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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of NANCY L. IREDALE and CLIFTON B. CATES III. NANCY L. IREDALE, Appellant, v. CLIFTON B. CATES III, Appellant.	B148135, B157568 & B165851 (Los Angeles County Super. Ct. No. BD289215)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Timothy M. Murphy, Commissioner, and Richard E. Denner, Judge. Affirmed in part, reversed in part, and remanded.

Troy & Gould, P.C. and Jeffrey W. Kramer for Appellant Clifton B. Cates III.

Jaffe and Clemens, Daniel J. Jaffe, Linda R. Snyder, Law Offices of Bernard N. Wolf, and Bernard N. Wolf for Appellant Nancy L. Iredale.

Introduction

In three consolidated appeals arising out of the dissolution of the marriage of Nancy L. Iredale and Clifton B. Cates III, Cates appeals from numerous rulings encompassed within the trial court's judgment concerning the division of

community property and other economic issues, from a postjudgment order to enforce the judgment, and from a postjudgment order imposing sanctions on him for thwarting the policy of the law to promote settlement and encourage cooperation to reduce litigation costs. As to the first appeal, with but one exception, we find no merit in Cates's contentions. Iredale filed a cross-appeal as to the judgment, however, given our resolution of Cates's appeal, we conclude no relief is in order on the cross-appeal.

As to the second appeal concerning the postjudgment order enforcing the judgment, we conclude the trial court's ruling was in excess of its jurisdiction. We therefore reverse that portion of the order from which the appeal was taken, and remand the matter to the trial court.

As to the third appeal concerning the imposition of sanctions, we find no error and affirm the order.

Factual and procedural background

The parties married on November 26, 1976. They have two children, Clifton IV (CB), born August 31, 1982, and Michael, born August 2, 1987.

Iredale filed a petition for dissolution of marriage on October 19, 1998. The parties separated in November 1998. Iredale contends they separated on November 2, 1998, citing Cates's response to the petition for dissolution. Cates apparently took the position later that they separated on November 30, 1998. The judgment does not specify the exact date of separation.

On May 24, 1999, the trial court issued a judgment of dissolution of marriage as to status only. The trial on the reserved issues took place over 20 hearing dates from October 1999 through June 2000.

The trial court issued a statement of decision on October 25, 2000. A judgment on the reserved issues was entered on January 30, 2001. Cates filed a

notice of appeal from the judgment on February 13, 2001; Iredale filed a notice of cross-appeal from the judgment on March 2, 2001.

After the judgment on reserved issues was filed, and the notices of appeal and cross-appeal were filed, the parties filed various motions to enforce the judgment, and Iredale filed a motion requesting sanctions pursuant to Family Code section 271. Cates filed notices of appeal from two of the resulting orders; those appeals are the subjects of the consolidated appeals in B157568 and B165851.[1] The factual and procedural background as to these appeals will be discussed separately with regard to each.

Discussion

I. B148135

A. Valuation of Iredale's Partnership Interest in PHJW

1. Factual Background

Iredale, through her professional corporation, is a partner in the Los Angeles law firm of Paul, Hastings, Janofsky & Walker (PHJW). She became a partner in 1982. Cates, through his professional corporation, is a contract lawyer with the Washington, D.C. law firm of Ivins, Phillips and Barker (IPB).

The trial court assessed the community interest in Iredale's partnership interest in the PHJW law firm at $238,347, including goodwill valued at $42,318.[2]

Iredale testified that she holds an interest of .00781 in the PHJW law firm, through her professional corporation. PHJW has 165 partners. Iredale is not involved in management of the firm.

When she became a partner in 1982, Iredale signed its partnership agreement, which she had no opportunity to draft nor modify. She periodically

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[1] The appeal from a third postjudgment order, designated as B150855, was ordered dismissed pursuant to stipulation of the parties.

[2] Cates's law practice was valued at $57,227.

signed modifications of the agreement. When she became a partner, she was not required to buy into the firm's accounts receivable, work in progress, or goodwill. PHJW has been in existence since 1951, and at the time Iredale joined, the firm already had substantial clients and a fine reputation, which continue to date.

Iredale is expected to bill at least 1,800 to 1,900 hours per year. She devotes an additional 600 to 900 nonbillable hours per year to enhance her reputation as a lawyer and to attract clients to the firm.

Donald Alfred Daucher, a partner at PHJW and its former managing partner, testified that every new partner must sign the partnership agreement, the terms of which are not negotiable. Incoming partners do not pay for any interest in the firm's accounts receivable, work in progress, or goodwill. Under the partnership agreement, a retiring partner receives his or her share of the firm's capital, calculated based upon that individual's percentage ownership interest in the firm. After a partner departs, he or she might not receive the balance in his or her capital account immediately; the firm may retain the capital account for up to five years. Upon leaving the firm, partners do not receive payment for the accounts receivable, work in progress, or goodwill. About 60 partners had left the firm over the prior seven years, and none received any payment for accounts receivable, work in progress, or goodwill.

Daucher testified that the firm does not retain much cash but instead distributes all the excess of cash over expenses each month, in an amount based upon each partner's percentage interest. Sometimes the firm distributes money to partners in amounts that exceed the income of the firm. Partners receiving such distributions would in essence be borrowing against their respective capital accounts.

Jeffrey Kinrich, a certified public accountant and financial analyst, testified as an expert witness on Iredale's behalf. He testified that Iredale's law practice

interest had no goodwill and the value of her interest in the firm should be measured by the value of her capital account, $183,000. He noted that pursuant to the PHJW partnership agreement, individual partners do not own any of the accounts receivable, work in progress, or goodwill of the firm. The partnership owns these items, not the individual partners.

Kinrich testified that he performed several alternative calculations regarding Iredale's goodwill using a traditional capitalization of excess earnings approach. He compared her compensation with the average profits per partner of the top 100 law firms in the United States. After making two adjustments, for her years of tenure as a partner and for her billable hours, he concluded that Iredale received reasonable compensation for her services when compared to her peers, and that she was not receiving excess compensation even before taxes. Therefore, the value of her goodwill in PHJW was zero.

Kinrich also compared Iredale's compensation with that of peer attorneys in Los Angeles-based law firms and California-based firms with more than 100 equity partners. Compared to peer attorneys in the Los Angeles-based law firms, the receipts of Iredale's professional corporation exceeded the annual income of an adjusted peer group by $33,000. After reducing that figure by about 49 percent to determine her after-tax, net excess earnings, Kinrich capitalized her net excess earnings by multiplying that figure by a factor of 2.5 (equivalent to a discount rate of 40 percent) to arrive at a valuation of Iredale's goodwill ($42,318).

Robert Daniels testified as a forensic expert on behalf of Cates. He valued Iredale's partnership interest in PHJW at $813,000 as of January 31, 1999 ($482,919 in net tangible assets including accounts receivable and work in progress, and $330,000 in intangible assets, i.e., goodwill). He did so by analyzing the PHJW firm as a whole, and did not examine Iredale's individual interest. To reach the $813,000 figure, he appraised the entire PHJW firm's tangible and

intangible assets and then multiplied those figures by Iredale's percentage interest. Daniels acknowledged that PHJW existed for many years as an established national firm before Iredale became a partner, and thus the firm already possessed substantial goodwill when she became a partner.

Daniels did not rely on the capitalization of excess earnings approach as his main basis for computing Iredale's goodwill. He instead estimated Iredale's replacement cost by assessing the expense of replicating Iredale's services through the salary and billable hours of an associate attorney, i.e., an employee. He acknowledged that such an associate likely would not have the same book of business as Iredale. He also acknowledged that comparing Iredale's compensation to that of her peers, rather than to that of an associate attorney, was "one thing to consider" in valuing her goodwill. He maintained, however, that there was no valid statistical data available to determine reasonable compensation to hire someone with all her skills and experience. He testified that the excess earnings approach should not be used here because there is no valid statistical data available from which to determine what it would cost to hire someone to replace her.

In addition, Daniels testified he performed several "sanity checks" to corroborate his $813,000 figure. He did so based on the assumption that Iredale's billable hours were about 1,900 per year. He did not take into account the fact that Iredale was also required to spend hundreds of hours on nonbillable career advancement and business promotion activities.

Furthermore, Iredale received (through her professional corporation) $220,000 in distributions from PHJW in the months immediately following the parties' separation; these distributions were subtracted from her capital account before the date on which her interest in PHJW was valued (January 31, 1999, the end of PHJW's fiscal year).

2. Contentions on Appeal and Discussion

Cates argues that the trial court erroneously valued the community's interest in Iredale's partnership at PHJW based on what Iredale is entitled to receive under the partnership agreement if she withdraws from the firm (i.e., her capital account, valued on the date of separation at approximately $190,000, reflecting the value of her interest in the hard assets of the firm, but not the firm's accounts receivable, work in progress, or goodwill). Cates contends that the valuation should have been based instead on the value of her continuing interest in the firm as a going concern. Specifically, he argues that the value of Iredale's partnership interest, including her share of PHJW's accounts receivable and work in progress, but not including goodwill, is $666,265, versus the $190,000 "liquidation value" used by the court. Cates contends that, in addition, the community's interest in the PHJW partnership should have included goodwill in the amount of $330,000.

Cates contends: "When, as here, all of the evidence indicates that the law partnership and the spouse's interest in the partnership will continue indefinitely, the valuation must be as a going concern rather than a liquidation." (Citing *Brawman v. Brawman* (1962) 199 Cal.App.2d 876; *In re Marriage of Foster* (1974) 42 Cal.App.3d 577, 584; and *In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 105.) Relying on *In re Marriage of Garrity and Bishton* (1986) 181 Cal.App.3d 675, 688-689, he argues that Iredale's capital account was not the only asset to be valued, and that the court was required to take into account the practice's fixed assets, properly aged accounts receivable, costs advanced, and work in progress, in establishing the partnership's value. (See also *In re Marriage of Kilbourne* (1991) 232 Cal.App.3d 1518, 1522, quoting *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 21.) While Cates's arguments would have some force under different circumstances, based upon the particular facts of this case we find no error.

General principles regarding valuation of a professional practice were set forth in *In re Marriage of Lopez, supra,* 38 Cal.App.3d 93. "In determining the value of a law practice or interest therein, the trial court should determine the existence and value of the following: (a) fixed assets, which we deem to include cash, furniture, equipment, supplies and law library; (b) other assets, including properly aged accounts receivable, costs advanced with due regard for their collectability; work in progress partially completed but not billed as a receivable, and work completed but not billed; (c) goodwill of the practitioner in his law business as a going concern; and (d) liabilities of the practitioner related to his business." (*Id.* at p. 110.)

