In the

Court of Appeal

of the

State of California

FIRST APPELLATE DISTRICT
DIVISION FIVE

A139408

ERIKA CARLSON,

Appellant,

v.

JAMES CARSLON,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF ALAMEDA COUNTY
HON. BRAD SELIGMAN · NO. HF12621279

BRIEF OF RESPONDENT

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I.

INTRODUCTION

Erika's contentions don't amount to a "hill of beans." (Casablanca (Warner Brothers Pictures 1942).) She believes that the pre-trial orders setting child support, temporary spousal support, and attorney's fees are unfair to her, but has not articulated any legal basis for reversal.

Before the hearing, Erika failed to comply with discovery requests concerning her trust assets and distributions. Several times, she also failed to make an accurate disclosure of her income, expenses, and assets to James. At the hearing, she presented false or misleading information to the court to make it appear that she had only modest income and assets. Around the same time, she told a financial institution that her net worth was much higher. She conceded to the court that she received a $1 million trust distribution in 2012 and that she expected to receive another $1 million distribution in 2017, in addition to the trust property she had been accessing to pay for her personal living expenses.

The court did not find Erika to be a credible witness when she claimed that her trust assets were now off limits for payment of support and fees. Erika's appeal essentially asks this court to overturn a credibility call and retry the case. The orders should be affirmed.

II.

STATEMENT OF FACTS

A. BACKGROUND

Erika and James married on September 12, 1998. (AA 1.) They separated in October 2011, but do not agree on the exact date. (AA 1 & 4.) Erica filed for dissolution on March 14, 2012. (AA 1.) They have three children: Ryan, born May 23, 2000; Jessica, born April 9, 2002; and Catalina, born September 3, 2004. (AA 1.) James and Erika equally share parenting time with their three children. (AA 332:15.)

B. REQUEST FOR TEMPORARY ORDERS BY JAMES

James filed a Order to Show Cause on June 15, 2012, requesting pre-trial orders for child custody, visitation, guideline child support, guideline temporary spousal support, $50,000 in pendente lite attorney's fees, and an order to continue to maintain the children in the Livermore School District. (AA 9.)

C. ERIKA'S RESPONSE

Erika responded on August 21, 2012, by stating her "consent to guideline [child support]" and her consent to "[p]roper formula *pendente lite* spousal support." (AA 20.) Her response requested joint legal and

physical custody with an equal sharing of parenting time, and stated that the parties had already resolved the school issue. (AA 20 & 23:9-10.)

Erika argued that James was not entitled to fees from her because he had waived the right to make any "claim" against her separate property in their Premarital Agreement, which contains the following provision: "JAMES shall have no right, title, interest, lien, or claim under the laws of any state in or to any of ERIKA's separate property assets." (AA 50:21 - 51:3.) She also argued that the request for $50,000 in fees by James "is not reasonable for this case." (AA 52:20-21.)

There is a mirror provision in the Premarital Agreement, preventing Erika from making any "claim" against James's separate property (AA 58), but she nevertheless requested James be ordered to pay her fees (AA 21). In addition, Erika requested $50,000 for her side of the case (AA 28:24-25), despite her claim that $50,000 would be an unreasonable amount to order for James (AA 52:20-21).

D. REPLY BY JAMES

James submitted a declaration by his counsel, Brigeda Bank, that Erika's discovery responses were incomplete. (AA 89.) The declaration states that Erika failed to produce documents concerning the trusts under which she is a beneficiary (AA 90:8-9 & 98), failed to produce any

information regarding her interests in estates (AA 90:10-11), and failed to produce all of the documents regarding her stocks and bonds (AA 90:13-14). Ms. Bank pointed out that, although Erika claims her assets are unavailable due to being tied up in various trusts, Erika has not produced the underlying trust documents to support the claim. (AA126:26-28.)

The other documents produced by Erika's counsel were in such disarray that Ms. Bank's office spent over 11 hours organizing them. (AA 127:26-28.) For example, the document production was not numbered or categorized according to the demand, documents were produced sideways or out of order, some were missing, and accounts were identified by the wrong number. (AA 137-138.)

E. ERIKA'S INCOME AND EXPENSE DECLARATION

Erika provided an Income and Expense Declaration dated April 16, 2012, stating that her average monthly income was $2,000 from dividends or interest, $3,000 per month from trusts, and $2,600 from self-employment. (AA 116.) She claimed $8,285 in monthly expenses. (AA 117.) She claimed to have only$6,818 in the bank, $121,780 in stocks and retirement accounts, and $72,500 in other assets. (AA 116.) She also claimed that she had $16,170 in credit card debt. (AA 117.)

F. TEMPORARY ORDERS PENDING FULL HEARING

The trial court issued temporary orders on September 4, 2012, which required Erika to pay James $2,886 per month in child support retroactive to June 15, 2012, directed Erika to pay $25,000 in fees to James, and reserved on the issue of spousal support retroactive to June 15, 2012, pending a long cause hearing on those issues. (AA 173-174.)

