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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of AMY LYNN
PAPAZIAN and GILBERT PAPAZIAN II.

AMY LYNN PAPAZIAN,
Appellant,

v.

GILBERT PAPAZIAN II,
Respondent.

A128064

(San Mateo County
Super. Ct. No. FL071764)

I. INTRODUCTION

Appellant, Amy Papazian, challenges an order denying respondent, Gilbert Papazian II's, motion to eliminate his child support obligation. She argues that the trial court improperly excluded from its calculation of Gilbert's income the substantial profits he made from the sale of certain stock. She further contends that the court failed to acknowledge other sources of Gilbert's income. Amy also argues that the trial court abused its discretion when it denied her requests for fees under Family Law Code sections 2030 and 271.¹ We uphold the trial court's order denying Gilbert's motion to decrease child support but find that the trial court abused its discretion when it denied Amy's request for fees under section 2030.

¹ All further statutory references are to the Family Law Code, unless otherwise noted.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Previous Orders and Appeals*

Amy and Gilbert Papazian's marriage was dissolved on December 15, 2003. That same year, Amy and Gilbert² entered into a Marital Settlement Agreement (MSA). One of the provisions of the MSA obligated Gilbert to pay monthly child support of \$5,000 based on an annual projected income of \$435,000. Gilbert also agreed to pay additional child support in the amount of ten percent of his yearly income over \$435,000, with certain sources of Gilbert's income excepted from this obligation.

In 2004, Amy challenged the MSA. While Amy's challenge to the MSA was pending, Gilbert sought to modify their custody arrangement and also to decrease his child support obligation. At that time, a court appointed mediator awarded Amy \$10,000 in fees and \$5,000 to hire an accountant.

The matter was heard in mid-2006. The court denied Amy's challenge to the MSA, increased Gilbert's timeshare and decreased Gilbert's child support obligation to a monthly payment of \$4,459.

We denied Amy's appeal from this order in an opinion filed April 22, 2009. (*Papazian v. Papazian* (Apr. 22, 2009, A114961) [nonpub opn.])

B. *Previous Discovery Sanctions*

Amy was represented until oral argument in her previous litigation by James Koehler. Koehler was assisted by a paralegal, Mr. Helmann. During the discovery that led up to the court's denial of Amy's challenge to the MSA, Gilbert produced, under a protective order, documents relating to a number of family-owned businesses. Upon learning that a number of these documents had not been returned to the attorney for these family-owned businesses, the court ordered their immediate return. Amy's counsel was unable to locate two of these documents. Amy and her counsel were sanctioned \$10,000,

² As is customary in family law matters, we refer to the parties by their first names to avoid any confusion that would otherwise result from their shared surname.

payable to the family-owned businesses, for what the court found to be an abuse of discovery.

With regard to Gilbert's income, the court noted a significant "capital payout" to Gilbert in 2005 that was not considered income and certain "perks" he received, some of which were characterized as income and others that were not. With regard to the capital payout, the court warned that "if the payout becomes a regular pattern, or if it recurs in the future, the point would be revisited"

The court also denied Amy's request for need-based fees under section 2030 on the ground that Amy's numerous requests for ex parte relief and noticed motions were unnecessary. A statement by Amy's then-attorney that his litigation strategy was "business as usual" was characterized by the court as "astounding." As a sanction under section 271 for these litigation tactics, the court ordered Amy to pay one-third of Gilbert's fees. This amounted to \$75,000.

Not surprisingly, shortly after these sanctions were imposed, Amy hired new counsel. Amy's new counsel appeared before this court on the appeal of the above-described orders. We affirmed the court's order upholding the MSA. At the same time, we rejected Amy's argument that the trial court erred in denying her request to modify child support and granting Gilbert's.³ Finally, we affirmed a second order denying her request for attorney fees and granting Gilbert's. At that time, we pointed out that the arguments made on appeal "border[ed] on the frivolous."⁴ We warned Amy to "turn her energy and resources to other, more productive, endeavors."

³ This order was entered on June 6, 2007 and provided that Gilbert would pay child support in the amount of \$4,459/month as well as 60 percent of the children's medical expenses.