While the guidelines set forth in *Lopez*, and followed in *In re Marriage of Garrity and Bishton, supra,* 181 Cal.App.3d 675, 688-689, are generally applicable, the particular circumstances of each case, and each professional practice, will vary and call for different methods of valuation. Here, in declining to value Iredale's partnership interest based upon the value of PHJW's accounts receivable and work in progress, the court reasoned: "Since Petitioner did not buy or otherwise acquire an interest in the accounts receivable, work-in-process, or goodwill of the law firm under the Partnership Agreement, and because upon Petitioner's termination, voluntarily, involuntarily or through retirement, will not result in her receiving any share of the law firm's intangible assets [*sic*], the intangible assets consisting of accounts receivable, work-in-process, goodwill are not a community asset to be valued or divided in this action."

Thus, the trial court was not evaluating Iredale's interest in PHJW at liquidation value rather than as a going concern as Cates claims, but instead was looking at the specific interest which Iredale holds in PHJW. That interest does not include an entitlement, at any time, to collect a portion of the accounts receivable, work in progress, or goodwill of the law firm. The trial court

reasonably concluded that Iredale's interest was limited to the value of her capital account, which reflected the value of her interest in the hard assets of the firm, but not the firm's accounts receivable, work in progress, or goodwill.

In *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, cited in the court's statement of decision and relied upon by Iredale on appeal, the appellate court affirmed the trial court's valuation of the husband's interest in a law corporation where the applicable shareholder's agreement provided that a shareholder had no interest in the corporation's accounts receivable, work in progress, or goodwill. The income of the firm's shareholders/members depended not on their percentage interest as shareholders, but on employment agreements which based compensation on seniority and productivity. The appellate court held that the trial court did not abuse its discretion in using the corporation's stock purchase agreement, which excluded accounts receivable and work in progress, to value the community interest in the husband's law firm. (*Id.* at pp. 671-672.) In so doing, the court rejected wife's contention that the stock purchase agreement merely measured a shareholder's contractual withdrawal rights, and was inapplicable because husband was not withdrawing from the firm. The appellate court held that although the trial court was not valuing husband's contractual withdrawal rights, it was not precluded from using the stock purchase agreement to determine the community interest in the business. (*Id.* at p. 672.)

Similarly here, although PHJW is a partnership rather than a corporation and Iredale is a partner and not a shareholder with an employment agreement, the values of PHJW's accounts receivable, work in progress, and goodwill are not relevant to a valuation of Iredale's interest in the firm. Pursuant to the partnership agreement she signed when she joined the firm, individual partners do not own any of the accounts receivable, work in progress, or goodwill of the firm; these items are owned by the partnership itself. We conclude that the trial court did not abuse

its discretion in using the value of Iredale's capital account to determine the community interest in PHJW; she held no entitlement to claim a portion of the accounts receivable, work in progress, or goodwill of the law firm as a going concern.

After concluding that Iredale did not have an interest in a proportionate share of the goodwill of her law firm, the court determined that Iredale herself possessed goodwill, and accepted the value of that goodwill offered by her expert, $42,318, finding her goodwill to be "partially a community asset." As detailed above, the court's finding was based on testimony by Iredale's expert that Iredale's compensation from her law firm is slightly more than the average compensation of her peers at other major Los Angeles law firms. Cates argues this is a misapplication of the excess earnings methodology, contending that in determining excess earnings, the spouse's earnings must be compared not to the earnings of her peers, but to the cost of replicating her earnings *by a salaried employee* whose compensation does not include a share of the firm's profits, relying on *In re Marriage of Garrity and Bishton, supra,* 181 Cal.App.3d 675, 688, footnote 14. He argues that the method accepted by the trial court primarily measured the relative profitability of the PHJW law firm compared to other major law firms, rather than measuring the goodwill Iredale enjoys as a partner in a major law firm, in comparison to others without such a valuable asset.

"Goodwill value may be measured by 'any legitimate method of evaluation that measures its present value by taking into account some past result,' so long as the evidence 'legitimately establishes value.'" (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 819, quoting *In re Marriage of Foster, supra,* 42 Cal.App.3d 577, 584.) "The trial court possesses broad discretion to determine the value of community assets as long as its determination is within the range of the evidence presented. [Citation.] The valuation of a particular asset is a factual question for

the trial court, and its determination will be upheld on appeal if supported by substantial evidence in the record. [Citation.]" (*In re Marriage of Nichols, supra,* 27 Cal.App.4th 661, 670.)

In *In re Marriage of Rosen, supra,* 105 Cal.App.4th 808, a case decided after the trial at issue here, the appellate court stated that the "'annual salary of the average salaried person' standard of *In re Marriage of Garrity and Bishton* is not the only standard for establishing reasonable compensation under the excess earnings method." (*Id.* at p. 823.) "[R]easonable compensation may also be based upon '"the cost of hiring a nonowner outsider to perform the same average amount that other people are normally compensated for performing similar services"'--the 'similarly situated professional' standard. Expert testimony . . . would be helpful in determining which approach (the 'average salaried person' or the 'similarly situated professional') is appropriate under the facts of a case and in applying the relevant approach to determine reasonable compensation."[3] (*Ibid.*)

We agree with the *Rosen* court that the "average salaried person" standard is not the only valid measure for establishing reasonable compensation under the excess earnings method. Where supported by substantial evidence, use of the "similarly situated professional" standard, as advocated by Iredale's expert and adopted by the trial court here, is appropriate. Iredale's expert testified that as compared to peer attorneys in Los Angeles-based law firms, Iredale's professional corporation received excess gross compensation of $33,000 annually. Capitalizing her net excess earnings produced the goodwill value of $42,318.

We conclude that the trial court's use of the "similarly situated professional" standard to calculate goodwill was entirely reasonable and supported by substantial

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[3] The *Rosen* court was assisted in reaching its conclusion in this regard by an amicus curiae petition filed by the California Society of Certified Public Accountants.

evidence. Cates's own expert had to concede that his method of comparing Iredale's compensation to what it would cost to hire an associate (actually 1.4 associates) did not account for the nonbillable hours expended by Iredale, nor would an associate be likely to have a client base comparable to Iredale's. Comparing Iredale's compensation to that of similarly situated professionals, rather than to a salaried employee, was indeed a more rational and reasonable method by which to calculate the value of Iredale's goodwill in this case.

Cates further argues the judgment ignored the community's interest in the $220,000 distribution declared and debited by PHJW to Iredale's capital account before January 31, 1999, the date which the parties agreed to use as the valuation date for Iredale's partnership interest (that date being the end of PHJW's fiscal year), thus reducing Iredale's capital account in the firm to the $190,000 value used by the court. The $220,000 distribution was considered to be her separate property, and this also resulted in a lower value for her capital account for purposes of computing Cates's share of that community asset. Cates requests that we modify the judgment to include as a community asset the $220,000 in "distributions due to partners" that PHJW deducted from Iredale's capital account or, alternatively, to add that amount back into Iredale's capital account in valuing her partnership interest in the law firm. We decline to do either.

As Iredale points out, the parties separated in November 1998. Iredale received the distribution of $220,000 on February 4, 1999. The distribution was for her services in January 1999, i.e., her postseparation work. The earnings of each spouse following the date of separation are separate property. (Fam. Code, § 771.) The fact that the parties agreed for purposes of trial to value Iredale's law practice interest as of January 31, 1999, does not convert her demonstrably separate earnings into community property.

B. Iredale's Postseparation Use of the Community Residence and Cars

1. Factual Background

For 19 years, the parties lived in a home on Armada Drive in Pasadena. The home was community property, and not encumbered by any appreciable debt. After the parties separated in late November 1998, Cates moved out of the Armada residence. He moved into a home he purchased with Nancy McCurley on January 8, 1999.

In a minute order dated March 29, 1999, the trial court (Timothy Murphy, Commissioner) issued a pendente lite order, awarding Iredale exclusive use and possession of the family residence. Iredale was ordered to pay to Cates spousal support in the amount of $3,200 per month. Iredale was granted primary physical custody of the children; Cates was awarded physical custody of the children on alternate weekends and on one evening per week. The court made no separate award for child support.

Iredale and the children continued to occupy the Armada residence for 27 months. During that time, she paid the expenses of maintaining the home, including the gardener, the pool service, and the alarm company. Her income and expense declaration of March 1999 estimated her monthly expenses at $2,780, including maintenance expenses for the home of $1,500 per month.

When the parties separated, Iredale kept the 1998 BMW 540i, worth $45,000, and a 1986 BMW 325es, worth $5,000. Cates kept the 1983 Porsche 911 SC, worth $13,000. The cars were free of debt.

In its statement of decision, the trial court found that (1) Iredale had paid all of the housing expenses for the community residence since the date of separation without requesting reimbursement; (2) the minor children occupied the residence with Iredale, and Cates contributed nothing to their upkeep; (3) "[t]he Court would

decline to award Watts[4] credits, because [Cates] voluntarily chose to leave the family residence and move into a new residence with his new girlfriend"; and (4) "[Iredale] and the minor children's occupancy of the residence without charge is in lieu of *pendente lite* support."[5]

As to spousal support, the court noted in its statement of decision: "[Iredale] has been paying [Cates] $3200 per month (a net figure) as spousal support. (This is a net figure once child support and childcare is deducted.)" Considering Cates's income, earning potential, and general financial situation (including the fact of his shared household expenses with Ms. McCurley), the court found Cates "has sufficient personal income and earnings potential to be self-supporting at or near the marital standard of living in a very short time," and "has little need for spousal support." Nonetheless, the court awarded to Cates "permanent spousal support at a reduced rate" of $1,683 per month, reserving jurisdiction to revisit the issue as of December 2001.[6]

In the judgment entered January 30, 2001, the trial court simply stated: "[Cates's] claim for Watts credits is denied."

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[4] *In re Marriage of Watts* (1985) 171 Cal.App.3d 366.

[5] In addition, the court found that Cates contributed $95,000 of community property funds toward the purchase of a new residence with Ms. McCurley, and ordered him to reimburse the community that amount plus interest.

[6] The statement of decision provides a record of the trial court's reasoning on particular disputed issues which we may review in determining whether its decision is supported by the evidence and the law. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2000) ¶ 8:21, p. 8-7; see *In Re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 649.)

