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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of VIKKI and ROBERT M.
LANE.

2d Civil No. B249872

(Super. Ct. No. 1093841)

(Santa Barbara County)

VIKKI LANE,

Respondent,

v.

ROBERT M. LANE,

Appellant.

Robert M. Lane, proceeding in propria persona, appeals from an order awarding his former spouse, Vikki Lane (respondent), attorney fees and costs of \$349,561 as a sanction pursuant to Family Code section 271.¹ Appellant contends that the trial court made eight errors. We reduce the award by \$180 to \$349,381. As so modified, we affirm the order granting respondent's motion for section 271 sanctions.

¹ All statutory references are to the Family Code unless otherwise stated.

Background

This is appellant's fifth appeal in this matter. The four previous appeals - *In re Marriage of Lane*, case numbers B215911 (Jan. 13, 2011), B221646 (Apr. 18, 2011), B224556 (Nov. 28, 2011), and B228801 (Feb. 15, 2012) - were decided adversely to appellant in unpublished opinions. The complex factual and procedural background is set forth in our prior opinions, of which we take judicial notice. (Evid.Code, §§ 459, 452.)

In May 2013 respondent filed a motion for section 271 sanctions. In support of the motion, respondent's counsel declared that, after the judgment of dissolution was issued in March 2009, respondent incurred additional attorney fees and costs of \$349,561. The judgment ordered that appellant "pay [respondent] a total of \$250,000 pursuant to a prenuptial agreement, child support of \$6,000 per month retroactive to May 1, 2008, and \$175,000 in attorneys' fees and costs."

Counsel further declared: "[Appellant] filed more [than] 35 post-judgment motions between July 2009 and October 2012. Not one of [his] motions has succeeded." On April 19, 2011, appellant filed a "voluntary petition for Chapter 7 bankruptcy relief . . . in the United States Bankruptcy Court for the District of Wyoming." "[T]he Chapter 7 Bankruptcy Trustee filed an adversary proceeding against [appellant] and various family members alleging that [appellant] created and maintained self-settled trust entities to delay, hinder and defraud his creditors, including [respondent]." In April 2013 the Trustee and appellant reached a settlement pursuant to which appellant "is allowed to keep his IRA and Pension fund up to a cap of \$2.5 million, the furnishings for his two homes, his collectibles, pens, wine, certain gold and silver coins, and his automobiles. His remaining assets, worth over \$25,000,000, are to be turned over to the Chapter 7 Trustee for orderly administration of the payment of claims."

In reply to appellant's opposition to the motion for section 271 sanctions, respondent's counsel declared: Appellant's "estate is currently solvent, because under the express terms of the settlement agreement [between appellant and the Chapter 7 Trustee],

[appellant] is walking away with between \$2,500,000 and \$3,000,000 in assets which are expressly excluded. . . . The remainder of the estate will go to pay the bankruptcy trustee (up to \$980,000), the attorneys' for the bankruptcy trustee (up to \$8,000,000), and [appellant's] creditors, including [respondent]. Whatever is left over . . . will be returned to [appellant]." Respondent "is seeking recovery of all the post-judgment fees and costs she incurred in both pursuing enforcement of [the trial] Court's divorce judgment and in defending [respondent's] vexatious motions and appeals. [Respondent] is NOT requesting any fees which have been previously ordered by [the trial] Court." "The fees previously awarded post-judgment have been subtracted from the amount requested."

In granting respondent's motion, the trial court declared: "The Court considers the facts set out in the moving papers and the reply as correct and accurate; it is very credible and persuasive."

Section 271

"Section 271 provides that a family court may impose an award of attorney fees and costs 'in the nature of a sanction' where the conduct of a party or attorney '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.' (§ 271, subd. (a).)" (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1316.) "[S]ection 271 vests family law courts with an additional means with which to enforce this state's public policy of promoting settlement of family law litigation, while reducing its costs through mutual cooperation of clients and their counsel." (*Id.*, at p. 1318.)

"A trial court has broad discretion under Family Code section 271 to award sanctions against a party who frustrates the policy to promote settlement and cooperation in family law litigation. The only stricture imposed by this statutory provision is that the sanctions may not impose an unreasonable financial burden on the party sanctioned, although the court must take into consideration all evidence concerning the parties' incomes, assets and liabilities. [Citation.]" (*In re Marriage of Falcone and Fyke* (2012)

203 Cal.App.4th 964, 995.) Section 271, subdivision (a) provides that a party seeking sanctions "is not required to demonstrate any financial need for the award."

Standard of Review

" 'A sanctions order under . . . section 271 is reviewed for abuse of discretion. [Citation.] Accordingly, we will overturn such an order only if, considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order.' [Citations.] ' "We review any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review." ' [Citation.]" (*In re Marriage of Falcone and Fyke, supra*, 203 Cal.App.4th at p. 995.)

