it. Rather, the only "agreement" about it was that Julia stopped contributing to it to free up money to pay family expenses. Otherwise, there was no evidence that the 401K was part of an agreement to share income from it. Under the applicable standards of review, we must indulge all presumptions in favor of the judgment. (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133.) We therefore cannot find any error in the court's award of 100 percent of that account to Julia.

Nor can we agree that blame for Tim's failure to introduce evidence about the 401K rests on the trial court. In apparent response to Julia's testimony that she expected to get $100 a month from the account, Tim had exhibit 10 marked for identification, which showed there was $39,000 in the account. When Tim began to read from the exhibit, the court told him, "[L]et's [just] mark it for identification. Don't need to testify what's in it," and reminded him to ask Reddall (the pension expert) questions about it. The court, however, did not tell Tim it was unnecessary to move it into evidence. Tim understandably may have misunderstood his obligation to move the exhibit into evidence, but there was no direction from the court telling him it was unnecessary to follow the rules of evidence. We cannot excuse his failure to do so on his in propria persona status. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 [self-represented litigants held to same standards as lawyers].)

C. *The Walsh property*

Finally, Tim contends that the trial court should have valued the Walsh property as of the date of trial (January 2016) rather than as of the date of the parties' separation (June 14, 2010), under Family Code section 2552, subdivision (a). That section requires community assets to be valued as near as

practicable to the time of trial. Tim also relies on *In re Marriage of Sherman* (2005) 133 Cal.App.4th 795, which was a dissolution proceeding and which therefore applied Family Code section 2552. This, however, was not a dissolution proceeding. The court here therefore owed no fealty to the Family Code. The court was free—to the extent permitted by the evidence and the law—to select another date, here, the date of separation, as the pertinent date. Indeed, the date of separation makes sense, because it is a "bright line" date on which the agreement in question was breached.

II. Tim's LACERA retirement account

The trial court ordered Tim, who was eligible to retire at the time of trial, to pay $213,500 to Julia *from* his LACERA account. Tim posits several reasons why this was error, including that Julia never made a *Gillmore*[9] election. We disagree that such an election was never made, but we agree with Tim that the court erred by ordering him to pay Julia a lump sum from his LACERA account. We therefore modify the judgment accordingly.

Division of retirement benefits is a complicated matter. We thus see no reason why certain principles regarding division of retirement benefits, although usually articulated in the context of dissolving a marriage, would be inapplicable to this situation involving an unmarried couple. According to those principles, when an employee spouse becomes eligible for retirement, he or she may choose either to retire and to receive benefits or to continue working. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 383.) An employee spouse eligible to retire thus may delay

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[9] *In re Marriage of Gillmore* (1981) 29 Cal.3d 418 (*Gillmore*).

retirement, thereby delaying payment of the nonemployee spouse's share of retirement benefits. (*Gillmore*, *supra*, 29 Cal.3d at pp. 422-423.) To prevent an employee spouse from timing retirement to deprive the nonemployee spouse of an equal share of the community's interest in a pension, a court can order the employee spouse to make payments to a former spouse. (*Id.* at p. 426.) Thus, the party with the pension may elect to continue working, but he or she will have to pay his or her former spouse an amount equivalent to the former spouse's interest in the pension. This means that the nonemployee spouse has a "choice of delayed benefits or immediate payments." (*Cornejo*, at p. 383.) If the nonemployee spouse decides to receive immediate payment, then the employee spouse may make arrangements to make the payment or may retire and allow the nonemployee spouse to draw his or her share. (*Ibid.*) If a nonemployee spouse chooses immediate payment, then the nonemployee spouse is entitled to payment from the date the spouse files a motion seeking immediate payment, thereby putting "the employee spouse on notice that he may exercise his choice of satisfaction or avoidance." (*Id*. at p. 385.) This "effectively requires the filing of a motion by the nonemployee spouse," which is sometimes referred to as a *Gillmore* motion or a *Gillmore* election. (*Id.* at p. 385, fn. 1.)