The child support order was "temporary and without prejudice to either party" and the parties agreed that the court would modify the amount retroactive to June 15, 2012, based on the evidence at the long cause hearing. (AA 174:7-12.) Temporary spousal support was not set at the temporary hearing and was reserved for determination at the long cause hearing. (AA 174:13-16.) The court found that the Premarital Agreement did not preclude an advance of fees in a dissolution action. (AA 174:18-22.) A hearing was set for November 2, 2012, as to child custody and visitation, to be followed by the long cause hearing on December 20, 2012, on the issues of child support, spousal support, and attorney's fees. (AA 174:23-27.)

The court issued a Pretrial Order on September 5, 2012, concerning the long cause hearing. (AA 146.) Each party was ordered to serve a statement of issues two weeks before the hearing and exchange a witness

list no less than five court days before the hearing. (AA 147.) The order contained the following warning: "The Court may, on its own motion or the motion of any party, and in the reasonable exercise of the Court's discretion, exclude the testimony of any witness not disclosed pursuant to this order." (AA 147:22-24.)

The parties resolved the custody and visitation issues by stipulation (AA 169), so the November 2, 2012, hearing was not needed and was taken off calendar.

G. LONG CAUSE HEARING

The long cause hearing was scheduled for December 20, 2012 (AA 174:23-27), but the hearing was continued and took place over three days: January 15, 2013, March 5, 2013, and April 11, 2013. The court made an exception to its normal two-day limit for such matters. (AA 331:23-24.) "The court admonished the parties about the time limit, and, after the second day, reluctantly permitted one additional hour of testimony on the third day." (AA 331:23-25.) After the hearing, the court issued a statement of decision and made orders for temporary spousal support, child support, and pendente lite attorney's fees. (AA 331.) Erika has appealed from those orders. (AA 341.)

1. Exclusion of O'Connor's Testimony

"At the close of the second day [of the hearing], the Court denied [Erika's] request to permit the testimony of Paul O'Connor in the third day because he had not been listed on the pre-trial witness list (as required by the pretrial order) and because of time limitations." (AA 331:25 - 332:2.) The exclusion of O'Connor's testimony is the lead argument raised by Erika in her appeal. (AOB 29-38.)

Erica filed her witness list on January 10, 2013. (AA 204-207.) Her list did not include O'Connor as a witness. After the first day of the hearing had been completed, Erika filed an "Updated Witness List" on February 27, 2013, adding O'Connor as a witness. (AA 199-200 & 331:25 - 332:2.)

At the close of day two of the hearing, Erika's counsel indicated that she "would probably bring in Paul O'Connor [as a witness]." (3/5/13 RT 92:2-14.) The court asked if O'Connor was a listed witness. (*Id.*) Erika's counsel acknowledged that O'Connor was not on the witness list that she filed before the hearing. (3/5/13 RT 92:15-18.) Erika's counsel said that she was "more than happy to put [O'Connor]on rebuttal of Mr. Burak's testimony as an impeachment witness that does not have to be disclosed." (3/5/13 RT 92:27 -93:2.) The offer of proof was as follows:

- O'Connor would "testify that he's the trustee of the trust. People could make requests of him."
- "Mr. Burak testified as to all these nice accounts that are [Erika's] money. I have a trustee [O'Connor] coming in to say that's nonsense. That's not her money." (3/5/13 RT 93:2-5.)

In denying the request to call O'Connor as a witness, the court stated: "I understand your argument. I'm not sure I need Mr. O'Connor to make that point but I've heard your point here." (3/5/13 RT 93:16-18.) "I'm not inclined to allow Mr. O'Connor since he wasn't disclosed earlier. I don't think it is proper impeachment. You're not impeaching somebody's testimony about what the trust terms are. I don't think there is a dispute here about what the trust terms are. One can argue about what the legal consequences are of that." (3/5/13 RT 95:16-23.)

On appeal, Erika argues that the terms of the trust were in dispute and that O'Connor's testimony would have shown that Erika had no legal right to access trust property under the terms of the trust. (AOB 36-37.) However, she never introduced the trust instrument into evidence.

Her second reason for O'Connor's testimony was to show that the accounts in question were held in the name of the trust. (AOB 36.) She does not explain why such testimony was needed because, as Erika

acknowledges in her opening brief, "O'Connor's name as trustee was listed as an address on those brokerage statements (Resp's Exh. G)." (AOB 36.)

2. James's Income

James is an employee of the Livermore Area Recreation & Park District. (AA 241.) His income was not largely disputed. (AA 332:16.) James earns a monthly salary of $7,238. (AA 242.) In 2012, he received a $1,000 retention bonus. (AA 332:17.) Each month, he pays $43 for health insurance, $703 in mandatory retirement contributions, and $717 for property taxes. (AA 242-243.) James lives in the marital residence and pays a monthly mortgage of $3,300. (AA 332:21 & 335:6-7.)