"A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Therefore, "[i]t is appellant['s] burden to establish an abuse of the court's discretion. [Citations.]" (*People v. Bhakta* (2008) 162 Cal.App.4th 973, 980.)

First Alleged Error

Appellant contends that the trial court abused its discretion by relying upon "photocopies of partial deposition and court transcripts that are not certified, and in some cases not even identified as to the deponent, the date, the location, and the case and jurisdiction to which they pertain." Furthermore, respondent's "uncertified deposition and court transcripts must be excluded since it was not proved that the opposing party [i.e., appellant] had the opportunity to cross examine." Appellant's contentions are forfeited because in the trial court he failed to object on these grounds. (Evid. Code, § 353, subd. (a).) In addition, appellant has failed to show that the court's allegedly erroneous consideration of the uncertified depositions and court transcripts "resulted in a miscarriage of justice." (*Id.*, subd. (b).)

Second Alleged Error

Appellant argues that "the Court's rulings show no evidence of the Court having considered [his] ability . . . to pay" attorney fees and costs of \$349,561. "[T]he sanction must be scaled to the payor's ability to pay and must be made in light of both parties' financial circumstances. [Citation.]" (*In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 828.) Section 271 does not require the court to expressly state on the record that it has considered the sanctioned party's ability to pay. Where, as here, there is no "indication to the contrary, we are required to presume [the] court was aware of, and followed, the applicable law and considered all the relevant facts and arguments. [Citations.]" (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 447.)

Appellant maintains that "the evidence shows that . . . , based upon his financial status, [he] does not have the ability to pay the sanctions requested and ultimately ordered by the Court." Substantial evidence supports the trial court's implied finding that he has the ability to pay. The settlement agreement between appellant and the Chapter 7 Trustee allows appellant to retain assets in his IRA and pension plan "in an amount not to exceed \$2.5 million." The settlement agreement refers to "Exhibit A," which values appellant's IRA at \$600,000 and his pension plan at \$1 million.² Appellant's Income and Expense Declaration, filed in May 2013, shows that he owns personal property worth \$294,400.

In his reply brief appellant asserts that "the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 protects IRAs from creditor judgments for up to \$1 million in IRA assets." But the issue is not whether appellant's IRA account is protected

² Appellant was born on June 4, 1953, and is presently 61 years old. We take judicial notice of the fact that, because appellant is over the age of 59 1/2, he can withdraw funds from his IRA without payment of a penalty. (Evid. Code, §§ 459, 452, subd. (h); see [http://www.irs.gov/Retirement-Plans/Retirement-Plans-FAQs-regarding-IRAs-Distributions-\(Withdrawals\)](http://www.irs.gov/Retirement-Plans/Retirement-Plans-FAQs-regarding-IRAs-Distributions-(Withdrawals)).)

against creditor judgments. The issue is whether he has the ability to pay respondent's attorney fees, and he could use the IRA funds for this purpose.

Third Alleged Error

The parties' prenuptial agreement was signed in Michigan. It provides that the agreement "shall be governed by . . . and enforced in accordance with" Michigan law. Appellant contends that the trial court erroneously applied section 271 instead of Michigan law. The contention is without merit. By imposing attorney fees and costs as a sanction for appellant's post-judgment conduct, the court was not interpreting or enforcing the prenuptial agreement.

Fourth Alleged Error

We reject appellant's argument that the trial court erred because in the prenuptial agreement the parties waived their right to "attorney fees . . . or any other form of payment that might otherwise result from a divorce or separation." This provision cannot reasonably be construed as a waiver of section 271 sanctions imposed against a party "who frustrates the policy to promote settlement and cooperation in family law litigation." (*In re Marriage of Falcone and Fyke, supra*, 203 Cal.App.4th at p. 995.) Such sanctions are not a form of payment that ordinarily results from a divorce or separation. Such sanctions result from the sanctioned party's conduct during family law litigation.

Fifth Alleged Error

Appellant contends that the trial court erred by failing to consider various factors, including "the complexity of litigation, the amount of time involved, . . . the attention given the litigation," and " 'whether counsel's skill and effort were wisely devoted to the expeditious disposition of the case.' " Section 271 does not require the court to consider these factors. It requires the court to "take into consideration [(1)] all evidence concerning the parties' incomes, assets, and liabilities," and (2) whether the sanction

"imposes an unreasonable financial burden on the party against whom the sanction is imposed." (*Id.*, subd. (a).)