2. Contentions on Appeal and Discussion

Cates contends that the community was entitled to reimbursement for Iredale's exclusive use of the Armada residence.[7] He relies on *In re Marriage of Watts, supra,* 171 Cal.App.3d 366, 374. In *Watts*, the appellate court held "that the trial court erred in concluding that it had no authority to reimburse the community for the value of [husband's] exclusive use of the family residence . . . between the date of separation and the date of trial. [¶] Upon remand, the trial court will determine whether [husband] should be required to reimburse the community for the value of his use of community assets after the date of separation in accordance with its findings. That determination should be made after taking into account all the circumstances under which exclusive possession was ordered." (See also *In re Marriage of Bell* (1996) 49 Cal.App.4th 300, 311 [trial court failed to address issue of husband's exclusive use of residence with rental value of $1,200 per month, on which husband made house payments of $350 per month after separation; Court of Appeal held that, in light of the *Watts* rule, "the court was obligated either to order reimbursement to the community or to offer an explanation for not doing so"].)

Cates contends that the trial court's stated reason for denying the *Watts* reimbursement--because Cates "voluntarily chose to leave the family residence and move into a new residence with his new girlfriend"--is legally impermissible under California's no-fault community property laws, citing *In re Marriage of Juick* (1971) 21 Cal.App.3d 421, 427. Cates also challenges the trial court's reasoning that Iredale's and the children's occupancy of the residence without charge was in lieu of pendente lite support, noting that the trial court also stated that the pendente lite award to Cates of $3,200 per month in spousal support was a net figure once

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[7] Cates contends the home had a fair rental value of $5,000 per month and a value of about $900,000.

child support and childcare were deducted. Thus, according to Cates, he paid Iredale pendente lite child support by a reduced spousal support order, and also did not get a *Watts* credit.

We conclude that Cates has not carried his burden of affirmatively demonstrating error in the court's denial of a *Watts* reimbursement to the community for Iredale's exclusive use of the home.

Initially, we agree, as Cates points out, that division of community property is to be carried out without regard to fault, but rather to achieve a mathematically equal division to the extent possible. In addition, we find that Cates's voluntary forsaking of the family home in favor of living with his new girlfriend did not amount to an agreement between the parties that the rental value would not be reimbursable.

However, the trial court concluded that after separation Cates was not contributing to the children's upkeep and Iredale's and the children's occupancy of the residence without charge was in lieu of pendente lite support. The pendente lite order awarded exclusive use and possession of the residence to Iredale, allocated physical custody of the children, and set an award of spousal support, but said nothing about child support nor rental value of the community residence. At the time of trial, in construing that previous order, the trial court noted in its statement of decision--though not in the final judgment--that the pendente lite award to Cates of $3,200 per month in spousal support was a net figure once child support and childcare were deducted. The court's statement on the one hand that the occupancy of the house was in lieu of child support, and on the other hand that the pendente lite spousal support award was a net figure after child support was deducted, at first blush appear to be directly contradictory. These statements are reconcilable, however, as we will explain.

In making the pendente lite order, the court arrived at the sum of $3,200 in spousal support, after deducting child care and child support, *and* after accounting for Iredale's exclusive use of the residence. The court's statement that Iredale's occupancy was *in lieu* of child support may be construed as a recognition that the two amounts, for child support and child care, and for Cates's community share of the rental value of the home, *offset* one another, leaving the net amount of $3,200 to be paid for spousal support pending trial.[8]

In Cates's trial brief, he acknowledged that he did not know how the trial court had computed the $3,200 *pendente lite* spousal support to be paid to him. As the order awarding pendente lite support was itself an appealable order,[9] from which neither party appealed, it is final and beyond our jurisdiction to review. Cates apparently did not request a statement of decision with regard to the pendente lite ruling.[10] Thus Cates cannot be heard to now object that the pendente lite order failed to explain or justify the amount of child support awarded,

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[8] In her income and expense declaration, Iredale claimed she paid $2,663 in private school tuition and expenses for the two children. Cates acknowledged Iredale paid the boys' tuition. On the other hand, Cates claims the monthly rental value of the home was $5,000; the rental value is a community asset to which Cates would be entitled to his community share, i.e., half, or $2,500 per month. (See *In re Marriage of Jeffries* (1991) 228 Cal.App.3d 548, 553.)

[9] Orders for temporary child and spousal support are in the nature of final judgments, and so are directly appealable. (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 595 [spousal support]; *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 [same]; *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1216 [child support].)

[10] Cates did object to the proposed statement of decision by "request[ing] specific findings by the Court of each item of income and expense of [each party] that the Court used in its order of March 29, 1999 in determining the net amount of spousal and child support payable by each of the parties *pendente lite*." As we explain, however, the trial court sufficiently described how it arrived at the conclusion that a *Watts* reimbursement was not warranted.

particularly where as here a reporter's transcript of the hearing at issue is not contained in the sizeable record on appeal (or at least is not called to our attention) and the court presumably stated sufficient findings on the record at that time.

Thus, we conclude that the trial court fulfilled its obligation to "determine whether [Iredale] should be required to reimburse the community for the value of [her] use of community assets after the date of separation in accordance with its findings," "after taking into account all the circumstances under which exclusive possession was ordered." (*In re Marriage of Watts, supra,* 171 Cal.App.3d 366, 374.) The trial court sufficiently explained in its statement of decision its reasoning in declining to order reimbursement, because such reimbursement was in lieu of, or stated otherwise was offset by, child support. We conclude the trial court rightfully declined to order reimbursement.

The court also denied Cates's request for compensation for Iredale's exclusive postseparation use of the community 1998 BMW automobile. He argues the rental value of the BMW should be offset by the rental value of the 1983 Porsche he retained, and the difference reimbursed to the community by Iredale. (Cates does not take issue regarding the lack of reimbursement of the rental value of the second BMW retained by Iredale primarily for the children's use.)

In rejecting Cates's request, the court found that no credible evidence was presented as to the rental value of the parties' automobiles, and declined to order reimbursement by either party for the use of the automobiles. Cates argues the court did have evidence of the *value* of each car, as noted in the statement of decision. He contends that he offered his opinion of their rental value but was prevented from testifying in detail about that opinion.[11] Cates claims it was error

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[11] Cates testified what the rental value would be for each car based on his calculation of what it would cost to lease the cars. The trial court sustained an objection by Iredale's

for the court to preclude such evidence, citing Evidence Code section 813 (value of property may be shown by opinion of owner or spouse of owner of property being valued). However, the court did in fact allow him to testify as to what amount he would accept as monthly rental for each vehicle. In the end, however, the court rejected the proffered evidence as lacking in credibility. We decline to interfere with the trial court's exercise of discretion, finding no clear abuse.

C. Spousal Support

1. Factual Background

In its statement of decision, the trial court made numerous findings regarding its award of spousal support, in accordance with the criteria enumerated in Family Code section 4320. Among them were that Cates graduated from Yale College and Harvard Law School, and is a highly skilled and well-educated tax attorney with an income potential equal to that of Iredale. He is employed as a contract lawyer with a guaranteed monthly salary of $23,750 per month plus travel expenses, and he is entitled to additional compensation for work in excess of 1,200 hours per year. He chose to structure a part-time employment arrangement, but expressed a desire to work more and become a partner. His law firm began paying the costs of his commuting to Washington, D.C., each month, reducing his former business expenses by about $18,000 per year. His job-related expenses were anticipated to be $2,323 per month. At least 80 percent of his automobile expenses are paid by his professional corporation and not reported as taxable income to him.

Cates is cohabiting with McCurley, whose salary is $90,000 per year, and she contributes 25 percent of the expenses of their joint household. He

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counsel that Cates did not demonstrate the expertise required to so testify. We find no error in this ruling.

demonstrated monthly expenses of $7,965 per month, and net monthly disposable income of $13,771. He demonstrated little need for spousal support. Prior to separation, he contributed $3,500 per month to joint household expenses, and one-third of the family travel expenses; he no longer contributes significantly to Iredale's household. Since separation, he took vacations to Hawaii and Europe. Evidence was presented that he has an extraordinary talent to invest money and be successful at it. He was able to purchase a new home that is perhaps more valuable than the family home. He has sufficient personal income and earnings potential to be self-supporting at or near the marital standard of living in a very short time. He has reduced expenses as a result of the contribution of 25 percent of expenses by his cohabitant. Cates has retirement assets in excess of $2.5 million dollars which he can utilize in the near future to augment his income if he chooses to continue to work part-time.

The court further found that Iredale devotes an average of 2,400 hours per year to her work. Her professional corporation pays substantial business expenses for clubs, business entertaining, taxes, social security, and car expenses, including paying both the employer and employee share of employment taxes, from the money paid to the professional corporation by PHJW for Iredale's services. Her professional corporation makes a mandatory contribution of $20,000 per year to the firm's defined contribution pension plan. Iredale testified that her corporation received distributions from PHJW, and that after her corporation paid its corporate expenses, it paid to her individually all of the remainder, so the corporation would have no additional tax to pay. Cates had paid little toward the children's support, medical expenses, or schooling since the date of separation, and both children attended private schools at a cost of approximately $1,500 per month. Iredale's W-2 income for 1998 was $657,300, and for 1999 it was $442,530.

Based on the foregoing, the court found that Cates could be self-supporting at the marital standard once the home was sold and he reached the retirement age of 55 in December 2001. The court awarded permanent spousal support "at a reduced rate" of $1,683 per month, through December 15, 2001. The court reserved jurisdiction on the issue of spousal support.

The court also found that Iredale paid a housekeeper, who assisted with childcare, $350 per week plus appropriate withholding, and that the housekeeper was necessary to permit Iredale to work full-time. "Based on the guidelines the Court finds that [Cates] would normally pay one-half the childcare plus an additional approximately $300 for CB and about $400 for Michael. In light of the previous orders the Court will use this amount as a setoff against the spousal support for the previous net figure as set out above in section IV [apparently referring to the $3,200 per month pendente lite spousal support award]."

In paragraph 9 of the judgment entered January 30, 2001, Iredale was ordered to pay Cates spousal support in the sum of $1,683 per month. The judgment repeated the findings as to the criteria the court considered in awarding spousal support as set forth in the statement of decision.

The court ordered that Cates would pay no child support to Iredale. However, the judgment states: "The amounts payable to [Iredale] as and for child support, including guideline child support, $300 for C.B. and $400 for Michael, and child care add-ons of one-half (1/2) of $350 per week, have been offset against [Iredale's] spousal support obligations to [Cates], so that the spousal support ordered in paragraph 9 above is a net spousal support payment, after deduction of [Cates's] child support obligations."

2. Contentions on Appeal and Discussion

Cates contends that the trial court erred in using Iredale's W-2 income in calculating spousal support, and also in considering the income of his cohabitant. He argues the award was "almost certainly the result of some mathematical calculation," but the trial court ignored his request for specific findings as to the income and expenses the court used to determine the number. He contends the court's lack of explanation for the award in the statement of decision violates the requirement of Code of Civil Procedure section 632 that the court "shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial," and that this alone requires reversal. (See *Marriage of Hargrave* (1985) 163 Cal.App.3d 346, 353-354.)