⁴ Toward the end of the hearing on Gilbert's motion to eliminate child support, Gilbert's counsel represented to the trial court that this court concluded that Amy's appeals were frivolous. Counsel's representation was incorrect. There is a difference between that which is frivolous and that which (as we put it) "borders on frivolous." The first is sanctionable; the second is a warning. However, we do wish to make the point, articulated by the trial court numerous times during this litigation, that the parties would do well to settle their differences expeditiously and without further rancor. The parties'

C. *Gilbert's Motion to Modify Child Support*

Within 12 months of these orders in Gilbert's favor, and despite the trial court's repeated pleas for the parties to settle their disputes without recourse to litigation, Gilbert moved to eliminate entirely his child support obligation. He argued that he no longer had money to pay for child support because all his funds had been expended to litigate various matters related to the dissolution of his marriage to Amy and the post-judgment litigation. From 2007 forward, Gilbert did not pay or did not timely pay his support obligations. In fact, for the first six months of 2008, he stopped paying child support entirely. He did, however, pay attorney fees and other debts.

The matter was set for hearing on June 19, 2007. The hearing commenced two years later, on May 14, 2009, and concluded on October 30, 2009.

D. *Intervening Discovery*

Amy defended against Gilbert's motion to eliminate child support by arguing that, in fact, Gilbert's income was far in excess of that which he was claiming and, therefore, he could amply afford to pay the child support he had been ordered to pay. Amy—quite reasonably—sought information to rebut Gilbert's claim that his income had decreased to the extent that he could no longer pay child support. Gilbert—quite reasonably—sought to protect from inappropriate disclosure financial information he considers confidential. Gilbert requested an unusually restrictive protective order in part because Amy's former counsel had both delayed in returning Gilbert's financial information and had, in fact, lost two of these documents. We note that Amy's former counsel, who was responsible for this loss, was sanctioned in the amount of \$10,000. Amy's current counsel, however, has

children are ill served by the inability of their parents to settle on an appropriate amount of child support. Gilbert, in particular, must understand that child support is for his children's well being. Had Gilbert been focused on this goal rather than his dismay at the funds expended in litigation, we doubt he would have filed this motion, particularly in light of the fact that it is well established that a parent's obligation to pay child support is paramount and does not take second place to other debts, something Gilbert might not have known when he filed this motion in pro per, but a principle his attorney, an experienced family law practitioner, should have understood from the outset of her representation of Gilbert.

behaved in a professional manner, a fact pointed out by the trial court on a number of occasions.⁵

Unfortunately, these two reasonable, and not at all mutually exclusive, goals led to a two-year conflict in principal part because of Gilbert's proposed protective order. At the end of two years, the protective order offered to Amy by Gilbert permitted two people—Amy's attorney and her forensic accountant—to have access to financial documents. The conditions under which the documents could be reviewed were quite limited. The documents could not be copied, but could be reviewed only at the offices of Gilbert's lawyer in San Francisco. The protective order specified that, should Amy's attorney wish to have copies made of any documents, he could do so only with the consent of Gilbert's attorney. Finally, Amy's counsel and forensic accountant were both subject to personal liability in the event of any breach of the protective order.

The trial court attempted to persuade Amy to enter into this protective order, which it explained was reasonable in light of past discovery abuses. Amy's attorney pointed out that he had not been responsible for the behavior that led to the \$10,000 sanction against Amy's former attorney, and that the extent of the "abuses" that led to this sanction were the loss of two documents and the lengthy delay in returning the rest of the documents.

Amy did not sign the protective order in part because her accountant was located in San Jose and the travel time to and from San Francisco to review documents in the offices of Gilbert's attorney was in excess of what she could afford to pay. Amy, therefore, went to trial without access to these documents.⁶

⁵ Counsel's one misstep during the hearing on this matter—a late filing of a subpoena for a witness he was assumed to have known about for quite some time—was related to his inexperience and unfamiliarity with a case he acquired after substantial litigation, and had nothing to do with an abuse of discovery.

⁶ Amy does not challenge this de facto denial of discovery on any ground. We are struck, however, by the unusually restrictive nature of the protective order offered by Gilbert on the ground of past discovery abuses. Amy's attorney was not involved in the actions that led to the discovery sanctions, one of the principal reasons Gilbert gave for

E. *The Hearing on Gilbert's Child Support Modification Motion*

Over the course of eight court days, Judge Susan Etezadi heard evidence in support of and in opposition to Gilbert's motion to eliminate child support. Gilbert, essentially, attempted to show that he was indigent because he had spent much of his income on attorney fees. Gilbert estimated that the total amount of post-judgment fees was in excess of \$500,000. He also stated that his income had decreased because he had taken a doctor-ordered six-month medical leave and because his business had declined.