3. Erika's Income

Erika's income was subject to substantial dispute. (AA 332:22-23.) On her Income and Expense Declaration dated March 3, 2013, she stated that she had $2,750 per month in business income, $375 per month in dividends, and $1,500 per month in trust income, for a total of $4,625 per month – which was lower than what she declared on earlier Income and Expense Declarations. (AA 332:22-25.) Erika's various Income and Expense Declarations assert she has monthly expenses ranging between $6,323 and $8,285. (AA 333:34-25.)

James presented evidence that Erika freely drew money from her trusts to maintain a lavish lifestyle and that she made misleading or false statements to the court regarding her income and assets. (AA 333:12-14.) Deposits into Erika's personal checking account for an 11-month period in 2012 averaged $29,080 per month. (AA 333:14-18.) Erika conceded that the checking account was for her personal use. (AA 33:20-21.) In addition, she received a $1,000,000 trust distribution in 2012. (AA 333:21-22.)

The court stated that "[i]t is difficult to reconcile these figures with the very modest income Petitioner claims. Nor is her own expense history consistent with the income she claims." (AA 333:23-24.) Although Erika told the court that her expenses were about the same as her income ($6,323-$8,285 per month), the disbursements from her checking account were in line with deposit activity. (AA 333:14-25.) The disbursements included a credit card payment of $44,354 for the month of July 2012, and a $23,283 payment for the month of August 2012. (AA 334:4-5.) Additionally Erika spent an average of $2,245 per month on horse-related expenses. (AA 334:5-6.) Erika took their son, Ryan, on a three-week trip to London for the Olympics. (AA 126:24-25.) The court noted that Erika's "investment conduct in 2012 is also not suggestive of a person with limited income . .

.[as] she invested $275,000 into unmarketable securities, $240,000 of which generated no income." (AA 334-7-9.)

4. Erika's Assets

In 2012, on Erika's 40th birthday, she received a distribution from a trust in the sum of $1,000,000. (AA 333:1-3.) She expects to receive an additional $1,000,000 on her 45th birthday. (*Id.*) From the $1,000,000 she received, Erika paid $565,000 in cash for her home in Danville. (AA 333:1-3.) She invested $275,000 into unmarketable securities. (AA 333:6-7.) She spent additional sums on attorney's fees, child support, maintenance, furnishings and improvements to her new home. (AA 333:2-5.) She also deposited $5,000 into an IRA and $6,000 into a college savings account for the children. (AA 333:5-6.)

Erika's first Schedule of Assets and Debts stated that had accounts valued at $2,900,000 in April 2012. (AA 334:11-12.) Her subsequent Income and Expense Declarations listed much smaller values, namely $1,050,000 in August 2012, $321,000 in December 2012, and $117,000 in March 2013. (AA 334:11-14.) Erika explained the discrepancy by claiming that she did not understand the forms and that her revocable trust had, in fact, declined in value. (AA 334:14-16.)

The court found Erika's explanation to be inconsistent with the IRA application she made in February 2013, in which she claimed $1,000,000 in estimated net worth (excluding her home), of which $500,000 was liquid net worth.[1] (AA 334:17-18.) Later that month, her counsel's brief to the court dated February 25, 2013, stated that Erika's "total investment assets as of this date are $308,000." (AA 193:9.) A week later, she claimed that her liquid assets were only $117,00 according to her Income and Expense Declaration dated March 4, 2013. (AA 334:11-14.)

5. Marital Standard of Living

The marital standard of living was "at least upper middle-class, which involved frequent vacations and dinner's out as well as equine activities." (AA 336:3-5.) During the last four years of marriage, James and Erika deposited an average of $21,976 per month into their checking accounts, of which approximately $6,400 per month was their wages and $15,000 per month came from Erika's separate property. (AA 334:19-22.) Spending during these four years was virtually the same amount as deposits. (AA 334:22-335:1.)

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1 Erika admitted that she lied on the IRA application when she falsely asserted that she was divorced, which had the effect of removing James as a beneficiary from the account. (AA 334, fn.4.)

6. Post-Separation Standard of Living

Erika maintained the same standard of living after the commencement of the divorce action, with the exception of housing expenses (which were excluded because Erika purchased her Danville home with cash after separation). (AA 335:1-5.)

"In contrast, [James] lives in somewhat more modest circumstances. While he continues to occupy the marital residence, his expenses, including his legal fees, exceed his income. His most recent Income & Expense Declaration lists $14,409 in expenses, a figure he conceded he cannot maintain without addition support. He owes over $60,000 in fees and expenses and has no liquid assets to draw upon." (AA 335:6-10.)

7. Income Available for Support Purposes

"Based on the testimony and documentary evidence, the Court finds that Erika in fact has substantially more income than reflected on her various Income & Expense statements, and that she is able to freely draw on trust assets to maintain her lifestyle, both before and after she filed this action." (AA 335:11-14.) "The Court concludes that in 2012, Petitioner had available to her, in addition to the $6,250 of declared income, $17,956 in 'other' income, for a total of $24,206 in total monthly income." (AA 335:23-25.)