In arriving at the award of spousal support, the court used Iredale's W-2 income from her professional corporation rather than the income her professional corporation received from PHJW. Cates contends Iredale has absolute discretion to determine how much of her professional corporation's income from PHJW she will pay to herself as W-2 income.[12] As to Cates, however, the court disregarded his W-2 income and used the income from his professional corporation. Cates objected to what he asserted was a double standard in his objections to the proposed statement of decision, without success.

Family Code section 4330 provides that in a judgment of dissolution the court may order a party to pay spousal support to the other in any amount, and for any period of time, that the court deems just and reasonable. Wide discretion is

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[12] Cates asserts that in 1998, the year of the separation, Iredale used her professional corporation to reduce her income by 19 percent, from $807,777 to $657,300. Cates argues she did so by charging her golf club membership, vacations, and personal travel to her professional corporation. She acknowledged that some errors were made in the deductions taken in her tax return and she would need to file a corrected return. The following year, she used her professional corporation to reduce her income by 46 percent, from $819,089 to $442,530.

vested in the trial court in setting the amount and duration of long-term spousal support. (*In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 916.) The court must, however, apply the criteria listed in section 4320. (*In re Marriage of Fransen* (1983) 142 Cal.App.3d 419, 425.)

We find no error in the award of spousal support. The trial court made detailed findings with regard to the business expenses paid by each party's professional corporation. Substantial evidence was offered that Iredale was required to engage in extensive business development activities for which she incurred sizeable, legitimate expenses, and that her corporation was required to pay taxes and pension contributions. In contrast, Cates did not have similar business development expenses, and his travel and car expenses were paid by his firm. Under all of the circumstances considered by the court, it was appropriate for the court to rely on Iredale's W-2 income but not Cates's in calculating spousal support. This was not a case of the court applying a double standard, but rather of the court making findings as to credibility which Cates has not demonstrated were lacking in evidentiary support.

As to Cates's argument that the court failed to specify the mathematical equation it used to arrive at the spousal support figure, we note that the court may not simply use statutory guidelines in setting permanent support. Instead, the court must consider all of the factors enumerated in Family Code section 4320 and exercise its independent judgment in arriving at an award for permanent spousal support. (*In re Marriage of Zywiciel* (2000) 83 Cal.App.4th 1078, 1081.) We are satisfied from our review of the record that the court did that here.

Finally, as to the court's reference in its statement of decision and judgment that Cates was cohabiting with a woman whose salary is approximately $90,000 per year, and that the two of them had taken vacations to Hawaii and Europe, we agree that the income of a supporting party's subsequent spouse or nonmarital

partner may not be considered when determining or modifying spousal support. (Fam. Code, § 4323, subd. (b).)

However, when a supported party is cohabiting with a person of the opposite sex, "there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support." (Fam. Code, § 4323, subd. (a)(1).) "When cohabitation is found to exist, the burden is on the supported party to show that, despite the relationship, his or her need for support has not diminished." (Practice Under the Cal. Family Code (Cont.Ed.Bar 2004) § 6.26, p. 189, citing *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1161.)

Thus, the evidence as to Cates's cohabitant's income and financial contribution to their shared household was indeed relevant and the court was permitted to consider it. There is no evidence that the court merely added the cohabitant's income to Cates's before calculating the spousal support figure. Evidence as to their vacations merely served to further demonstrate Cates's standard of living and the availability of discretionary income for him to spend on leisure activities. We find no error.

D. Educational Expenses for Adult Child

1. Factual Background

The proposed statement of decision noted that the parties' son C.B. would be attending the University of Southern California the following year. The court then stated: "[U]nless [Cates] directly contributes one-half (1/2) of the cost of [C.B.'s] college expenses, one-half of those expenses shall be offset against any spousal support otherwise payable from [Iredale] to [Cates]." The same language was repeated in the statement of decision.

When this language appeared in the proposed statement of decision, Cates objected to the equal division of the college expenses. "While [Cates] has always

recognized his parental obligation to contribute to his children's college costs, [Iredale's] and [Cates's] respective incomes, whether computed on a gross or a net basis, do not warrant the Court's imposing one-half of this cost on [Cates]. In determining spousal support, *In re Marriage of Paul*, 173 Cal.App.3d 913 (1985) requires the Court to *consider* the college expenses of a child over the age of 18 paid by one party in determining spousal support. The case does not suggest, let alone require, that the parties share such expense equally. [Fn. omitted.] [Cates] requests that the Court modify it[s] order by providing an offset against spousal support payable by [Iredale] of either (1) *one-quarter* of C.B.'s college expenses (the approximate ratio of the parties' respective total incomes) or at most (2) *one-third* of C.B.'s college expenses (the parties' pre-separation expense-sharing arrangement." In a footnote, Cates stated: "In fact, the holding in *Marriage of Paul* was very limited. The Court of Appeals [*sic*] found merely that the trial court had abused its discretion by failing to consider at all college costs paid by the wife in determining spousal support. 173 Cal.App.[3d] at 921."

In addition, Cates objected "to the inclusion of child support of $300 per month for C.B. except for the month of August, 2000. [Cates] requests that the Court include an additional finding that C.B. was born on August 31, 1982 and turns 18 on August 31, 2000."

The judgment states in paragraph 9(a): "Payment of spousal support as set forth in paragraph 9 of this Judgment [in the amount of $1,683] is conditioned upon [Cates's] payment of one-half of the college expenses of the child of the parties, C.B. Cates, who will be attending the University of Southern California. On the first day of each month, [Iredale] shall provide [Cates] with a list of the full amount of C.B. Cates' college expenses paid through the end of the prior month and the anticipated college expenses for that month. 'College expense' is defined as tuition, room, board, books, normal student fees billed by the University, and

allowance not to exceed $450 per month, plus clothing. [Iredale] shall be entitled to offset one-half of all expenses paid, together with any arrearages due for any prior month, against the spousal support obligation set forth in this paragraph."

The judgment further provides that Cates would pay no child support to Iredale. However, the judgment also states: "The amounts payable to [Iredale] as and for child support, including guideline child support, $300 for C.B. and $400 for Michael, and child care add-ons of one-half (1/2) of $350 per week, have been offset against [Iredale's] spousal support obligations to [Cates], so that the spousal support ordered in paragraph 9 above is a net spousal support payment, after deduction of [Cates's] child support obligations."

2. Contentions on Appeal and Discussion

Cates requests that we modify the judgment to eliminate his obligation to pay child support and contribute to college expenses for the parties' adult child, as an offset to spousal support or otherwise. Cates points out that Family Code section 3901, subdivision (a) provides that child support for an able-bodied child continues "until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first."

In offsetting CB's college expenses against the award for spousal support, the trial court cited *In re Marriage of Paul, supra,* 173 Cal.App.3d 913, 920-921, in which the appellate court found the trial court, in awarding spousal support, had abused its discretion in failing to weigh the fact that the supported spouse was paying college expenses for an adult child "which would necessarily impact upon her need for spousal support." On appeal, Cates contends *In re Marriage of Paul* is from an "'older line of authority'" in conflict with "'more current authority [that] comes down strongly on the other side.'" He urges instead that we follow *In re Marriage of Serna* (2000) 85 Cal.App.4th 482, which criticizes *In re Marriage of*

Paul for "allow[ing] for the naked circumvention of a decision that has already been made by the Legislature--namely, that child support ends at age 19 at the latest, absent incapacity to earn a living," and for "allowing something to be done indirectly what could not be done directly." (*In re Marriage of Serna, supra,* 85 Cal.App.4th at p. 491. See also *In re Marriage of McElwee* (1988) 197 Cal.App.3d 902, 910-911 [husband could not be ordered to make child support payments to wife, so he could not be ordered to make support payments to wife sufficient to enable her to provide a residence for adult children]. But see *In re Marriage of Epstein* (1979) 24 Cal.3d 76, 90 [Supreme Court found no error in trial court's consideration of fact that supporting spouse was paying for college education of adult child when determining that spouse's ability to pay spousal support; lower court was "fairly attempting to allocate the available income to meet the financial needs of both parties"] [superseded by statute on other grounds as stated in *In re Marriage of Perkal* (1988) 203 Cal.App.3d 1198, 1201-1202].)

We conclude that we need not decide which of these apparently divergent authorities to follow because Cates invited the error, if any error there was, with regard to the court's imposing upon him an obligation to contribute to C.B.'s college expenses. In his income and expense declaration of March 2000, Cates noted that C.B. would be attending USC in the fall, and stated that he "expect[ed] to be sharing those expenses with [Iredale] in some equitable fashion." In his objection to the proposed statement of decision, he acknowledged he had "always recognized his parental obligation to contribute to his children's college costs," and took issue only with the equal division of these costs given the parties' respective incomes. He explicitly took the position that *In re Marriage of Paul, supra,* 173 Cal.App.3d 913, required the court to *consider* the college expenses of a child over the age of 18 paid by one party in determining spousal support. Granted, *In re Marriage of Serna, supra,* 85 Cal.App.4th 482, which criticizes *In re Marriage of*

Paul, had not been filed at the time he objected to the proposed statement of decision (although it was filed in December 2000, prior to the entry of judgment in January 2001), but other authority then existed by which he could have taken issue with the court's legally obliging him to share C.B.'s college expenses, e.g., *In re Marriage of McElwee, supra,* 197 Cal.App.3d 902, 910-911. The crucial fact is that Cates willingly accepted responsibility for paying part of C.B.'s college expenses. Having done so, and thus leaving it for the court to decide the proportion each party was to pay, he cannot now complain about the fact of the imposition of the obligation as being contrary to law. "It is settled that where a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal. [Citations.]" (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501 [husband who conceded at trial that determination of a community interest should be adjudicated pursuant to one case, could not subsequently argue on appeal that the trial court erred in failing to apply the principles stated in another case in determining the community interest].) We conclude Cates is barred from now taking the position that the court erred in imposing upon him the obligation to pay half of C.B.'s college expenses.

The court's reduction of the spousal support award by $300 per month for child support costs for C.B. is, however, another matter. Although the trial court nominally declined to award child support, it openly stated that the amount payable to Iredale "as and for child support, including guideline child support [of] $300 for C.B. . . . , have been offset against [Iredale's] spousal support obligations to [Cates], so that the spousal support ordered in paragraph 9 above is a net spousal support payment, after deduction of [Cates's] child support obligations."