Amy, however, pointed out numerous sources of Gilbert's income that belied his argument that he could not afford to pay any child support. In particular, she showed that Gilbert sold stock in December 2007 for an after tax profit of \$1.2 million, took out a credit line from Bank of America in 2007 in the amount of \$300,000, and had \$500,000 in retirement accounts. He also received a construction loan from his parents in the amount of \$1.3 million.

Gilbert testified that the majority of the money from the sale of stock went to pay off his debts, many of which were related to his legal fees. He had also earlier transferred some of the stock to his second wife, a transfer he explained "wasn't worth anything tangible."

In a written statement of decision filed on January 29, 2010, the trial court ruled that Gilbert had failed to carry his burden of proof that his child support obligation should be modified, much less eliminated, and, accordingly, denied his motion. Citing relevant statutory and case law, it rejected his argument that the payment of attorney fees to litigate the matter with Amy justified a reduction in child support. The trial court pointed out that "[e]vidence offered at trial, for sake of example, establishes that he has borrowed \$1.3 million for construction on a Hillsborough lot. While Mr. Papazian is clearly distraught over the amount of money he views as having been wasted on litigation, such

insisting on this restrictive protective order. Gilbert's protective order imposes on Amy an untoward financial burden, particularly in light of the fact that there is nothing in the record that gives us pause about Amy's present attorney's ability to scrupulously abide by a protective order.

expenditure is no more reason to modify child support than his decision to spend \$1.3 million on residential construction.” The court also rejected Gilbert’s argument that he suffered a decrease in income because of a medical disability. Rather, the court found that Gilbert failed to provide admissible evidence to substantiate this claim.

With regard to Gilbert’s claim that his employers, Papazian Properties LP, Papazian Investments LP and Lucky Strike Farms, Inc., experienced a decrease in profitability that justified a reduction in his child support obligation, the court found that Gilbert had not provided sufficient financial data to support this claim.

At trial, the court criticized Gilbert’s decision to cease paying child support. In response to counsel’s argument that Gilbert had in the past paid a “substantial amount of child support,” the court pointed out that, “[i]t’s also fair and true that he doesn’t pay on time and he pays when he thinks he can pay. I mean that’s also clear here. I think from the evidence that I’ve heard is, you know, he waits until he gets his year-end bonus. And the bottom line is that’s not okay. [¶] Child support is something that has to be paid monthly and on time. Mother should not have to struggle with knowing when money is coming. And, you know, with the amount of money that he came into in December of 2007, however you characterize it, whatever it is, it was a large sum of money. And child support ought to have been paid—should have been paid and should be paid in this case every month on time no matter the conduct of mother—alleged conduct of mother. [¶] I mean, there are people that make far less money . . . that are able to make their child support payments in a timely manner and we never hear from them.”

The court ordered that Gilbert pay back child support, with adjustments for the \$75,000 in sanctions awarded against Amy for conduct engaged in when she was represented by her former attorney and also ordered that the parties determine the amount of certain medical expenses to be apportioned between Gilbert and Amy.

The court also considered the issue of a taxable gain of \$2,227,276 realized by Gilbert in 2007 from the sale of stock options, which Amy argued was, in fact, income for the purposes of calculating child support. The court found that these stock options were Gilbert’s separate property and, therefore, funds realized by Gilbert due to their

sale, were not “income” for the purposes of the Marital Settlement Agreement. Finally, the court ordered the parties to bear their own fees and costs.

Amy appealed from the court’s January 29, 2010, order on March 29, 2010.

III. DISCUSSION

A. *Motion to Eliminate Child Support*

As we have noted, the trial court denied—in its entirety—Gilbert’s motion to eliminate his child support obligation. As we understand it, Amy’s appeal of the trial court’s order denying Gilbert’s motion appears to be related in significant part to the trial court’s conclusion that the profit realized from the sale of stock is Gilbert’s separate property. Amy contends that this conclusion is incorrect and that, in fact, Gilbert’s child support obligation should be increased.