"It is appropriate to include the $17,956 in income for Petitioner for purposes of determining child support because it reflects a habitual draw she made during and after the marriage on her separate property to maintain the marital standard of living, a standard of at least upper middle-class, which involved frequent vacations and dinner's out as well as equine activities. The Court concludes that Petitioner had and has access to draw on her trust accounts, and that she in fact has drawn on them to maintain her lifestyle." (AA 336:1-6.)

8. <u>Child Support</u>

The court considered how Erika's trust distributions and assets might be considered for purposes of setting child support, and whether a rebuttal of the guideline child support formula would be appropriate. (AA 336:6-26.) Ultimately, the court found that there would be no difference in the amount of child support, whether under the presumptively correct guideline formula or if the court set support without reference to the guideline. (AA 336:18-26.) Erika did not request a non-guideline order in any event. (*Id.*) "[N]either party herein suggests that an adjustment was the appropriate approach or that the bottom line would be any different if that approach was taken. Accordingly, the Court will treat the habitual payments from the trust accounts as income. Nevertheless, if it is not counted as income the Court

finds that an adjustment under section 4057(b)(5) would be warranted. Attached hereto is a Dissomaster calculation based on the above inputs which yields a presumed $3899 basic child support." (AA 336:23 -337:2.) The court set child support in that amount. (AA 337:24.)

9. Temporary Spousal Support

The court stated that the marital standard of living was relevant, but was not determinative in setting temporary spousal support. (AA 337:3-5.) "The Court has considered, in addition to the income figures addressed above, the fact that the trusts' corpus is undoubtedly declining, and that part of [James's] expenses are the result in his attempting to retain the marital residence, despite its high level of expenses. The increase in child support resulting from the above calculations will no doubt mitigate his situation. (AA 337:5-9.)

The Alameda Superior Court temporary spousal support guideline was $4,326 per month. (AA 339.). The court awarded temporary spousal support in the lower amount of $3,000 per month. (AA 337:5-9.)

10. Pendente Lite Attorney's Fees and Costs

The court found: "Both parties have expended prodigious sums in this action, with [James]claiming fees and expenses of over $120,000 to date in this action, of which he currently owes about $73,000." (AA 337:15-

17.) The legal fees incurred by James exceeded his income, and he had no liquid assets to draw upon to pay those fees. (AA 335:8-10.) Erika, on the other hand, "owes her counsel a modest amount of fees." (AA 337:17.)

"The Court has considered the necessity of fees to allow each party to have sufficient resources to present their cases adequately, taking into account the circumstances of the parties and their relative access to resources. The Court finds that there is a disparity in access to funds to retain counsel, and that Petitioner is able to pay for a portion of Respondent's legal representation. The Court accordingly directs Petitioner to pay $40,000 for attorney's fees to Respondent." (AA 337:15-22.)

11. Statement of Decision

The court rendered a statement of decision on May 13, 2013. (AA 309-317.) Erika filed objections to the decision in pro per, consisting of 27 interrogatories such as:

- "Is [Erika] required to expend the balance of her separate property inheritance to support [James]?" (AA 320:7-8.)
- "[W]hat specific sources or accounts can [the court-ordered] child support be paid?" (AA 320:4-5, emphasis in original.)

- "Is the Court assuming or finding that the funds that existed and were drawn upon by [Erika] in 2013 still existed as of close of trial and, if so, what funds remained as of that time which were available to pay support?" (AA 320:10-12.)
- Whether the court meant "Valley Trust accounts" or "Petitioner's trust accounts" when it used the term "trust accounts." (AA 319:16-25.)

The court filed an Amended Statement of Decision on May 31, 2013. (AA 331-340.) Erika filed her notice of appeal on August 2, 2013. (AA 341:16-18.) Her notice of appeal states that notice of entry of the Amended Statement of Decision was served June 3, 2013 (*Id.*), but the notice of entry was not included in Appellant's Appendix.

III.

THE STANDARD OF REVIEW

Erika assigns error to the trial court's findings and orders in the following respects, all of which are subject to review under the abuse of discretion standard:

- Erika's claim that the court improperly precluded O'Connor from testifying about the terms of the trust and how title to the accounts in question were held;
- The claim that the court erroneously considered assets held in trust and past trust distributions in determining Erika's income available for purposes of setting child support and temporary spousal support; and
- Her argument that the award of attorney's fee was improper because the court incorrectly determined Erika's income.

Erika's opening brief acknowledges that the abuse of discretion standard is "[n]ormally" used for support orders and evidentiary rulings (AOB 26 & 29), then argues that de novo review should be applied here instead (AOB 27.) Her de novo argument is based on the premise that the court relied on uncontested documentary evidence to make its findings and orders, so "without conflicting extrinsic evidence, appellate courts review written documents *de novo*." (AOB 27.)

Erika's position regarding the standard of review is an understandable strategy, in that she has no chance of obtaining a reversal in

this case if the abuse of discretion standard is applied.[2] But to say that the facts here are undisputed or that the decision is based entirely on the interpretation of documentary evidence is far more than a stretch.