Cates objected to the spousal support award being offset by $300 toward C.B.'s child support, citing Family Code section 3901. It provides: "(a) The duty

of support imposed by Section 3900 continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first. [¶] (b) Nothing in this section limits a parent's ability to agree to provide additional support or the court's power to inquire whether an agreement to provide additional support has been made."

We conclude that the court erred in offsetting $300 from the spousal support awarded to Cates, particularly because it separately ordered Cates to pay half of C.B.'s college expenses (defined as including, among other things, room, board, an allowance not to exceed $450 per month, and clothing). By offsetting $300 from the spousal support award, in effect the court charged Cates twice for the same expenses. He had agreed to contribute to C.B.'s college expenses, thus invoking the exception found in section 3901, subdivision (b), but had not agreed to continue to pay child support for C.B. after August 2000. We find that the court abused its discretion by offsetting $300 in child support for C.B. from the spousal support award after that time.

E. Iredale's Charitable Contributions

1. Factual Background

Cates contends that the trial court erred by failing to reimburse the community for a $50,000 charitable gift Iredale purportedly made to Holy Family Church, citing Family Code section 1100, subdivision (b).[13] She initially pledged

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[13] Family Code section 1100, subdivision (b) provides: "A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. This subdivision does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse."

the money during the marriage, in 1996 or 1997. Cates testified he did not consent to the gift. Iredale made contributions to Holy Family during the two to three years prior to the parties' separation, but Cates testified he did not know how much she had paid.

Iredale testified that shortly after the parties separated, she made a $15,000 charitable contribution to Holy Family out of her December 1998 paycheck. The parties disputed whether her postseparation earnings, beginning with paychecks in December 1998, were her separate earnings. Iredale testified to the $15,000 charitable contribution and other expenditures because, in the event the court found her December 1998 paycheck to be community earnings, she would seek reimbursement of expenditures she made toward community debts.

In his objections to the proposed statement of decision, Cates requested that the court reimburse the community for the charitable gift, but the statement of decision and judgment make no mention of it. The statement of decision specifies, however, that "[t]he distributions received by NLI, PC during December 1998 and January 1999 from the law firm are not the community property of [the parties]. They are [Iredale's] and/or her corporation's separate earnings pursuant to Family Code § 771."

2. Discussion

We find no error in the court's declining to order reimbursement to the community of the $50,000 charitable gift. Even assuming the applicability of section 1100, subdivision (b), Cates presented no evidence whatsoever regarding the amount of community property funds expended on the charitable contribution prior to the parties' separation. The only specific evidence was that Iredale made a

$15,000 charitable contribution from earnings which the court correctly found to be her separate property.[14]

F. Iredale's Postseparation Retirement Plan Contribution

1. Factual Background

Iredale testified [on April 12, 2000] that she was required to make contributions of $30,000 per year to a defined contribution plan, and that she made contributions to this plan after separation. The payments were made directly by PHJW, i.e., this was cash she never received but which her corporation would have otherwise received from PHJW.

During her rebuttal testimony, Iredale testified that since the parties separated she had made contributions to the pension plan. Counsel for Cates objected that Iredale had already rested her case, and that the information to be presented had not been given to Cates for evaluation. Iredale's counsel responded that the testimony would merely be an itemization of which contributions were made postseparation. The court permitted Iredale to proceed, and she then made reference to exhibit 58, a memorandum supplied to her by PHJW as to what postseparation contributions she had made. Cates's counsel objected that the exhibit was hearsay. Iredale stated, "I've actually made these contributions. This is simply an itemization of them." Iredale's counsel urged that it would be inane to have her testify verbatim from the document as to each contribution she had made. The court allowed Iredale to continue. Referring to exhibit 58, Iredale testified that she had "made these contributions" to the defined contribution plan, one of the plans she was seeking to have divided with the exception of her postseparation

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[14] In section A above, we upheld the trial court's ruling that the January 1999 distribution to Iredale's professional corporation from PHJW was her separate property.

contributions. Over Cates's counsel's renewed hearsay objection, the court allowed Iredale to move exhibit 58 into evidence based on Iredale's counsel's suggestion to "[p]ut it in as a summary of her testimony."

The judgment exempts from the community $55,000 in postseparation retirement plan contributions together with all accumulations thereon.

2. Contentions on Appeal and Discussion

Cates contends on appeal, as he did at trial, that exhibit 58 was hearsay, for which Iredale offered no exception to the hearsay rule. (Evid. Code, § 1200.) He argues that the only evidence of the $55,000 in contributions was the memorandum to Iredale from PHJW listing "contributions you have made to the Defined Contribution Plan since December 1998," and she gave no testimony independent of the document. He contends that her testimony was not sufficient to authenticate the exhibit.

He further objects based on the fact Iredale introduced the exhibit on the last day of trial, six months after she rested her case, giving Cates no opportunity to evaluate it or obtain contrary evidence. Cates argues admission of this evidence was an abuse of discretion. (Code Civ. Proc., § 607, subd. 6.) He points out that the burden of proof was on Iredale to prove by clear and convincing evidence that some portion of her interest in the retirement plan, which was acquired during the marriage, was her separate property. (*In re Marriage of Ashodian* (1979) 96 Cal.App.3d 43, 47-48; see Fam. Code, § 760.)

Evidence Code section 1523 provides in subdivision (a): "Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing." Subdivision (d) provides, however, that "[o]ral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court

without great loss of time, and the evidence sought from them is only the general result of the whole." Iredale testified with regard to exhibit 58 that she had in fact made the contributions listed there. Exhibit 58 was a useful summary of Iredale's postretirement contributions to her defined contribution plan, the contents of which she specifically adopted in her oral testimony.

In addition, exhibit 58 did not constitute the *only* evidence of Iredale's postseparation contributions to the retirement plan. Exhibits 4, Bd, and F show some of Iredale's retirement contributions: $2,500 in early December 1998; $10,500 in early January 1999;[15] and $30,000 for 1999. She had previously testified that she was required to make annual contributions of $30,000 to the defined contribution retirement plan. In addition, the court could infer from exhibit 9 that she had made a $12,000 contribution in early 2000, just as she had in early 1999. Thus, her contributions were demonstrated by her testimony and by other exhibits which Cates already had in his possession. We find no error requiring reversal of the challenged portion of the judgment.

G. Community Debts to the Parties' Professional Corporations

1. Factual Background

During the marriage, both Iredale and Cates borrowed money from their professional corporations. As of the date of valuation, Cates owed his professional corporation about $32,000, and Iredale owed hers about $27,000. In its statement of decision, the court found that "[a]s of the date of separation, the community had received the benefits of the loans from both [Iredale's] and [Cates's] corporations

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[15] The parties separated in November 1998. The court specified in its statement of decision that "[t]he distributions received by NLI, PC during December 1998 and January 1999 from the law firm are not the community property of [the parties]. They are [Iredale's] and/or her corporation's separate earnings pursuant to Family Code § 771."

in terms of cash received and taxes deferred . . . . Therefore, the community will not be charged with any of these loans . . . ." The court did not include Iredale's $27,000 loan among the assets of her professional corporation and specified in its statement of decision that "[t]o be consistent, the [Cates professional corporation] 'asset' consisting of loans due from officers has not been included above in connection with the valuation of [Cates's] professional corporation."

2. Contentions on Appeal and Discussion

Cates contends, however, that the court *did* include the $32,000 in loans in valuing Cates's professional corporation. It found that his corporation's assets totaled $73,227, a figure from the balance sheet shown on Schedule L of the corporation's 1998 tax return. Included in the $73,227 figure was $32,826 in "[l]oans to stockholders." Thus, the net worth of Cates's professional corporation is overstated by $32,826, as $57,227 rather than $24,401.

Cates objected to this mistake when it first appeared in the court's proposed statement of decision, but it was not corrected in the statement of decision and judgment.

The judgment awards Cates his professional corporation as his separate property and credits Cates with the erroneous $57,227 valuation in calculating an "equalizing payment," thus reducing the equalizing payment otherwise due to Cates by $32,826.

Iredale responds that the court has wide discretion in valuing assets, and that Cates invited the error, if any, by submitting on April 28, 2000 proposed findings of fact that specified that the assets of his corporation were valued at $73,227, less liabilities of $16,000. The statement of decision adopts that finding as proposed by Cates.

We conclude that Cates has satisfactorily established error. The court clearly stated its intent that the $32,826 debt was not to be counted toward the value of Cates's corporation, just as the community debt owed to Iredale's corporation was not included in valuing her corporation, yet the value of Cates's corporation used by the court clearly includes the debt as an asset of the corporation. We therefore order the judgment to be modified to reduce the value of Clifton B. Cates, Inc. from $57,227 to $24,401, thereby excluding the $32,826 community debt to Cates's professional corporation. The equalizing payment due to Cates must be modified accordingly.

H. Cates's Request for Attorney Fees and Costs on Appeal

In view of our resolution of the numerous issues raised by Cates on appeal in favor of Iredale, with only one exception, we consequently decline to award him attorney fees and costs on appeal.

I. Iredale's Cross-Appeal

Iredale filed a cross-appeal, urging that in the event Cates's appeal proved successful, it would be necessary to remand the matter to the trial court for reassessment of the spousal support awarded to him. It is true that our decision in section G above requires modification of the equalizing payment to award Cates $32,000 more, in light of the error with regard to valuing his corporation. However, we conclude the modification has a de minimis effect on the division of the assets held by each party. It is highly unlikely the court's order as to spousal support would have been materially different had the error not been made. For that reason, and in the interest of finality, we decline to remand the matter to the trial

court for the purpose of reevaluating the spousal support award based on the modification of the equalizing payment.

II. B150855

After the judgment on the reserved issues was entered on January 30, 2001, each party filed a motion to enforce the judgment. On May 14, 2001, the trial court filed an order enforcing judgment. Cates filed a notice of appeal from that order on June 1, 2001, which was designated Second Appellate case number B150855. That appeal was consolidated with the appeal in B148135 by order dated October 12, 2001. The briefing in B148135 included discussion of the appeal in B150855 regarding the May 14, 2001 order enforcing judgment, and specifically with regard to the division of two investment partnerships, Equity Holdings and Armada Associates II. However, on February 2, 2004, the parties stipulated to dismiss the appeal from the May 14, 2001 order. Accordingly, we do not address the issues with regard to that dismissed appeal.