This is not, however, the forum for considering an increase in Gilbert’s child support obligation. Amy’s reasons for supporting this increase are not specious—for example, an earlier court involved in this matter was troubled by indications that certain monies received by Gilbert were not reported as income and that Gilbert and his parents (who loaned him over \$1 million to build a house) are involved in setting the amount of his compensation, which suggests this amount can be easily manipulated. However, if Amy wishes to seek such an increase, she must do so through her own noticed motion which follows the statutory provisions applicable to a post judgment motion for an increase in child support.⁷

Under these provisions, Amy is required to file either an order to show cause or a notice of motion seeking an increase in child support. (Cal. Rules of Court, rule 5.118; *In re Marriage of Judd* (1977) 68 Cal.App.3d 515; *In re Marriage of Acosta* (1977) 67 Cal.App.3d 899.) Amy must also give Gilbert personal notice of her intention to seek an increase in child support. (§ 215, subd. (a).) In fact, had the trial court ordered an increase in support at the hearing on Gilbert's motion to decrease his support obligation,

⁷ We do not, however, recommend that Amy file such a motion. In our view, this entire matter should be expeditiously and inexpensively resolved through less litigious means.

such an order would be void on its face. (*In re Marriage of Kreiss* (1990) 224 Cal.App.3d 1033, 1039-1040.) Therefore, should Amy wish to increase child support, she must do so either through negotiation and settlement, or through a noticed motion.⁸

She has not done so here, and we will not, therefore, consider her arguments that the trial court did not properly take into account Gilbert's profits from the sale of stock, as well as benefits, perquisites, and loans received by Gilbert from various family businesses constitute income under the Marital Settlement Agreement. Should she file a motion in the trial court seeking an increase in child support she will then be able to make appropriate arguments regarding the proper characterization of Gilbert's income under the Marital Settlement Agreement and other matters. She will also then be able to seek a section 2030 fee award as appropriate.

Additionally, we review the trial court's ruling, not its reasoning. (*People v. Geier* (2007) 41 Cal.4th 555.) Even if the trial court was incorrect in its characterization of the nature of the stock sale (a characterization that was unnecessary to its ultimate ruling), the trial court's denial of Gilbert's motion is amply supported by the record. Amy does not argue otherwise.

B. Section 2030 Attorney Fees

Amy argues that the trial court erred because it did not award her attorney fees, despite the fact that she was entitled to such fee awards under section 2030. She is correct.

1. Factual Background

At several points in the litigation that followed Gilbert's motion to eliminate child support, Amy requested an award of fees under section 2030 to permit her to mount a defense. It is clear from the record that Amy's financial resources are significantly less

⁸ At oral argument, Amy's counsel expressed a concern that language in the trial court's order to the effect that profits from the sale of stock were Gilbert's separate property would be deemed conclusive on the issue. However, this determination was not in issue in Gilbert's motion, nor essential to the trial court's ruling and, therefore, is not conclusive should there be a subsequent action between the parties. (See Rest.2d Judgments, § 27.)

than Gilbert's. At the time Gilbert's motion was filed, it was undisputed that Amy had no income and owed her new attorney \$22,123 for fees. She received no child support from March to September 2008, and before that time only intermittent payments or reduced payments.

Amy's first request for fees was made via a noticed motion heard on April 10, 2009. Amy also sought to compel the production of certain documents. At that hearing, the trial court rejected Amy's section 2030 fee request. Amy did not appeal from the court's order rejecting this request for fees. However, the trial court's explanation for its ruling is relevant to other, appealable, orders regarding section 2030 fee requests because the court referred to its April 10, 2009, order when it rejected Amy's subsequent 2030 fee request.

In denying the April 10, 2009, fee request (as well as Amy's simultaneously filed motion to compel), the court explained, "[T]he court is going to grant the request for protective order for all the reasons stated here on the record, because of a clear abuse of previous discovery issues and there is a 75,000 dollar 271 sanction against your client. [¶] So in view of that, the court is not going to be granting attorneys fees in this scenario."