- The court determined Erika's income for purposes of support "[b]ased on the testimony and documentary evidence...." (AA 335:11-14.) Indeed, Erika's opening brief concedes that the decision was not based solely on documentary evidence: "the Trial Court derived *most* of the basis for its decision regarding the amount of income to charge to Erika for purposes of determining support from documentary evidence." (AOB 27, emphasis added.)
- The court noted that the facts were "subject to substantial dispute." (AA 332:22-23.) Erika's brief frames the disputed issue as follows: "The support proceedings largely centered on the issue of whether and how much Erika could access money from several family trusts of which she was a beneficiary." (AOB 1.)

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Erika's opening brief acknowledges her fate: "Normally cases such as this, in which the abuse of discretion and substantial evidence standards of review are at play, mean an all too difficult burden for appellants to overcome. This case is an exception to the rule." (AOB 3.)

- Erika never introduced the trust instrument into evidence, so there is no trust document for the Court of Appeal to examine de novo anyway.

Erika is asking this Court to reweigh the evidence and make credibility determinations. "Appellate courts 'do not reweigh evidence or reassess the credibility of witnesses.' [Citations.]" (*Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531.) In this case, the court carefully considered the facts, weighed the evidence, judged Erika's credibility, and applied the law in making its decision. (AA 331-339.) The fact that Erika disagrees with the court's conclusions does not equate to reversible error.

IV.

ARGUMENT

All of Erika's complaints stem from the court's finding that she had $17,956 per month in income from trust distributions she received or her use of trust property in 2012. Substantial evidence supports that finding and the court was vested with broad discretion to include those amounts as "income" for purposes of setting child support and temporary spousal support. The record demonstrates that the court weighed the evidence and exercised discretion according to the law in making its orders.

A. INCOME IS BROADLY DEFINED FOR SUPPORT PURPOSES

There may be a difference in the definition of "income" for purposes of child support than spousal support in some cases[3], but Erika has not made that argument. There are no policy reasons why the child support definition of income should not used here for setting temporary spousal support as well. When setting guideline child support, courts shall adhere to the principle that "[c]hildren should share in the standard of living of both parents." (Fam. Code, § 4053, subd. (f).) Temporary spousal support "is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations.' [Citations.]" (*Marriage of Tong & Samson* (2011) 197 Cal.App.4th 23, 29.) Since child support and temporary spousal support share a focus on maintaining the lifestyle condition of the children or other spouse pending trial, it is appropriate to use the child support definition of income for purposes of setting temporary spousal support.

California Family Code section 4058 defines "income" for child support purposes as the "annual gross income of each parent means income from whatever source derived. . . ." (Fam. Code § 4058, subd. (a).) The

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3 *Marriage of Blazer* (2009) 176 Cal.App.4th 1438.

statute lists examples of the types of income which are included. (*Id.*; *Marriage of Alter* (2009) 171 Cal.App.4th 718, 732 - the list is nonexclusive for purposes of illustration only.) The only excluded item is child support payments or public assistance. (Fam. Code § 4058, subd. (c).) "Thus, for purposes of the computing child support under the statutory guidelines, 'income' should be broadly defined while the exclusions are specific and must be narrowly construed." (*Alter, supra,* at p.732.)

Although the definition of income in the child support guideline was lifted from the federal income tax definition, tax law is not controlling when determining whether an item is to be included in the child support calculation. (*Alter, supra,* at pp.734-735.) More instructive is the common meaning of income, which is "a gain or recurrent benefit that is usu[ally] measured in money and for a given period of time, derives from capital, labor, or a combination of both . . . ." (*Alter, supra,* at p.733, citing Webster's 3d New Internat. Dict. (1993) p. 1143, col. 3.) Courts have discretion to count as income for child support purposes any money or benefit which bears "a reasonable relationship to the traditional meaning of income as a recurrent monetary benefit." (*Alter, supra,* at p.736 - concluding that recurring gifts may be counted as income.)

Since the definition of income is broad, the court had discretion to consider the recurring deposits into Erika's checking account from her trust accounts as "income" for purposes of setting child support and temporary spousal support.

Erika tries to distinguish *Alter* by stating that she merely transferred funds from her brokerage account to her checking account, thus the money was not gifted to her. (AOB 46.) In support of this contention, Erika's cites to Black's Law Dictionary and the Oxford English Pocket Dictionary to provide definitions of a gift, which both in essence state that a gift is a voluntary transfer to someone else without payment. (AOB 46.) She claims that a gift was not made because "there is no transfer from one person to another." (*Id.*)

Whether the money she received from the trusts is legally considered a gift is beside the point. The rule in *Alter* is not limited to gifts. The deposits fit the traditional meaning of income as a recurring benefit measured in money which is derived from capital or services. (See, *Alter, supra,* at p.733.) It is the history of Erika's use of trust assets to maintain her lifestyle, before and after separation, that makes it appropriate to consider the trust assets and distributions as a basis for setting child and spousal support.