Julia did not make a formal *Gillmore* motion. Nonetheless, she "effectively" made a *Gillmore* election at trial to receive an immediate cash payment. Specifically, Julia introduced evidence of the value of Tim's pension via Reddall, a pension evaluator. Reddall prepared several valuations using, for example, different dates of separation and different treatments of the four years of service credits to calculate Julia's present cash interest in the

pension. In the valuation the court relied on, Reddall stated, "I find a $426,000 to $428,000 present hypothetical community-interest in [Tim's] matured lifetime LACERA—Plan D benefits." (Italics and bold omitted.) Based on that hypothetical community interest, Reddall concluded that Julia had a present community half interest of $213,000 to $214,000 in the account. Julia thus focused on what she should get from the LACERA account as an immediate cash payment, while Tim produced no evidence in response. Also, the court clearly understood that Julia was electing to get an immediate cash payment, because the court asked Reddall to clarify that one "spouse's value" in the pension would be "between 213 and 214?" We therefore disagree that Julia failed to make an election. At trial, it was clear she was asking for an immediate cash payment; hence, we reject Tim's related arguments that he had no notice or opportunity to respond to any election. He was at trial, but failed to offer any evidence regarding his pension.

That failure notwithstanding, we agree with Tim that the trial court erred by ordering him to satisfy the payment *from* his LACERA account. An employee spouse may use his or her separate property to reimburse the nonemployee spouse. (*Gillmore*, *supra*, 29 Cal.3d at p. 427; see also *In re Marriage of Oddino* (1997) 16 Cal.4th 67, 82, fn. 8.) Julia also concedes the error, characterizing it, however, as a clerical as opposed to judicial one. The distinction between the two is whether the error was made in rendering the judgment or in recording the judgment rendered, the latter of which is a clerical error that may be corrected by amendment. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) Although this was not clerical error, any dispute about the type of error is academic because we find that

the appropriate remedy is to modify the judgment by striking that portion of the judgment directing Tim to pay Julia the $213,500 *from* his LACERA account and to execute such documents as necessary to transfer monies from the account to Julia.[10]

III. Procedural errors

Tim also contends that two "procedural" errors deprived him of a fair hearing: (a) the trial court's denial of his request to continue trial and (b) the court's refusal to rule on his objections to the proposed statement of decision.

A. *Continuance*

On December 9, 2015, the trial court quashed Tim's deposition subpoenas and notices to produce documents to various financial institutions. A week later, Tim moved ex parte to continue trial to obtain discovery, which he described as important to impeach Julia and to prove his case. It appears that the court considered the application at the January 7, 2016 final status conference, at which time Tim said he needed the continuance to obtain documents to which subpoenas had been quashed. The court responded that the case was "very, very old" and was coming up against the five-year rule. The court therefore denied the request to continue trial.

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[10] The trial court awarded $37,500 to Julia and similarly ordered Tim to "execute such documents as are necessary to transfer monies from these accounts to Julia." Tim does not similarly argue that it was error to order payment from those accounts, and therefore any such issue as to the $37,500 is not before us.

Trial dates are regarded as "firm." (Cal. Rules of Court, rule 3.1332(a).) Grounds to continue a trial date include a "party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts." (*Id.*, rule 3.1332(c)(6).) In ruling on a continuance motion, the trial court must consider all relevant facts and circumstances, including the proximity of the trial date; prior continuances or delays; length of the continuance requested; availability of alternative means to address the problem giving rise to the request for a continuance; prejudice that parties or witnesses will suffer as a result of the continuance; the court's calendar and the impact of granting a continuance on other pending trials; and whether the interests of justice are best served by a continuance, by trial or by imposing conditions on the continuance. (*Id.*, rule 3.1332(d).) We review a decision denying a continuance for an abuse of discretion. (*Link v. Cater* (1998) 60 Cal.App.4th 1315, 1321.)

Tim failed to show that he should have been excused from obtaining allegedly essential evidence despite diligent efforts. His subpoenas had been quashed in December 2015, but it was unclear what efforts, if any, he thereafter made to obtain documents. Moreover, he failed to explain why those documents hadn't been obtained sooner, especially given the age of the case. On that particular point, the court cited the age of the case, which was filed on July 27, 2011, as a reason to deny the continuance. Specifically, the case was coming up against the five-year rule. (Code Civ. Proc., § 583.310.) The court acted well within its discretion to deny the motion on that ground.