Later in the hearing, Amy's counsel informed the court that Amy could not both share in the costs of appointing a special master to look through Gilbert's financial documents and continue to retain her own accountant. He explained that "part of the reason we have asked for pendente lite fees was to pay for the forensic accountant so we could match against the Price Waterhouse accountant they will be using at trial." The trial court reiterated its earlier position on fees. "Here is the problem, Mr. Warren. You are asking me to give you 2030 fees in the face of a 75,000 dollar 271 sanction against your client and a 10,000 dollar discovery sanction against Mr. Koehler [Amy's former counsel]. [¶] I respectfully understand you inherited this case. It is what it is. And

because of those clear abuses, the court is not going to grant 2030 fees in the case.⁹ Later in the hearing, Amy’s counsel corrected the court’s assumption that he was working “pro bono” in Amy’s case.¹⁰ “[T]o correct the record, the award I received is for pro bono work I do in Marin County. This is not a pro bono case.” The court stated that Amy had sufficient assets to pay fees. “There is a house here. There are assets. If you need to be paid attorney’s fees, it comes out of her share of the community property if there is any such community property. If there isn’t, then it—when you litigate, you have to pay your lawyers. [¶] The 2030 argument does not apply five years later with the history that is in

⁹ In *Koehler v. Superior Court* (2010) 181 Cal.App.4th 1153, 1170, this court held that the third contempt proceeding presided over by Judge Etezadi “was improper in several particulars.” We also found that the two prior contempt proceedings were defective. We need not go into detail regarding these particulars, but note that we observed at that time that “[o]ne of the many inexplicable aspects of this case is how a person deemed sufficiently impecunious to be entitled to appointed counsel [i.e., Mr. Koehler, Amy’s former attorney] can be held in contempt and incarcerated for failure to pay a \$10,000 fine—indeed, on the trial court’s theory, repeatedly so held and repeatedly incarcerated, apparently ad infinitum.” (*Id.* at p. 1171.) We concluded that the trial court “must be absolutely certain that it not only knows the law, but that it has also dotted all the i’s and crossed all the t’s. What happened here was a far cry.” (*Ibid.*) Unfortunately, the trial court’s repeated denial of section 2030 fees also suggested some significant lack of appreciation of the pertinent law.

¹⁰ With regard to later suggestions that he was working for Amy “for free” and, thus, Amy did not need a fee award, Amy’s counsel stated that he was not, in fact, working for Amy without billing her for his time. “I have billed Ms. Papazian for that [a previously filed document], and I understand that I would not be paid unless we prevail if she gets the child support. I took that risk, but it was never an intention to work for free. And I would ask the Court not to read anything into a motive based on me working for free. I am a business person first and foremost when it comes to money issues whether the practice of law or anything else.”

At several points during the hearing, Gilbert’s counsel pointed out that Amy had been in a relationship with a paralegal in her former attorney’s office. There was some speculation that Amy was not, in fact, incurring any legal fees because this paralegal was not billing her for the time he spent on her case. The nature of Amy’s personal relationship with this paralegal is irrelevant. Section 2030 attorney fees are awarded for “reasonable” fees. The court may modify this award in the event there is a change in the amount of fees that would be considered “reasonable.” In any event, the record makes clear that Amy’s lawyer did not work for Amy pro bono and was billing her for his time.

the case. It applies at the outset because there should be parity when one party has more money [than] the other. [¶] But once one side has abused the process and there are discovery sanctions and 75,000 you owe the other side, in my mind— . . . it would be inappropriate to give 2030 fees when you owe them money. [¶] You choose to litigate, you pay your lawyer. If you can't afford it, it is what it is. And in this context, with this history, I am sorry. When people are fair with one another and they are honest with one another and there is no agenda, it is one thing. But this has gotten out of hand.” The court continued: “If you choose to continue to litigate, it is what it is.^[11] I mean, I think the record speaks for itself. . . . [i]t would [not be] fair for me to give you 2030 fees with this record. She owes them money.” (*Ibid.*) Finally, the court stated, “[W]e proceed in May. I am sorry. The history in the case deserves this kind of scrutiny. Not for you, Mr. Warren, I have no issues—or with anybody, frankly. It is what it is.”

Amy's renewed her request for fees on May 21, 2009, the second day of the hearing, when it became apparent that she would not be able to question expert witnesses because she was unable to pay expert fees.¹² When counsel attempted to elicit testimony from a doctor regarding the recommendation that Gilbert take six months off from work, the court reminded him that he could not do so without paying expert witness fees. The court went on, “The record should reflect that I am not stopping you from doing anything, but you are obviously concerned about the cost, which I will appreciate. The record should reflect nobody is stopping you from presenting expert witnesses. You can

¹¹ At several points, including this one, the trial court apparently forgot that it was Gilbert, not Amy, who had filed the motion to eliminate child support.