III. B157568

1. Factual Background

Among the retirement assets divided in the judgment on reserved issues entered January 30, 2001, was Cates's Thrift Savings Plan (TSP). The judgment on reserved issues stated that "the following retirement assets are community property and shall be divided in kind between the parties as set forth in this paragraph. Each block of shares in any retirement plan containing stock shall be equally divided between the parties to the extent possible, and cash within the retirement plan shall be utilized for equalizing the division, if necessary. Any remaining cash assets in any retirement plan shall be divided equally between the parties. There shall be no equalizing payments between the parties to balance the division of retirement assets. . . . [¶] h. An interest in the 'Thrift Savings Plan' established by the United States government, and held in the name of [Cates]. The

provisions of this subparagraph shall be effectuated through an appropriate Qualified Domestic Relations Order prepared by [Cates], if required."

The judgment also awarded to Cates as his separate property "[o]ne-half of all assets of Paine Webber Investment account #RR83947 held in the name of [Iredale], including General Electric common stock."

On September 1, 2000, after the court had issued its August 2, 2000 proposed statement of decision, but before the judgment recited above was entered, Cates had divided the community retirement assets under his control.

In April 2001, Cates filed a motion (among other things) to enforce the judgment as to Iredale's obligation to distribute the General Electric (G.E.) stock. The value of the stock had declined since September 1, 2000, when most of the parties' other assets were divided, and thus Cates requested that the court order Iredale to pay him cash equal to the value of the stock as of September 1, 2000--the date on which Cates divided the assets under his control.

The court granted Cates's motion by order dated May 14, 2001, ordering Iredale to transfer to Cates "cash in the amount of $19,470, which represents the value on September 14, 2000, of one-half of the 660 G.E. shares held in petitioner's Paine Webber individual investment account." The court found that the parties "have been unable to effectuate an equal division of the assets pursuant to the judgment. It appears to the court that [Cates] has attempted to divide the stocks, and mutual funds in kind but the division is not yet complete due to poor communication and mistrust between the parties." The trial court also directed Iredale to identify the retirement accounts into which Cates should transfer a series of securities, including the securities in Cates's TSP to which she was entitled. The court directed Cates to take all action necessary to transfer a one-half interest in the TSP. It found that a qualified domestic relations order was not necessary to effectuate a division and transfer of the TSP interest.

Cates filed a notice of appeal on June 1, 2001, as to the May 14, 2001 order (designated Second Appellate case number B150855, and later consolidated with B148135). Cates did not contest on appeal the portion of the ruling regarding the TSP assets or the G.E. stock. As indicated above, on February 2, 2004, the parties stipulated to dismiss the appeal from the May 14, 2001 order.

On July 31, 2001, Iredale issued transfer instructions to enable Cates to divide the TSP assets. On August 2, 2001, Cates issued transfer instructions to the TSP office directing the transfer of "one-half of all securities held in my Thrift Savings Account."

Iredale filed an order to show cause on August 29, 2001, seeking orders regarding the G.E. stock and the TSP assets. She contended she should only have to distribute one-half of the G.E. stock to Cates, despite its decline in value since September 1, 2000. She argued that the order of May 14, 2001, requiring her to distribute the value of the stock to Cates as of September 1, 2000, was a clerical error that the court should correct as inconsistent with the judgment. As to the TSP, Iredale argued that Cates should be ordered to distribute to her one-half of the value of the TSP assets as of September 1, 2000, the date on which Cates divided the vast majority of the retirement assets under his control. Like the G.E. stock, the TSP assets had declined in value since that date. She argued all retirement assets must be divided as of the same date.

On September 25, 2001, Cates opposed the motion. Iredale filed reply papers.

The motion was argued on October 9 and 26, 2001. The court ruled on the issue of the G.E. stock but took under submission the issue of the TSP assets. The court announced its ruling by minute order dated November 2, 2001, finding that Cates "requested September 1, 2001 [*sic:* 2000] to be deemed the date of division of the parties' retirement assets," and therefore ordered Cates to instruct the TSP to

transfer to Iredale "$53,401.76 in cash securities, representing the value of one-half of the assets at September 1, 2001 [*sic*]." The trial court directed Iredale to prepare a formal order to be approved by Cates's counsel and the court.

On January 30, 2002, Cates filed a notice of motion to correct clerical error, claiming that the ruling was inconsistent with the court's in-kind division of a block of shares of G.E. stock. Iredale filed opposition to the motion, noting that the G.E. stock was not a retirement asset and therefore was not subject to Cates's stipulation to divide all of the retirement assets as of September 1, 2000. The appellant's appendix does not contain the trial court's ruling on Cates's motion. However, it appears the court denied the motion.[16]

The trial court entered its order on February 1, 2002, incorporating various rulings on Iredale's order to show cause. Therein, the court found that Cates had divided the common stock in the retirement accounts into substantially identical blocks on September 1, 2000, and that "additional in kind division of the parties' retirement assets as of September 1, 2000, including division of cash, mutual funds and other assets is necessary to complete the in kind division of the parties' retirement assets." The court held that "[t]he date of the in-kind division of all of the parties' retirement assets . . . shall be September 1, 2000." The court declared its prior ruling as to the G.E. stock to be a clerical error, and permitted Iredale to distribute one-half of the depreciated G.E. stock to Cates, rather than one-half of the value of the stock as of September 1, 2000.

Regarding the TSP assets, the court ordered Cates to distribute one-half of the value of the TSP assets as they existed on September 1, 2000. "The Court

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[16] We denied Cates's motion to augment the record on appeal to include the February 20, 2002 reporter's transcript. The request for augmentation was filed after Iredale filed her respondent's brief. Therein she accepts Cates's representation that the court denied his motion.

finds that [Cates] requested September 1, 2000 to be deemed the date of division of the parties[’] retirement assets, and therefore orders [Cates] to instruct the [TSP] to transfer to [Iredale’s] Rollover IRA account . . . a total value of $53,401.76 in cash or securities, representing the value of one-half of the assets at September 1, 2000 of [Cates’s TSP].”

Cates filed a notice of appeal from the order on March 26, 2002.[17]

2. Contentions on Appeal and Discussion

Cates argues the order should be reversed because it contradicts the judgment on reserved issues and requires an unequal division of the TSP assets, and also because an appeal was pending as to the judgment on reserved issues and therefore the trial court was without jurisdiction to make such an order, citing *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938.[18]

Iredale counters that pursuant to Code of Civil Procedure section 917.2, the perfecting of an appeal from a trial court judgment that directs the delivery of personal property does not stay the ruling, unless the appellant posts a sufficient undertaking, and Cates did not do so here. “In certain circumstances, the perfecting of an appeal does not stay enforcement of the judgment or order in the trial court unless an undertaking is given by the appealing party. (See Code Civ. Proc., §§ 917.1, 917.2-917.9.) Like an automatic stay, the purpose of an

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[17] The appeal was originally denominated Second Appellate case number B157568, but was later ordered consolidated, pursuant to the parties’ stipulation, with the prior appeal in case number B148135.

[18] Cates does not challenge on appeal the division of the G.E. stock. He points out that ultimately the court ordered each party should receive half of the 660 shares, or 330 shares each, of the stock, rather than half of the value of the stocks as of September 1, 2000. He relies on that fact to argue on appeal that the TSP stocks should be treated in the same manner.

undertaking is to protect the judgment while the appeal is *pending*. [Citations.]" (*City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 362-363. See also *Smith v. Smith* (1941) 18 Cal.2d 462.)

We agree that the trial court retained jurisdiction to *enforce* the judgment on reserved issues, despite the pending appeal, because Cates did not post an undertaking. "Where the stay of proceedings pending appeal does not include the enforcement of the decision appealed from, the trial court has jurisdiction of proceedings related to the enforcement, as well as to any other matter embraced in the action and *not affected by the judgment or order appealed from*." (4 Cal.Jur.3d (1998) Appellate Review, § 32, italics added; see Code Civ. Proc., § 916, subd. (b).) However, the trial court was divested of jurisdiction to amend the judgment. The portion of the judgment on reserved issues which determined the parties' respective property rights was not severed from the remainder of the judgment. The fact that Cates does not argue in the main appeal (in B148135) from the judgment on reserved issues that the TSP assets were improperly awarded does not mean that that issue was severed from the remainder of the appeal, such that the trial court retained jurisdiction to entertain proceedings to amend or clarify the judgment in that regard. The trial court merely retained jurisdiction to enforce the judgment as written.

The judgment on reserved issues was silent as to the date of valuation of the retirement assets ordered to be "divided in kind between the parties." The directive that "[e]ach block of shares in any retirement plan containing stock shall be equally divided between the parties to the extent possible, and cash within the retirement plan shall be utilized for equalizing the division, if necessary," could reasonably be read to mean *either* that each party was to receive half of the number of shares of stock in the TSP, or that each party was to receive half of the TSP's

assets as of a certain date.[19] As such, the order of February 1, 2002, supplied an omitted term to the judgment, which was then on appeal. We conclude that the challenged portion of the order of February 1, 2002, though understandably made in an effort by the trial court to enforce its judgment on reserved issues, was in excess of the trial court's jurisdiction and is therefore void.

"A judgment [or order] is appealable, even though void. [Citations.] Rather than dismiss the appeal, the proper procedure is to reverse the void judgment." (*In re Marriage of Micalizio* (1988) 199 Cal.App.3d 662, 670, fn. 2.) We therefore reverse the portion of the order of February 1, 2002, regarding division of the TSP assets. On remand, the trial court is free to clarify the judgment on reserved issues as it pertains to division in kind of the TSP assets. The conclusion reached in the February 1, 2002 order was eminently sensible, as it divided the TSP assets using the same date of valuation as was used for the other retirement assets--a date essentially chosen by Cates--it simply was beyond the court's jurisdiction to make the order because it encroached on the judgment then on appeal.