The fact that the trust assets are held by the trustee, and not Erika, is not a limitation on the court's authority to determine Erika's income for purposes of support. (*Marriage of Dick* (1993) 15 Cal.App.4th 133, 161-163.) In *Marriage of Dick*, the husband had no assets in his name but had access to trust funds and the use of property held by others. He spent $74,521 per month during the last 17 months of their marriage. The court determined that, even though the assets were not in the husband's name, his beneficial use of those properties to support his lifestyle was properly considered when setting temporary spousal support for his wife. (*Id.,* at p.163.)

B. THERE IS SUBSTANTIAL EVIDENCE FOR THE FINDING OF ERIKA'S INCOME

The substantial evidence rule requires the appellate court to consider conflicting evidence in the light most favorable to respondent, giving respondent the benefit of every reasonable inference and resolving all conflicts in favor of the judgment. (California Civil Appellate Practice (Cont.Ed.Bar 3rd ed. 2011) § 13.2. p. 844.) If the factual determination in the lower court is supported by substantial evidence, the appellate court may not re-weigh the evidence even if the weight of the evidence is to the contrary. (*Id.*)

The court's finding of Erika's income available for support was based on testimony and exhibits received over the course of a three-day hearing. "The parties, an accountant, and the Petitioner's brother/financial advisor testified during the hearing, and various exhibits were admitted into evidence." (AA 332:2-4.) James presented considerable evidence to demonstrate that Erika regularly drew on a variety of trusts to maintain their lifestyle during marriage and for herself after separation, and that she presented false and misleading statements to the court about her income and assets. (AA 333:12-14.) The court found James's evidence to be persuasive and did not believe Erika.

The trial court's statement of decision shows a thorough and rational analysis of the evidence presented regarding support. The evidence presented by Erika was not credible because the history of her deposits and expenses vastly exceeded her stated income. (AA 332:22-333:11 & 333:23-336:5.) The evidence supporting the trial court's decision was not merely substantial, it was overwhelming.

C. PAUL O'CONNOR'S TESTIMONY WAS PROPERLY EXCLUDED

Erika failed to list O'Connor as a witness before the hearing, as required by the Pretrial Order. (AA 331:25 - 332:2.) Erika also failed to comply with Family Code section 217, subdivision (c), and Rule of Court

5.113, subdivision (e), which require a witness list before a hearing of this nature. After the court pointed out the failure to list O'Connor as a witness, Erika's fallback position was to offer O'Connor as a rebuttal or impeachment witness. The court, however, found that O'Connor's proffered testimony would not rebut or impeach anything.

(3/5/13 RT 95:16-23.)

Erika claims that the "exclusion of Mr. O'Connor's testimony was particularly egregious, since the Trial Court in essence gave Erika's counsel 30 minutes of trial time to use as he wanted, so long as O'Connor did not testify." (AOB 38.) The trial court's granting of an additional 30 minutes of trial time that could have been used for O'Connor's testimony is of no consequence. Time was not the only consideration for the court's exclusion of O'Connor. The primary reasons were Erika's failure to list O'Connor on the witness list before the hearing and her inadequate offer of proof as to why O'Connor's testimony would be helpful.

O'Connor could not have testified as to whether Erika had the legal right to access trust funds according to the terms of the trust. Oral testimony by O'Connor concerning the contents of the trust instrument would have been inadmissible. (Evid. Code, § 1523, subd. (a) -- "Except as otherwise provided by statute, oral testimony is not admissible to prove the

content of a writing.") The best evidence to prove whether Erika had any control over the trust would have been the trust instrument, but it was not introduced into evidence. Erika also failed to produce the trust document discovery. (AA 90:8-9; 98 &126:26-28.) "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.)

O'Connor's testimony was not necessary to establish how title to the brokerage accounts were held, as the account statements were in evidence. (AA 269; AOB 36 -- "O'Connor's name as trustee was listed as an addressee on those brokerage statements (Resp's Exh. G).") Thus, it was proper for the court to exclude testimony by O'Connor that he was the named account holder as cumulative. (Evid. Code, § 352 - relevant evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time. . . .")

O'Connor's testimony was appropriately excluded because his testimony was inadmissible or cumulative, and Erika did not list him as a witness before the hearing.

D. GUIDELINE CHILD SUPPORT WAS ORDERED

The trial court did not deviate from guideline child support. It calculated and ordered guideline child support based on Erica's income and the other findings made at the hearing. (AA 339.) The court considered, as an alternative approach, whether to make a non-guideline order and concluded that the amount of child support would not change. (AA 336:18-25.) Erika never requested a non-guideline order in any event and never argued that the result would be any different. (AA 336:23-24.)

E. THE COURT EXERCISED ITS DISCRETION IN SETTING TEMPORARY SPOUSAL SUPPORT

When making a temporary spousal support order pending trial, the court may order either party "to pay any amount that is necessary for the support" of the other party. (Fam. Code, § 3600.) The purpose of temporary spousal support is to maintain the status quo of the parties pending trial, and the court is not restricted by any statutory guidelines in fixing temporary spousal support. (*Marriage of Tong & Samson* (2011) 197 Cal.App.4th 23, 29.) "The trial court has broad discretion to determine the amount of temporary spousal support, considering both the supported spouse's need for support and the supporting spouse's ability to pay [Citation.]." (*Blazer, supra,* at p.1442.) "Ability to pay encompasses far more than the income of the spouse from whom temporary support is sought; investments and other

assets may be used for both temporary spousal support and attorneys fees pendente lite." (*Dick*, *supra,* 15 Cal.App.4th at p.159.)

