



## In Re Marriage of Marci and Gary Fong. v. Gary Fong

2012 | Cited 0 times | California Court of Appeal | February 22, 2012

Marriage of Fong CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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Affirmed.

Gary Fong appeals a judgment awarding \$180,000 in attorney fees to Marci Kington. The trial court awarded that amount based on Family Code sections 271, 2030, and 1101, subdivision (g) and declined to specify the amount awarded under each statute.<sup>1</sup> Gary challenges the award under each statute and contends the court's failure to specify the amount awarded under each statute precludes effective appellate review and constitutes reversible error. He also contends he is entitled to an attorney fee award under sections 271 and 1101, subdivision (g), and the court erred by retaining jurisdiction to increase the amount of fees awarded to Marci in the event of the reversal of a prior award in another appeal.

We conclude that the fee award was proper under both sections 271 and 2030. Because we conclude that sections 271 and 2030 amply support the award, we reject Gary's argument that the failure to specify the amount awarded under each statute was reversible error, and we need not decide whether Family Code section 1101, subdivision (g) provides an additional basis for the award. We therefore will affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

#### 1. Pretrial Proceedings

Gary and Marci separated in March 2002 after five years of marriage. They had no children together. Marci filed a petition for dissolution, spousal support and division of property in May 2002. The property at issue included several vacation homes in Canada, a condominium in Marina Del Rey, California, an Internet-based sales business and shares of stock. The trial court entered a judgment of dissolution in January 2006, reserving jurisdiction over all other issues.



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Marci commenced a proceeding in British Columbia, Canada for spousal support and property division in February 2007. She recorded certificates of pending litigation stating that she claimed an interest in several properties in Canada. The case was later dismissed.

### 2. Trial

A bifurcated trial was conducted in April 2008 on the characterization of three properties in Canada. The trial court concluded in its statement of decision that the properties were community assets and that the debt on the properties was community debt. A second bifurcated trial was conducted in June 2008 on the characterization and value of shares of stock. The trial court concluded that the stock was part community and part separate property.

Marci filed a motion in July 2008 seeking, among other things, \$400,000 in monetary sanctions under section 2107, subdivision (c) and \$150,000 in attorney and accountant fees as a monetary sanction under section 271. The trial court (Hon. Glenda Veasey) ruled on the motion on April 7, 2009, ordering Gary to pay Marci \$200,000 in monetary sanctions under section 2107, subdivision (c) for failure to comply with statutory financial disclosure requirements. The court also ordered Gary to pay an additional \$100,000 in attorney and accountant fees under section 271.

A third and final bifurcated trial was conducted in June and July 2009 on the remaining property division issues and spousal support. The trial court in a ruling filed on August 24, 2009, stated that Marci left her \$60,000-per-year employment in Los Angeles after the separation and moved to Seattle, Washington where she lived with her boyfriend and established a small photography business. She later moved to Tennessee to live with her parents. The court found that Marci had made no effort to seek employment for several years and had failed to make reasonable efforts to become self-supporting, and therefore concluded that she was not entitled to spousal support. The court reserved the issue of attorney and accountant fees for later determination.

### 3. Posttrial Attorney Fee Award

The parties filed briefs and declarations in support of their respective requests for attorney and accountant fees. Marci claimed to have incurred a total of \$611,674 in attorney fees plus approximately \$220,000 in accountant fees and interest. She acknowledged that the amount of professional fees incurred was "enormous" in relation to the value of the estate. She sought an award of attorney fees and costs under sections 271 and 1101, subdivision (g) based on Gary's litigation conduct and under section 2030 based on need. Gary opposed the requests. He claimed to have incurred a total of \$432,051 in attorney fees and \$213,359 in accountant fees and sought an award of \$100,000 in fees and costs under section 271 based on Marci's litigation conduct. He also requested a statement of decision regarding any attorney fee award.