IV. B165851

1. Factual Background

A. Division of the Armada and Equity Partnerships

The judgment on reserved issues awarded to each party (1) "[o]ne-half of all partnership interests owned by any partner or participant in Armada Associates" (Armada) (in Iredale's case, excluding those interests owned by the CBC Profit Sharing Plan Trust, and in Cates's case, including but not limited to the partnership

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[19] In its statement of decision, the court recognized that "[t]he majority of the community values held in retirement plans are held in the form of shares of stock, and in Mutual Funds. The Court finds that the values of these substantial assets fluctuate with the stock market, and change to at least some extent on a daily basis. No evidence has been presented valuing all of these assets o[n] any particular day, nor would such evidence be probative of the values of these assets on any other day."

interest owned by the CBC Profit Sharing Plan Trust), and (2) "[o]ne-half of all interests in Equity Holdings [(Equity)] excluding those interests owned by the Cates Children's trust." In seeking to enforce that portion of the judgment, Iredale filed a separate civil action to dissolve the partnerships; that action was joined with the marital dissolution action.[20]

On November 14, 2002, Iredale filed a motion seeking attorney fees pursuant to Family Code section 271,[21] requesting that Cates be ordered to pay $140,650 in fees she incurred with regard to the dispute over division of the assets held in the two investment partnerships, Equity and Armada. Cates filed opposition. The parties eventually settled the dispute with regard to division of the partnerships, after the court ruled that a trial of the issues was necessary, apparently including the issue of the request for sanctions pursuant to section 271. The ruling on the section 271 motion regarding Cates's conduct in dividing the partnerships is not at issue in this appeal. However, that motion was heard at the same time--and therefore provides context relevant to this appeal--as Iredale's motion for section 271 sanctions arising out of Cates's conduct in the

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[20] Cates, on behalf of Equity and Armada, would not stipulate to Commissioner Murphy deciding the dispute over division of the partnerships' assets. When Commissioner Murphy refused to reassign the matter, Equity and Armada filed a petition for writ of mandate in the partnership action. On April 2, 2002, this court issued an alternative writ ordering the trial court to transfer the matter to another judicial officer. Commissioner Murphy complied, vacating his orders of April 4, 2002, and transferring the entire matter to Judge Richard E. Denner on April 5, 2002.

[21] Family Code section 271 "advances the policy of the law 'to promote settlement and to encourage cooperation which will reduce the cost of litigation.' (*In re Marriage of Quay* (1993) 18 Cal.App.4th 961, 970 . . . .) Family law litigants who flout that policy by engaging in conduct that increases litigation costs are subject to the imposition of attorneys' fees and costs as a sanction. (*Ibid*.; accord, *In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82 . . . .)" (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177.)

All further references to section 271 are to section 271 of the Family Code.

postjudgment division of the parties' retirement assets, which is at issue in this appeal.

B. Division of the Retirement Assets

On November 19, 2002, Iredale filed a motion, the order on which is the subject of this appeal, seeking section 271 attorney fees in the amount of $132,291, based on Cates's purported lack of cooperation in the postjudgment division of the parties' retirement assets.

Specifically, Iredale asserted that Cates (1) refused to provide her with account statements or other documentation demonstrating the assets in the parties' respective retirement accounts for nearly 10 months, from May 17, 2000, until March 1, 2001; (2) willfully failed to provide her with any documentation or other information regarding the value of the retirement accounts or the basis of his proposed division, with the purpose of concealing an attempted unequal division of the nonpartnership retirement assets; (3) willfully disobeyed the order after ex parte hearing of April 4, 2001, requiring him to provide her with an accounting statement "which sets forth in detail any purported division of the community retirement assets" with "sufficient specificity to permit [her] or her agents to determine whether such purported division resulted in [her] receipt of one-half of said assets"; (4) prepared and submitted accounting spreadsheets that failed to reflect accurately the cash and other assets in each of the parties' retirement accounts; and (5) failed to disclose, until June 1, 2001, that he had entered into "Investment Advisory Agreements" pursuant to which he proposed to pay compensation to his own professional corporation, Clifton B. Cates, Inc., without Iredale's consent.

In support of the motion, Iredale filed the declarations of her attorneys, Jaffe and Snyder, her own declaration, a declaration by her certified public accountant, and numerous exhibits.

The Snyder declaration attached as Exhibit H a letter of March 1, 2001, from Cates, accompanied by a spreadsheet and accounting statements. To Snyder's knowledge, Iredale had received no spreadsheets or other documentation of the identity or value of the retirement assets held in the parties' respective retirement accounts since May 17, 2000. According to Snyder, there were discrepancies between the spreadsheet and the underlying account statements, as demonstrated in Exhibit I, the "Revised Comparison," filed by Iredale on October 4, 2001, for use in the hearings of October 9 and 26, 2001 (discussed above with regard to the appeal in B157568).

Also attached to the Snyder declaration, as exhibit K, is an April 4, 2001 order after ex parte hearing, requiring Cates to provide Iredale with an accounting statement setting forth details as to the division of community retirement assets. Cates produced such a statement on May 1, 2001. On that date, at a hearing on Iredale's order to show cause, Cates produced a chart entitled "Comparison of Parties' Retirement Plans as of 9/1/00 Following Division In Kind." The chart is attached to the Snyder declaration as Exhibit M. Prior to seeing Exhibit M, Snyder had no knowledge that Cates had in fact bought and sold stock in the parties' accounts to equalize the common stock holdings in their respective accounts.

Exhibit O, an "Investment Advisory Agreement" dated August 5, 1999, between Clifton B. Cates, Inc. and the Clifton B. Cates Profit Sharing Plan Trust, was faxed to Snyder on June 1, 2001. The agreement states that "[t]he Trust wishes to retain CBC Inc. to manage its portfolio and to compensate CBC Inc. for so doing but only to the extent that CBC Inc.'s investment performance exceeds

such historical return."[22] Iredale and her counsel had no knowledge of this agreement before June 1, 2001. A similar investment advisory agreement was also executed between Equity and Clifton B. Cates, Inc. In Cates's final declaration of disclosure, neither investment advisory agreement had been disclosed as either a contingent obligation of Equity and Cates's Profit Sharing Plan, or as an asset of Cates's professional corporation.

The Snyder declaration also details the allocation of attorney fees incurred by Iredale as between the partnerships action and the efforts to divide the retirement assets. Attached as Exhibit Z are the relevant billing statements.

Cates filed opposition to the motion for section 271 sanctions regarding division of the retirement assets, attaching his own declaration, a declaration by Attorney Jeffrey Kramer, and numerous exhibits. He argued that Iredale's motion seeking an award of attorney fees was in fact a motion for reconsideration because she had already requested and been denied attorney fees, based on the same facts, on prior occasions. He asserted that his conduct did not warrant sanctions. He also filed evidentiary objections to the declarations filed by Iredale in support of her motion, and requested a hearing of the matter, including the right to cross-examine witnesses.

In his declaration, Cates stated that by the end of August 2000, except for cash and those securities over which he had no control, he had effected an in-kind division of the parties' retirement assets; he resigned as Iredale's investment advisor by letter dated September 2, 2000, and ceased exercising any control over

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[22] Specifically, the agreement provides that CBC Inc. would receive an "incentive management fee" equal to 20 percent of the amount by which the appreciation in the value of the trust's assets for a one-year period exceeded 15 percent of the assets at the beginning of each yearlong period. The agreement was signed only by Cates, both as trustee of the trust, and as president of CBC Inc.

her retirement plan accounts.[23] As to the division of some assets, he needed Iredale's cooperation. He acknowledged that through inadvertent error, Iredale's Exhibit H, prepared by Cates, did indeed fail to report stock valued at $61,075.

As to Iredale's claim that he failed to give her information about the retirement accounts between May 17, 2000, and March 1, 2001, Cates responded that Iredale "has always received statements *on her own retirement plan accounts* as long as she has had those accounts, including during the period May 17, 2000 through March 1, 2001. *Those statements were addressed to her at her correct address.* [Iredale] produced these statements *to me* in March and April, 2001." He continued: "From her own August, 2000 Fidelity statement, [Iredale] could see *every trade that I made on her account that month in order to equalize our respective securities holdings.*" Even if she did not read her own statement for August 2000, "I advised her in my letters of August 18, 2000 and August 25, 2000 ([Iredale's] Exhibit E) that I would take steps to equalize our respective holdings, and in my letter of September 2, 2000 ([Iredale's] Exhibit F) advised her that I had done so." Cates stated that from September 2000 through February 2001, neither party exchanged financial information with the other. "There was no need to do so, because each party was by then managing his own assets." In late February 2001, in order to implement the terms of the judgment, the parties agreed to exchange such information. On March 1, 2001, he provided to Iredale account

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[23] According to Cates, the parties owned community property interests in the following retirement plans: (A) Iredale: (1) Rollover IRA, Fidelity Investments, custodian; (2) Individual (regular) IRA, Fidelity Investments, custodian; (3) PHJW 401(k) plan, City National Investments, trustee; (4) Individual IRA, Paine Webber, custodian; (5) Rollover IRA, CNA Trust, custodian; (6) PHJW Defined Benefit Plan for Partners; and (B) Cates: (1) Clifton B. Cates, Inc. Profit Sharing Plan, Clifton B. Cates, trustee; (2) Individual (regular) IRA, Fidelity Investments, custodian; (3) United States Government Thrift Savings Plan.

statements and summary balance sheets for the period July 2000 through February 2001.

Cates further declared that he paid only the principal he owed to Iredale in dividing the assets of his corporate profit sharing plan, and not the interest, because to do so would violate the qualified domestic relations order pertaining to the plan.

Cates also included in his declaration information regarding the parties' respective financial resources, including that his gross income from his law firm for 2002 was $280,225. He also detailed his attempts to settle the present litigation. These settlement attempts were also discussed in the declaration of Attorney Kramer.

Cates also filed an extensive request for judicial notice pertinent to both the section 271 motion as to division of the retirement assets and the section 271 motion as to division of the partnerships.

Iredale then filed a reply to the opposition, including supplemental declarations and exhibits.[24]

Cates filed a request, pursuant to California Rules of Court, rule 323, seeking permission to introduce oral evidence on specified matters relating to division of the parties' retirement assets. Therein, Cates stated his intent to call as witnesses himself, Iredale, and her attorney Linda Snyder.

The court heard both section 271 motions on January 16, 2003. As to the retirement assets, Iredale's counsel noted that Cates had an investment advisory agreement with his own pension plan (as well as with Equity and Armada), which Commissioner Murphy had disallowed. Counsel then turned to discussion of the Equity and Armada partnerships, but later addressed the retirement assets once

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[24] Attorney Snyder specified in her declaration that the section 271 motion at issue did not include a request for any attorney fees incurred for pursuing the appeal in this matter.

again, arguing that when Cates presented his chart purporting to demonstrate an equal division of assets, "[w]e didn't know that he already deducted his investment advisory fee that -- and he had that claim against it. It cost us a hundred twenty-five thousand dollars more or less to divide up . . . the pension money which he managed."

Counsel for Cates then spoke, first addressing division of the partnerships' assets. The court noted that if the matter were set for trial, Cates might well have to finance both sides' attorney fees. The court continued: "I get the feeling that you're heading into a buzz saw that you may not realize how sharp it is." Cates's counsel responded that the partnerships had been dissolved and distributed most of their assets to the partners, including Iredale. However, the partnerships had retained money to pay for their defense of the lawsuit, and were willing to litigate the issue of their entitlement to do so, if necessary. The court expressed its disagreement with the position taken by the partnerships, i.e., that Iredale was not a partner. The court again asked counsel, "Are you sure you want to do this? You're running into a buzz saw. I'm prepared to run you in." Cates's counsel indicated they were prepared to have the matter decided at trial.