Appellant claims that some attorney fee billings are unwarranted because they "are clearly for matters unrelated to the enforcement of [respondent's] judgment including items marked personal, the investigation of a complaint against [respondent], the theft of artwork by [respondent], etc." Moreover, "the billing includes \$39,635.00 . . . for something called Attorney Service with no further documentation" In support of these claims, appellant cites a 93-page detailed schedule of attorney fees. The claims are forfeited because appellant failed to make precise record citations. "Each brief must . . . [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) " 'The appellate court is not required to search the record [i.e., the 93-page schedule of attorney fees] on its own seeking error.' [Citation.] Thus, '[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]' [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) "In [his] reply brief [appellant] supplies some record references although they are still incomplete, but this is too little, too late because [respondent] did not have the opportunity to respond." (*Provost v. Regents of University of Cal.* (2011) 201 Cal.App.4th 1289, 1305.)

Appellant's claims are also forfeited because they are not supported by meaningful legal argument. Each point in a brief must be supported "by argument and, if possible, by citation to authority." (Cal. Rules of Court, rule 8.204(a)(1)(A).) "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary. [Citations.]" (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

Sixth Alleged Error

Appellant contends that the section 271 sanctions award provides respondent with a double recovery because the award includes attorney fees that the trial court previously ordered appellant to pay. The previously ordered fees are \$15,000 for the first of appellant's four appeals and \$40,000 for the first of appellant's two contempt proceedings. In reply to appellant's opposition to the motion for section 271 sanctions, respondent's counsel declared that "the fee based sanction [respondent] is asking for does not include the \$15,000 this Court previously made in connection with [appellant's] first appeal [and] the \$40,000 in fees ordered after the first contempt trial" Appellant's contention that the sanctions award includes these items is forfeited because the contention is not supported by record citations and meaningful argument.

Seventh Alleged Error

The seventh alleged error is a repetition of appellant's forfeited fifth alleged error that the sanction award includes legal fees for respondent's personal matters, including "an anonymous complaint filed against her . . . and her theft of artwork." This time, however, appellant cites specific pages of the 93-page schedule of attorney fees: pages 625, 629, and 652 of the Clerk's transcript. Page 625 shows that on April 16, 2009, counsel charged \$30 for reviewing a letter from respondent about "missing artwork." Page 629 shows that on June 9, 2009, counsel charged \$180 for reviewing an email from respondent about "medical board investigation of anonymous complaint." (Respondent is a licensed physician.) Page 652 shows that on March 3, 2010, counsel charged \$34 for preparing a letter to the medical board concerning the complaint.

The trial court did not abuse its discretion in allowing recovery of the \$30 fee for reviewing the letter about missing artwork. In his reply to appellant's opposition to the motion for section 271 sanctions, respondent's counsel explained that appellant, "through his sister Patricia Lane, retained Glendale attorney Gary Bradley to pursue litigation against [respondent] for the return of the art work he claimed that she had taken. . . . After

numerous threats to seek legal redress and exchanges between Mr. Bradley's firm and [respondent's counsel], Mr. Bradley declined to further pursue the matter"

On the other hand, the trial court abused its discretion in allowing recovery of the \$180 fee for reviewing respondent's email about an anonymous complaint to the medical board. Respondent asserts that the complaint was "part of [appellant's] ongoing harassment strategy to bully [her] into compromising the Trial Court's judgments and orders." But we were unable to find any evidence in the record supporting a reasonable inference that appellant was involved in making the complaint.

The trial court did not abuse its discretion in allowing recovery of the \$34 fee for preparing a letter to the medical board. In his opposition to the motion for section 271 sanctions, appellant stated that on the 93-page schedule of attorney fees he had marked as "Personal" the nonrecoverable fees for personal matters. The \$180 fee was marked "Personal," but there was no mark next to the \$34 fee.

Eighth Alleged Error

Finally, appellant argues that the trial judge erred in ruling on the section 271 motion after appellant filed a motion to disqualify him. The disqualification motion was filed on June 7, 2013, four days after the judge conducted a hearing on the section 271 motion and issued a tentative decision granting that motion. Four days after the filing of the disqualification motion, the judge signed his final order granting the section 271 motion. Appellant maintains that, after the filing of the disqualification motion, the section 271 motion should have been "assigned to another judge until the disqualification motion ha[d] been ruled upon."

After the filing of the disqualification motion, the trial judge properly ruled on the section 271 motion. Code of Civil Procedure section 170.4, subdivision (c)(1) provides: "If a statement of disqualification is filed after a trial or hearing has commenced . . . , the judge whose impartiality has been questioned may order the trial or hearing to continue The issue of disqualification shall be referred to another judge for decision . . . , and if

it is determined the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated." On July 1, 2013, another judge determined that the trial judge was not disqualified.

Disposition

The award of attorney fees and costs as a sanction pursuant to section 271 is reduced by \$180 to \$349,381. As so modified, the order granting respondent's motion for section 271 sanctions is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Thomas P. Anderle, Judge
Superior Court County of Santa Barbara

Robert M. Lane, in pro per, Appellant.

Griffith & Thornburgh, Bruce D. Glesby and Marisa K. Beuoy, for
Respondent.