The trial court (Hon. Mark A. Juhas) filed an order ruling on the fee requests on May 26, 2010. The



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court found that Gary had paid a total of \$286,194 toward Marci's attorney fees pursuant to prior court orders or otherwise. The court also noted the April 2009 awards of \$200,000 in attorney fees as a monetary sanction under section 2107, subdivision (c) and \$100,000 in attorney fees and accountant fees under section 271, and noted that Gary had not paid those amounts and the awards were on appeal.<sup>2</sup> The court stated that Marci's settlement demands in this case were "totally unreasonable." The court also stated that Gary had frustrated settlement by treating community assets as if they were his separate property, failing to appear for a voluntary settlement conference, poor record-keeping and failing to comply with court orders. The court stated further that Gary had adequate assets to pay an attorney fee award and that it was "troubling" that Marci had failed to maintain employment.<sup>3</sup>

The trial court concluded that Marci was entitled to another fee award based on Gary's breaches of his fiduciary duties. The court awarded Marci an additional \$100,000 in attorney and accountant fees, stating, "This amount appears to be appropriate in light of the nature of the litigation to date; the fact that the respondent can well afford an attorney fee award and the respondent will also receive a substantial amount from the community and will thus be able to pay a large part of her own fees. This amount is a further recognition that the fees in this matter are not reasonable in light of the size of the marital estate. Nevertheless, the petitioner is entitled to some fees for the respondent's breach of his fiduciary duties." The court stated further that it reserved jurisdiction to increase the fee award in the event of the reversal on appeal of the prior \$100,000 fee award.

### 4. Further Posttrial Proceedings and Amended Fee Award

The trial court entered a judgment on property division, the denial of spousal support and other matters on July 12, 2010. The court reserved jurisdiction with respect to an award of attorney fees and costs, stating that a separate judgment would be issued.

Marci moved to correct the fee award or for a new trial, arguing that the trial court had overstated by \$80,000 the amount of Marci's fees previously paid by Gary. Gary also moved for reconsideration of the fee award.<sup>4</sup> The trial court in an order filed on October 4, 2010, stated that the court had overstated by \$80,000 the amount of Marci's attorney fees previously paid by Gary and that Gary had received credit against the community property for that amount. The court therefore increased the amount of the fee award to \$180,000. The court also modified the award by ordering an initial payment of \$25,000 followed by \$10,000 monthly payments until payment of the award in full.

The trial court determined that a statement of decision and judgment on reserved issues pertaining to the attorney fee award were warranted, and the parties submitted proposed statements of decision and proposed judgments on the fee award.<sup>5</sup> The court filed a statement of decision and a judgment on reserved issues on April 4, 2011.

The statement of decision stated that the \$180,000 fee award was made pursuant to sections 271, 2030



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and 1101, subdivision (g), but did not state the amount of fees awarded based on each statute. The statement of decision also stated:

"The Court is not quantifying the amount of money spent for any specific action or litigation event. In making the attorney fee award, the Court looked at all of the various aspects of the case in light of the case history, settlement proposals and all other facts and circumstances surrounding the matter, including but not limited to the nature of the litigation to date, the Parties' incomes, assets and liabilities, the circumstances delineated in Family Code § 4320, any breaches of fiduciary duty, the arguments of counsel, the amount of fees spent on both sides, the necessity for those fees and the merits of the case. The Court finds that there was a disparity in the Parties' incomes and that Respondent has more than adequate assets and can well afford to pay an attorney fee order. The Court finds that Petitioner has need for a contribution to her fees even though she will receive a substantial amount from the community and will thus be able to pay a large part of her own fees. The amount ordered also further recognizes that the total fees incurred in this case were not reasonable in light of the size of the marital estate, but that nevertheless, the Petitioner is entitled to some fees for the Respondent's breach of his fiduciary duties, which the Court finds he committed. . . .

"With regard to Respondent's request for fees, the Court did not find that the Petitioner's actions standing alone were sufficient to rise to the level of a Family Code § 271 violation resulting in a fee award to respondent. When placed in the context of the whole case, Petitioner's actions was one of the factors that caused the Court to make the fee award that it made, however the Court does not award any fees to Respondent. In determining whether the Petitioner's fees were reasonable & reasonably incurred the Court balanced the action of the Petitioner & how those actions caused the respondent to react in spending fees. The Court denies an award of § 271 fees to the respondent."