After much further discussion by both parties and the court as to the partnership issues, the court took a recess to permit the parties to discuss the matter and try to reach a settlement. They could not.

The court stated: "I understand your position. By way of ruling, on the 271 issue, yes, I think it's well founded. [Cates] is ordered to pay directly to counsel for [Iredale], 271 grounds, $100,000." The court continued, "As to the other issue, I think it's got to be adjudicated by trial."

Cates's counsel then stated, "May I address, I didn't think we had reached the 271 at this one motion." The court indicated, "we were arguing both," then said, "I'm not going to let you argue that some more." Cates's counsel inquired

whether the court had denied his request for an oral hearing on the 271 motion. The court did not respond, instead asking when counsel wanted to go to trial. After a trial date was set, Cates's counsel reiterated that he had not argued both motions. The court disagreed, but responded, "Anyway, that is my order."

Iredale submitted a proposed order, to which Cates filed written objections. On February 28, 2003, the court entered its order regarding attorney fees pursuant to Family Code section 271, awarding $100,000 as sanctions against Cates based on his conduct involving division of the parties' retirement assets.

Cates's notice of appeal from the order of February 28, 2003, was filed on March 14, 2003. We ordered that the ensuing appeal, designated Second Appellate case number B165851, be consolidated with the main appeal in B148135.

2. Contentions on Appeal and Discussion

A. Iredale's Attorney Fee Claims Were Subject of Earlier Motions and Had Been Denied

Cates argues on appeal that Iredale's request for section 271 attorney fees was based on the same arguments and facts she had raised in previous motions, and that her previous requests for attorney fees had been denied. He argues now, as he did before the trial court, that she should not have been permitted to renew her requests for attorney fees.

In its order enforcing the judgment dated May 14, 2001, in which the court (Commissioner Murphy) ruled on both Cates's and Iredale's motions to enforce the judgment, the court ordered: "Court will not assess any additional fees *at this time* but leave the parties as is." (Italics added.)

In its order of February 1, 2002, among numerous other matters, the court (Commissioner Murphy) ordered Cates to provide Iredale with copies of all checks drawn on the CBC Profit Sharing Plan from the date of separation to September 1,

2000, and with accounting statements for June 2000 on each retirement account held in the name of either party, including all original documentation of the assets held in the accounts. In addition, the court ruled in Iredale's favor on the issue of the "Investment Advisory Agreement" with Cates's profit sharing plan, holding it invalid. The court "reserve[d] continuing jurisdiction over the division of the parties' retirement assets, and the issue of attorney's fees for obstruction of the division of such assets."

We disagree that the trial court's prior rulings foreclosed further consideration of whether or not Cates had engaged in sanctionable conduct in dividing the retirement assets. In fact, the trial court indicated that the issue of attorney fees remained open for consideration, depending on the parties' conduct in implementing the orders enforcing judgment. We conclude that it was appropriate for the trial court to first attempt to deal with the mechanics of dividing the assets, leaving consideration of the issue of sanctions for another day, if necessary. There was nothing to prevent the trial court (Judge Denner) from considering the parties' entire postjudgment course of conduct in ruling on the section 271 motion for attorney fees which is now before us on appeal.

B. Denial of Due Process

Cates claims that the court erred by ignoring Cates's written evidentiary objections to Iredale's supporting declarations, by denying Cates's request for an evidentiary hearing on disputed factual matters, and by denying Cates the opportunity to argue the motion at the hearing.

As to Cates's written evidentiary objections to Iredale's declarations, he failed to obtain a ruling. The rule announced in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, footnote 1, applies: "Because counsel failed to obtain rulings [in the trial court on objections to evidence], the objections are

waived and are not preserved for appeal. . . . [F]or purposes of this appeal we must view the objectionable evidence as having been admitted in evidence and therefore as part of the record."

As to the court's denial of Cates's request for an evidentiary hearing, including live testimony, and its truncating of oral argument on the motion, we find no error requiring reversal. The appellate court in *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161 considered the question of whether an oral hearing is required before sanctions are imposed under section 271, although it did not decide the issue because it concluded that the complaining party had waived such a hearing. (*Id.* at p. 179.) In any event, the court noted that section 271 does not specify the nature of the hearing it contemplates, and observed that the opportunity to be heard does not necessarily compel an oral hearing. "'California courts have concluded that use of the terms "heard" or "hearing" does not require an opportunity for an oral presentation, unless the context or other language indicates a contrary intent.'" (*Id.* at p. 179, quoting *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1247.) The *Petropoulos* court also noted: "'[T]he scope of a hearing on an application for sanctions is within the trial court's discretion, as with motions generally.'" (*Petropoulos*, at p. 179, quoting *Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1028.)

It is generally true that where resolution of an issue before the court "depend[s] upon which of two sharply conflicting factual accounts is to be believed, the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414.) However, under the circumstances now before us, we conclude that oral testimony and cross-examination were simply not necessary. The parties had submitted to the court voluminous documentation and extensive briefing regarding what had occurred in

the course of division of the retirement assets. No doubt it was within the court's ability to absorb the information contained in the written filings and make a fully informed decision on the issue of sanctions on that basis. At issue was not so much the facts of what had occurred, but rather the characterization of those facts. In light of the complexity of the documentation before the court and the thoroughness of the briefing, it is doubtful that oral testimony or argument by counsel would have added anything of critical import to the court's consideration of the sanctions motion. We find no error.

C. Trial Court's Purported Failure to Consider Evidence

Cates contends that the trial court, contrary to the requirements of section 271, failed to consider evidence, and that Iredale did not present evidence, as to the parties' income, assets, and liabilities, and as to whether the $100,000 sanction would impose an unreasonable financial burden on Cates. We disagree.

We note that Iredale requested that the court take judicial notice of the judgment on reserved issues, which contains extensive information regarding the parties' income, assets, and liabilities. Cates also included evidence in his opposition with regard to his declining income with his law firm and his version of the state of his finances. The court had all of the required information before it, and was not required to state its findings with regard to the parties' finances and the bases for those findings. Where, as here, Cates has not affirmatively demonstrated that the court failed to consider this evidence, we presume the trial court regularly performed its official duty. (Evid. Code, § 664.)

Regarding Cates's contention that it was an abuse of discretion for the court to award $100,000 in sanctions because it imposed an unreasonable financial burden, we also disagree.

"A sanction order under Family Code section 271 is reviewed under the abuse of discretion standard. '"[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order . . . ." [Citations.]' (*In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1106 . . . .)" (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82.)

While Cates represented that his gross income from his law firm for 2002 was $280,225, the court was also well aware of Cates's exceptional acumen and success as an investor, and of the fact that the recent sale of the Armada residence had added substantially to Cates's available resources. There is no showing that the court abused its discretion.

D. Purported Lack of Evidence that Cates Frustrated the Policy of Law to Promote Settlement

Finally, Cates contends on appeal that there is no substantial evidence to support the finding that he frustrated 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.)

Viewing all the evidence most favorably in support of the trial court's order, it is clear that the court did not abuse its discretion in imposing sanctions. For example, a statement from Cates's opposition makes clear that he largely expected Iredale to simply take his word for it that he had equally divided the community property retirement assets under his control in September 2000. He noted that Iredale had her own Fidelity Investments statement, from which she "could see every trade that I made *on her account* that month in order to equalize our respective securities holdings." (Original italics deleted, italics added.) Even if she did not read her own statement for August 2000, "I advised her in my letters of

August 18, 2000 and August 25, 2000 ([Iredale's] Exhibit E) that I would take steps to equalize our respective holdings, and in my letter of September 2, 2000 ([Iredale's] Exhibit F) advised her that I had done so." *The point is, he did not provide her with adequate documentation to demonstrate he had done so.* Her account statements alone were insufficient to demonstrate equal division of the assets. Cates *acknowledged* that from September 2000 through February 2001, neither party exchanged financial information with the other, stating "[t]here was no need to do so, because each party was by then managing his own assets." Of course she knew what assets she held, but she did not know whether they constituted half of the assets at the time of division. It is true that it ultimately proved to be the case that the assets were evenly divided. Iredale did not, however, simply have to take Cates's word for it.

Further, it is undisputed that Cates failed to disclose, until June 1, 2001, that he had entered into an "Investment Advisory Agreements" pursuant to which he proposed to pay compensation to his professional corporation, without Iredale's consent. The documentation Cates provided to Iredale did not make clear whether Cates's division of assets purported to take into account payment of this fee to Cates. He characterizes the disagreement over the fee as "open, honest and genuine." The court, however, earlier stated that the failure to disclose the agreement "[a]rguably . . . constituted a breach of his fiduciary duties." The agreement, dated August 1999, was not disclosed at the time of trial either as an asset of his professional corporation or as a purported community obligation of Cates's community property profit sharing plan.

In the final analysis, Cates asks us to reweigh the wrongfulness of the conduct in which the trial court concluded Cates engaged, and summarily contends that the billing statements provided by Iredale did not support her fee request. Giving the trial court the deference to which it is due in deciding a motion for

sanctions under section 271, we find no abuse of discretion and therefore decline to interfere with the court's decision.

Disposition

As to the appeal and cross-appeal in case number B148135, the judgment on reserved issues entered January 30, 2001, is reversed as to the valuation of Cates's professional corporation, and remanded to the trial court for recalculation of the equalizing payment due to Cates in keeping with the views expressed in this opinion. In all other respects, the judgment is affirmed. Iredale is awarded her costs on appeal in B148135.

As to the appeal in case number B157568, the order of February 1, 2002 regarding the valuation date for division of the TSP assets is reversed. Cates is awarded his costs on appeal in B157568.

As to the appeal in case number B165851, the order of February 28, 2003 is affirmed in full. Iredale is awarded her costs on appeal in B165851.

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.

Filed 8/3/04

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of NANCY L. IREDALE and CLIFTON B. CATES III. NANCY L. IREDALE, Appellant, v. CLIFTON B. CATES III, Appellant.	B148135, B157568 & B165851 (Los Angeles County Super. Ct. No. BD289215) ORDER

THE COURT:*

The opinion in the above-entitled matter filed on July 9, 2004, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be partially published in the Official Reports and it is so ordered.

Pursuant to California Rules of Court, rules 976(b) and 976.1, the portions of the opinion to be published are the following: Introduction, Factual and Procedural Background, Discussion, part I, subpart A, and the Disposition.

*EPSTEIN, Acting, P.J. HASTINGS, J. CURRY, J.