The court determined that Erika was "able to freely draw on trust assets to maintain her lifestyle, both before and after she filed this action." (AA 335:11-14.) The temporary spousal support order was consistent with the purpose of temporary spousal support -- to maintain the status quo until trial.

F. THE SUPPORT ORDER DOES NOT EXCEED ERIKA'S ABILITY TO PAY

Erika contends that the amounts ordered for support and fees exceed her ability to pay (AOB 52), and that she will have to go into debt to pay these amounts (AOB 57). Elsewhere in her opening brief, her situation is stated in less certain terms: "ERIKA faces the prospect of not being able to afford the obligations the order imposed on her." (AOB 8.) There is no evidence in the record that Erika would have to go into debt if she complied with the orders.

The court did not believe Erika's assertions regarding her income or assets. Erika's argument on appeal that she lacks the ability to pay the ordered amounts is based on the factual assertions she made to the court below, which the court did not find to be credible.

- The court found it "difficult to reconcile [the history of deposits into Erika's accounts] with the very modest income [Erika] claims." (AA 333:23-24.)
- The court found that Erika failed disclose "large monthly expenditures" in excess of her claimed income. (AA 334:2-6.)
- In 2012 and 2013, Erika "filed inconsistent statements with this Court and financial institutions regarding her resources and investments." (AA 334:10-11.) She told the court that she only had $117,000 in liquid assets as of March 2013, but told a financial institution a month earlier that her lquid net worth was $500,000. (AA 334:12-18.)
- Even after separation, she maintained the same lifestyle and spending habits as during marriage. (AA 335:3-5.)
- Erika "in fact has substantially more income than reflected on her various Income & Expense statements, and that she is able to freely draw on trust assets to maintain her lifestyle, both before and after she filed this action." (AA 335:11-14.)

One reason why Erika has less money now is that she chose to spend and invest it before the hearing. Erika invested $275,000 in 2012 (mostly in the fall of 2012) in unmarketable securities, $240,000 of which produces no

income. (AA 334:7-9.) She paid $565,000 in cash for a home in Danville and spent additional funds for furnishings, improvements, and maintenance for that house. (AA 333:3-4.) Erica commenced this divorce action on March 14, 2012. (AA 1.) Her investment decisions do not supercede her obligation to pay support. If this were the case, a spouse seeking to avoid a support obligation could do so by investing all of her money before the court made a support order.

Erika expects to receive another $1,000,000 distribution in 2017, on her 45th birthday. (AA 333:1-3.) Whatever hardship is caused by paying the support and fees ordered by the court now will presumably be remedied when she receives that distribution.

The child support and temporary spousal support orders are modifiable and are effect "until further order of the court." (AA 338 4-9.) If circumstances warrant a examination of the support orders pending trial, the court reserved the power to consider such a request.

G. THE ATTORNEY'S FEES AWARD WAS APPROPRIATE

Erika's opening brief spends two sentences on this issue. She argues that the fee award must be reversed because it was based on the court's finding regarding Erika's income. (AOB 61.) There is no discussion of the law regarding a fee award under Family Code section 2030. The appeal of

the fee award should be treated as waived because it is not supported by legal argument or proper citation of authority. (See *Marriage of Falcone & Fyke* (2012) 203 CA4th 964, 1004 -- "We are not bound to develop appellants' arguments for them. [Citation,] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived. [Citation].")

In any event, Erika's argument that the fee award was made solely according to her income is incorrect. A needs-based fee award requires an examination of many circumstances, not just the income of the parties. (Fam. Code, § 2032, subd. (b) - the court shall take into consideration the circumstances of the parties described in Family Code section 4320, to the extent relevant, which may include assets, debts, income, expenses, earning capacity, tax consequences, and domestic violence.)

Here, the court considered the assets of each party, the post-separation lifestyle of each party, their financial obligations, and each party's income. The court also considered the amount James had incurred in fees and the $73,000 he owed to his attorney, compared to the fact that Erika only owed "a modest amount of fees" to her counsel. (AA 337:14-17.) "The Court has considered the necessity of fees to allow each party to have sufficient resources to present their cases adequately, taking into

account the circumstances of the parties and their relative access to resources. The Court finds that there is a disparity in access to funds to retain counsel, and that [Erika] is able to pay for a portion of [James's] legal representation. The Court accordingly directs [Erika] to pay $40,000 for attorney's fees to [James]." (AA 337:17-22.)

The fee award was a proper exercise of the court's discretion, so it should be affirmed.