The statement of decision stated further:

"It is apparent in the Court's ruling that Respondent breached his fiduciary duties to the Petitioner. As a result of this breach, pursuant to the Family Code she is entitled to some fees pursuant to that breach independent of Commissioner Veasey's Feldman [In re Marriage of Feldman (2007) 153 Cal.App.4th 1470] order. Respondent argues that he cannot be sanctioned twice by the Court for the same actions. This is a true statement of the law. Commissioner Veasey already sanctioned him per Feldman for various reasons. That sanction (and concurrent \$100,000 fee award) is currently on appeal. The gravamen of that sanction was not for violation of the ATROs [automatic restraining orders contained within the summons] or actual misuse of the community property, but rather for his failure to be forthcoming in the discovery and disclosure process. This Court found that Respondent breached his fiduciary duty to the Petitioner in the way that he handled the Canadian properties and the Marina Del Rey property. These breaches are different in nature than the actions that gave rise to the sanctions issued by Commissioner Veasey. This Court did not quantify the amount of attorney fees Petitioner expended as part of the property breach. Much of the trial in this Court was taken up in tracing money through the property, following it from one property to the next. Additionally, there



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was evidence that Respondent was ordered not to sell any of the property and contrary to that order, placed the Marina Del Rey property on the market. Again, it is apparent to the Court that Respondent essentially treated the martial assets as though they were his own and did little to get the matter resolved as he purchased and sold property with at least some marital assets, and without Petitioner's knowledge or consent. This he cannot do and is sanctionable under the Family Code §§ 1100 and 1101."

The judgment awards Marci \$180,000 in fees, payable in monthly installments as previously ordered, and denies any fees to Gary. It states that the trial court reserves jurisdiction to increase Marci's fee award in the event of the reversal on appeal of the prior \$100,000 fee award in favor of Marci.

### CONTENTIONS

Gary contends (1) the statement of decision is insufficient because it fails to specify the amount of attorney fees awarded based on need and the amount awarded based on conduct; (2) the \$180,000 fee award is based in part on the same conduct as the April 2009 \$100,000 fee award, resulting in a double recovery; (3) Marci failed to establish a basis for an attorney fee award under section 1101, subdivision (g); (4) the trial court's finding that Marci made no reasonable effort to become self-supporting compels the conclusion that she is not entitled to a fee award based on need under section 2030; (5) the court failed to adequately explain the basis for the fee award; (6) Gary is entitled to a fee award under section 271 based on Marci's litigation conduct; (7) he is entitled to a fee award under section 1101, subdivision (g) based on Marci's breaches of her fiduciary duty; and (8) the court had no authority to retain jurisdiction for the purpose of increasing the fee award in the event of a reversal in the prior appeal.

### DISCUSSION

#### 1. The Trial Court's Failure to Specify the Amount of Attorney Fees Awarded Under Each Statute Is Not Reversible Error

Gary contends the trial court's failure to specify the amount of attorney fees awarded under each statute precludes effective appellate review of the award and therefore is reversible error. We conclude that there is ample support for the award under both sections 271 and 2030, as we will explain. We therefore reject the contention that the failure to apportion the award is reversible error, and we need not decide whether section 1101, subdivision (g) provides an additional basis for the award.

#### 2. The Award of Fees Under Section 271 Was Proper

Gary contends part of the \$180,000 fee award is based on the same conduct as the award in April 2009 of \$100,000 in attorney and accountant fees. He argues that to the extent that the \$180,000 award is



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based on section 271, it duplicates the prior \$100,000 award under section 271 and results in a double recovery.

Section 271 authorizes an award of attorney fees and costs as a sanction for obstreperous conduct that frustrates settlement and increases litigation costs. (In re Marriage of Fong, supra, 193 Cal.App.4th at p. 290.) A court may not award a sanction under section 271 that would impose an unreasonable financial burden on the party against whom the sanction is imposed, but the party requesting an award need not show financial need.<sup>6</sup> (Id., subd. (a).) The party requesting an award also need not show any actual injury resulting from the conduct. (In re Marriage of Tharp (2010) 188 Cal.App.4th 1295, 1317.)

"We review an award of attorney fees and costs under section 271 for abuse of discretion. [Citation.] 'Accordingly, we will overturn such an order only if, considering all of the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order. [Citations.]' [Citation.] We review any factual findings made in connection with the award under the substantial evidence standard. [Citation.]" (In re Marriage of Fong, supra, 193 Cal.App.4th at p. 291.)

The trial court stated in April 2011 that the April 2009 award of \$100,000 in attorney and accountant fees, made by another judicial officer, was for failure to make financial disclosures and failure to be forthcoming in discovery. The record suggests some ambiguity as to the basis for the court's April 7, 2009, award of \$100,000 in attorney and accountant fees under section 271.