B. *Statement of decision*

Next, Tim contends that the trial court's supposed failure to rule on his objections to the proposed statement of decision prejudiced him. The court mailed a proposed statement of decision to the parties on February 1, 2016. Tim filed objections to it on February 22, 2016. Nine days later, the court filed its statement of decision, which stated: "The Court rejects the late filed Objections to Proposed Statement of Decision filed by Plaintiff on February 22, 201[ ] ('Plaintiff's Objections') pursuant to [California Rules of Court, rule] 3.1590(c)(4)."

Even if Tim did timely file his objections, we do not agree that the trial court failed to consider them.[11] The court's statement that it was "reject[ing]" the objections could mean that the court had considered but was overruling them.[12]

In any event, our review of Tim's objections fails to reveal how any failure to rule on them prejudiced him. A trial court's statement of decision must explain "the factual and legal basis for its decision as to each of the principal controverted issues at trial" (Code Civ. Proc., § 632), and the statement is sufficient if it

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[11] A party has 15 days from the time a proposed written statement of decision is served to file objections. (Cal. Rules of Court, rule 3.1590(g).) Service by mail extends by five days the time to file a response. (Code Civ. Proc., § 1013, subd. (a); *Staten v. Heale* (1997) 57 Cal.App.4th 1084, 1088-1089.)

[12] It would appear that the court did review them, because one of Tim's objections was the proposed statement of decision misstated that the parties resided at the Walsh property until June 2008, when in fact it was until November 2010. The court's final decision noted that the parties resided at Walsh until October 2010.

fairly discloses the court's determination as to the ultimate facts and material issues in the case (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380). Tim's objections did not identify any principal controverted issue, ultimate fact or material issue the court failed to resolve. (See generally Cal. Rules of Court, rule 3.1590(c); *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 558.) Moreover, his objections were argumentative and primarily reflected mere disagreement with factual findings. (See, e.g., *Yield Dynamics*, at pp. 558-560 [argumentative, tendentious or vague queries that fail to conform to the manifest purpose of Code of Civil Procedure sections 632 and 634 are improper].) To the extent Tim's objection that the court provided no guidance how he was supposed to make an early withdrawal from his retirement account to pay Julia was valid, we have resolved that issue to Tim's advantage on appeal.

IV. The award of costs and attorney fees

In *Gilroy I*, we ordered Tim to bear Julia's costs on appeal. Julia then filed a motion in the trial court to set costs and attorney fees in the amount of $5,420.[13] On November 21, 2014, the court signed an order granting $5,420 to Julia, "payable by Plaintiff's counsel within 30 days." Because those monies had not been paid, the trial court awarded Julia $5,420 as part of the judgment. However, because the order was against his counsel

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[13] Although Tim asserts that there was no notice of motion, the superior court file contains one. However, the notice of motion does not clearly specify against whom fees and costs were sought.

only, Tim argues on appeal that $5,420 should be stricken from the judgment.

During the course of our review of the record, we discovered an interlineated copy of the court's November 21, 2014 order stating that the order was against "*Plaintiff or* Plaintiff's counsel." (Italics added.) We therefore asked the trial court for clarification. The court clarified that it had ordered $5,420 to be payable by Tim or his counsel and that Tim was present at the November 21, 2014 hearing and requested the interlineation.[14] The court then issued a nunc pro tunc order to correct the November 21, 2014 order. The court having clarified that the November 21, 2014 order was in fact also against Tim, we must reject Tim's argument that the $5,420 should be stricken.

DISPOSITION

Julia's motion for sanctions for filing a frivolous appeal is denied. Tim is obligated to pay $213,500. However, the judgment is modified to strike any language directing that Tim pay Julia $213,500 *from* Tim's LACERA account and directing Tim to execute documents to transfer monies to Julia from that

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[14] This is probably another typographical error, because it is unclear why *Tim* would ask that the fee and cost award be issued against him personally. Although we cannot resolve any dispute, Tim has filed a supplemental letter brief disputing he asked the trial court to impose personal liability for the monies on him. We are unable to evaluate Tim's arguments in the absence of a reporter's transcript or settled statement from the November 21, 2014 hearing.

account. The judgment is otherwise affirmed as modified. Appellant is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.