H. THE APPEAL MAY BE DISMISSED BECAUSE ERIKA HAS NOT COMPLIED WITH THE APPEALED ORDERS

> The disentitlement doctrine enables an appellate court to stay or to dismiss the appeal of a party who has refused to obey the superior court's legal orders. [Citation.] 'Dismissal is not "'a penalty imposed as a punishment for criminal contempt. It is an exercise of a state court's inherent power to use its processes to induce compliance' with a presumptively valid order." [Citations.] Thus, the disentitlement doctrine prevents a party from seeking assistance from the court while that party is in 'an attitude of contempt to legal orders and processes of the courts of this state.' [Citation.]

(*Marriage of Hofer* (2012) 208 Cal.App.4th 454, 459.)

Erika has not paid the child support, temporary spousal support, and attorney's fees which were ordered almost a year ago on May 31, 2013. Her opening brief is an admission of the fact that she has not paid any of the amounts.[4] Admissions made in a brief can be treated as binding for purposes of determining the appeal. (See *Franklin v. Appel* (1992) 8 Cal.App.4th 875, 893, fn. 11 – "While briefs and argument are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party. [Citations.]")

There is no requirement that Erika must first be found in contempt for the disentitlement doctrine to be applied. (See *Hofer, supra,* 208 Cal.App.4th at p. 459.) It is her persistence in willfully disobeying court orders which entitles the Court of Appeal to dismiss the appeal. The court may consider Erika's failure to disclose her income, expenses, and assets, as well as her failure to comply with discovery prior to the hearing, in assessing whether the dismiss the appeal. (See *Hofer, supra,* at p.458-459 – "Where a party unlawfully withholds evidence of his income and assets, he

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Erika contends that the amounts ordered for support and fees exceed her ability to pay (AOB 52), and that she will have to go into debt to pay these amounts (AOB 57). She also states that she "faces the prospect of not being able to afford the obligations the order imposed on her." (AOB 8.)

will not be heard to complain that an order is not based on the evidence he refuses to disclose. If John wished the trial court to have considered all of the circumstances in making an attorney fee award, the simple solution would have lain in his own hands: disclose the information.")

Erika's appeal is based on her claim that the court improperly determined her income, but she refused to comply with discovery on that issue, failed to make a complete or accurate disclosure, and presented false or misleading information to the court at the hearing. Principles of equity should prevent Erika from taking an appeal under such circumstances.

I. THE STATEMENT OF DECISION WAS PROPER

Erika complains that the court did not completely respond to the 27 objections she filed, in pro per, to the initial statement of decision. (AOB 57; AA 318.) She claims that the court's "failure to respond requires reversal." (AOB 61.) Some of the objections were phrased more like interrogatories to the court. For example:

- "Is Petitioner required to expend the balance of her separate property inheritance to support Respondent?" (AA 321:7-8.)
- "What remaining funds does Petitioner have from which she should pay support, if any?" (AA 321:9-10.)

A statement of decision is typically required only following a trial. (See Code Civ. Proc., § 632.) Erika fails to explain how reversal could be required for not issuing a proper statement of decision when one was not required in the first place. Erika cites two cases: *Marriage of Sellers* (2003) 110 Cal.App.4th 1007 and *Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272. (AOB 58.) *Sellers* involved a post-judgment modification of spousal support where there is a statutory right to request a statement of decision. (*Sellers, supra;* Fam. Code, § 3654.) *Ananeh-Firempong* involved a trial. Since Erika did not state the correct legal basis for her position that reversal is required in this instance, her argument for reversal has been waived.

Even if some of her objections were proper, the court was not obligated "to sift through a host of improper [objections] in search of the few arguably proper ones." (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 559.)

While managing a congested calendar and operating under budget constraints, the court took the time to prepare a well-reasoned and thorough statement of decision for the benefit of the parties. The court should be commended for doing so.

J. ERIKA HAS NOT ALLEGED A MISCARRIAGE OF JUSTICE

No judgment shall be reversed for error unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal Const. Art. VI, section 13.)

> No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. *There shall be no presumption that error is prejudicial, or that injury was done if error is shown.*

(Code Civ. Proc., § 475, emphasis added.) To reverse on an alleged abuse of discretion, it must appear that injury from such wrong constitutes "manifest miscarriage of justice." (*Corbett v. Harward Dodge Inc.* (2004) 119 CA4th 915, 927.)

Erika complains about her ability to pay the ordered amounts, but did not allege that a miscarriage of justice had occurred. While such harm may be inferred, it may not be presumed.

VIII.

CONCLUSION

The orders should be affirmed.

Dated: March 5, 2014

Respectfully submitted,
WALZER & MELCHER LLP

By: 

Christopher C. Melcher
Anthony D. Storm
Attorneys for Respondent,
James Carlson

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Brief of Respondent is produced using 13-point or greater Roman type, including footnotes, and contains 7,444 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 5, 2014

Respectfully submitted,
WALZER & MELCHER LLP

By: 

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Anthony D. Storm
Attorneys for Respondent,
James Carlson

State of California)
County of Los Angeles)
)

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

On 3/6/2014 declarant served the within: Brief of Respondent

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Signature: Kirstin Largent