Marci moved in July 2008 for \$400,000 in sanctions under section 2107, subdivision (c), which authorizes monetary sanctions for failure to comply with financial disclosure requirements, and also requested an additional \$150,000 in attorney and accountant fees under section 271. She argued that Gary had breached his fiduciary duties owed to her by withholding financial information and failing to comply with his discovery obligations. She also argued that Gary had attempted to sell property acquired during the marriage despite specific court orders not to do so, profited from his control of community assets and repeatedly filed frivolous motions.

The trial court stated in its order of April 7, 2009, that Gary had failed to comply with his financial disclosure obligations and that his conduct had frustrated settlement and cooperation between the parties. The order stated, "Accordingly, the [court] orders sanctions for breach of fiduciary duty by Respondent herein payable to Petitioner in the sum of \$200,000, and additional attorney and accountant fees payable to Petitioner pursuant to FC Section 271 in the sum of \$100,000." (Some capitalization omitted.)

We conclude that the trial court's determination in April 2011 that the April 2009 award of \$100,000 in attorney and accountant fees was based only on Gary's failure to make financial disclosures and failure to be forthcoming in discovery was reasonable and was not an abuse of discretion. The award





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of additional attorney and accountant fees in April 2011 based on Gary's attempting to sell and otherwise exploiting community assets in violation of court orders therefore was based on different conduct from the April 2009 fee award. Gary has not shown otherwise.

Gary argued in his prior appeal that the evidence did not support the trial court's finding that his conduct frustrated settlement and cooperation between the parties and counsel, as necessary to support the prior \$100,000 award under section 271. Rejecting that argument, we cited the evidence presented by Marci that Gary not only had failed to provide financial information and failed to comply with his discovery obligations, but also refinanced community property on several occasions in violation of a court order and attempted to sell real property in violation of a court order. We concluded that that evidence supported the challenged finding and supported the award under section 271. (In re Marriage of Fong, *supra*, 193 Cal.App.4th at p. 292.)

Our view of the bases for the prior \$100,000 award was consistent with the presumption of correctness, which requires a reviewing court to resolve any doubts in favor of the appealed judgment or order. (Denham v. Superior Court (1970) 2 Cal.3d 557, 564.) We did not hold in our prior opinion that all of the cited evidence was essential to support the finding that Gary's conduct frustrated settlement and cooperation between the parties and counsel,<sup>7</sup> and it is apparent that the evidence of Gary's failure to provide financial information and failure to comply with his discovery obligations alone was sufficient to support the challenged finding. We conclude that the discussion in our prior opinion did not preclude the trial court from reasonably concluding that the April 2009 fee award under section 271 was based on different conduct from the April 2011 fee award.

### 3. The Award of Fees Under Section 2030 Was Proper

Gary contends the trial court's finding that Marci failed to make any efforts to become self-supporting compels the conclusion that she is not entitled to an attorney fee award based on need under section 2030. We disagree.

Section 2030, subdivision (a) authorizes an award of attorney fees and costs in a dissolution proceeding based on the parties' respective needs and ability to pay. A court has broad discretion to determine the amount of fees and costs to award based on the parties' financial circumstances, the factors set forth in section 4320 and other considerations. (§ 2032, subds. (a) & (b); In re Marriage of Sorge (2012) 202 Cal.App.4th 626, 662.) The earning capacity of the party requesting fees and the goal that each party should become self-supporting are among the factors to consider. (§ 4320.)

The trial court found in August 2009 that Marci left a job in Los Angeles paying \$60,000 annually to live in Seattle, Washington where she established a small photography business, and she later moved to Tennessee to live with her parents. The court stated that Marci had failed to make reasonable efforts to become self-supporting and awarded no spousal support. The court noted Marci's failure to become self-supporting again in its order of May 26, 2010, awarding attorney and accountant fees.



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The court nonetheless concluded in light of the nature of the litigation, the disparity in the parties' income, the factors set forth in section 4320, and other considerations that an award of attorney and accountant fees was appropriate, as explained in its statement of decision. We conclude that Gary has shown no abuse of discretion in this regard.

Gary cites *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, for the proposition that the trial court must explain its attorney fee award in greater detail. *Keech* held that the evidence compelled the conclusion that the husband did not have the ability to pay \$500 per month for the wife's attorney fees as ordered by the trial court under section 2030. (Id. at pp. 867-868.) *Keech* stated that the trial court failed to consider the husband's other financial obligations and that there was no indication that the court had considered the proper factors in determining whether the fees awarded were reasonable and necessary. (Id. at pp. 867-870.) Here, in contrast, the evidence does not compel the conclusion that Gary cannot afford to pay the fee award and the record does not suggest that the trial court failed to consider the proper factors in awarding fees under section 2030. We conclude that *Keech* is not on point.

### 4. The Denial of Gary's Request for Attorney Fees Under Section 271 Was Proper

Gary contends the denial of his request for an attorney fee award under section 271 was error. He argues that Marci's unreasonable settlement offers and her filing of a separate proceeding in Canada seeking spousal support and property division justify a fee award in his favor under section 271. He argues that the trial court erred by balancing the parties' misconduct and by considering conduct for which Gary previously had been sanctioned. We review the denial of an attorney fee award under section 271 for abuse of discretion. (*In re Marriage of Tharp*, supra, 188 Cal.App.4th at p. 1316.)

The trial court stated in its statement of decision that, in determining the amount of fees to award Marci, it had considered her actions and their impact on the litigation. The court suggested that it had "balanced" the parties' behavior in determining the amount to award Marci and in denying any fees to Gary. Gary has shown no abuse of discretion in this regard and, as explained above, has not shown that the court improperly considered conduct for which Gary previously had been sanctioned.

Gary has not shown that Marci's misconduct was so egregious as to require a fee award in his favor, particularly in light of his own misconduct. We conclude that the denial of a fee award in his favor was proper.

5. Gary Is Not Entitled to An Attorney Fee Award Under Section 1101, Subdivision (g) Gary contends he is entitled to an attorney fee award under section 1101, subdivision (g) based on what he characterizes as the trial court's finding in August 2009 that Marci breached her fiduciary duty by resisting the sale of several properties, resulting in losses to the community. He argues that an attorney fee award is mandatory under section 1101, subdivision (g) in these circumstances. Gary acknowledges, however, that he failed to request a fee award under section 1101, subdivision (g) in





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the trial court. We conclude that having failed to request such fees in the trial court, Gary cannot argue for the first time on appeal that he is entitled to a fee award under the statute. (In re Marriage of Hinman (1997) 55 Cal.App.4th 988, 1002.)

### 6. The Retention of Jurisdiction Is Moot

The trial court stated that it retained jurisdiction to increase the \$180,000 award of attorney and accountant fees in the event of our reversal on appeal of the prior \$100,000 award. We affirmed the \$100,000 award in our prior opinion, and the decision is final. The trial court's retention of jurisdiction therefore is moot and cannot constitute prejudicial error (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475).

### DISPOSITION

The judgment is affirmed. Marci is entitled to recover her costs on appeal.

### NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We Concur: KLEIN, P. J. ALDRICH, J.

1. All statutory references are to the Family Code unless stated otherwise.
2. We affirmed the April 2009 award of \$100,000 in attorney fees under section 271 and reversed the award of \$200,000 in attorney fees under section 2107, subdivision (c) in an opinion filed on March 3, 2011, In re Marriage of Fong (2011) 193 Cal.App.4th 278.
3. The order stated: "It is troubling to both Mr. Fong and to the court that Ms. Fong has not found and maintained employment. She has struggled financially since leaving her job in Los Angeles, living in at least Seattle and now Tennessee. While the court certainly appreciates the amount of time that dissolution litigation can consume, at some point, Ms. Fong has an obligation to become self supporting which in turn would allow her to bear at least some of her own fees."
4. Marci and Gary filed their motions in June 2010, before the entry of judgment on July 12, 2010, which judgment expressly reserved jurisdiction with respect to an award of attorney fees and costs.
5. We filed our opinion in In re Marriage of Fong, supra, 193 Cal.App.4th 278, on March 3, 2011. The opinion became final and the remittitur issued on May 4, 2011.
6. Section 271, subdivision (a) states: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging



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cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

7. Contrary to Gary's argument, our prior opinion did not establish res judicata, collateral estoppel or law of the case that the cited evidence was essential to support the \$100,000 fee award.