¹² The trial court pointed out that the testimony counsel was attempting to elicit from the doctor who recommended that Gilbert take time off from work “relates to an expert opinion. There is no way around it Mr. Warren, respectfully. . . . [¶] Litigation costs money, Mr. Warren. You know that, your client knows that, Mr. Papazian knows that. You decided to present a defense. It costs money.” In light of our finding that the trial court erred in refusing to award fees under section 2030 to a woman who had no income and was in debt to her attorney, and was fighting against a motion that could leave her without any child support whatsoever, the trial court's repeated statements regarding the fact that “litigation costs money,” is, we believe, somewhat insensitive and unwarranted.

call your own expert accountant. You can call these individuals as experts. You are choosing not to because you don't want to incur this expense. That's your business."

At this point, counsel renewed his request for fees under section 2030 "so we can afford to examine the witness." The court denied this request on grounds almost identical to those it articulated when it denied counsel's April 2009 request. "Respectfully, you have made that request in the past, and because petitioner has spent over a million dollars in attorney fees related to this divorce, unfortunately, and because there are still outstanding fees your client owes Mr. Papazian in sanctions she has heretofore not paid, the Court respectfully for all the reasons previously stated denies your request for fees

The hearing was continued to October 30, 2009, at which point counsel completed their closing arguments. When Gilbert's counsel began to address fees under sections 2030 and 271, the court asked if it had granted those fees. Upon learning that it hadn't, the court told counsel it was not taking those fee requests under consideration again. Finally, in its order denying Gilbert's motion to eliminate child support, the court ordered that each party pay its own fees and costs.

2. *Legal Principles*

Section 2031 provides as follows: "(a)(1) Except as provided in subdivision (b), during the pendency of a proceeding for dissolution of marriage, for nullity of marriage, for legal separation of the parties, or any proceeding subsequent to entry of a related judgment, an application for a temporary order making, augmenting, or modifying an award of attorney's fees, including a reasonable retainer to hire an attorney, or costs or both shall be made by motion on notice or by an order to show cause." Section 2031, subdivision (b)(1), provides: "An order described in subdivision (a) may be made without notice by an oral motion in open court at . . . the time of the hearing of the cause on the merits."

With regard to fee requests made *pendente lite*, as they were here, section 2030, subdivision (a)(1) provides: "In a proceeding for dissolution of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment,

the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding."

When considering a request for a fee request under section 2030, the trial court must keep in mind the public policy behind the award of attorney fees in family law matters. As the court explained in *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1315 (*Tharp*), the public policy purpose behind sections 2030 and 2032 is " "leveling the playing field" and permitting the lower-earning spouse to pay counsel and experts to litigate the issues in the same manner as the spouse with higher earnings." (Gray & Wagner, *Complex Issues in Cal. Family Law, Vol. I, Complex Financial Issues in Determining Support, Fees and Sanctions* (2009) Public Policy, Purpose and Philosophy Underlying Support, Professional Fees and Sanctions, § I2.13.) Attorney fees, financial experts, other experts, witness fees, and other costs are all awardable. (*Ibid.*)"

The trial court has "considerable latitude in fashioning or denying" a pendente lite fee award. However, "its decision must reflect an exercise of discretion and a consideration of the appropriate factors (*Tharp, supra*, 188 Cal.App.4th at p. 1313.)

The "appropriate factors" include a consideration of the parties' incomes and needs. Thus, " "[w]here one spouse does not have the funds available to pay attorney's fees to prosecute a family law motion, the other spouse is able to pay, and the motion is made in good faith, it is an abuse of discretion to deny a request for attorney's fees to the needy spouse." [Citations.] "The basis for awarding attorney's fees is that each party must have access to legal representation in order to preserve all of his or her rights." (*In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1219.)

Section 2032, subdivision (b), states that "the court *shall* take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the

extent relevant, the circumstances of the respective parties described in Section 4320.” (Italics added.)

Among these circumstances, the following are particularly relevant: “earning capacity (subd. (a)); ability to pay, taking into account such things as assets and standard of living (subd. (c)); respective needs (subd. (d)); obligations and assets (subd. (e)); age and health (subd. (h)); and the overall balance of hardships (subd. (k)).” (*Alan S., Jr. v. Superior Court* (2009) 172 Cal.App.4th 238, 253 (*Alan S.*))

Finally, we employ the abuse of discretion standard to review the trial court’s denial of fees. (*Tharp, supra*, 188 Cal.App.4th at p. 1312.)

The closest the trial court came to this consideration of the factors to be considered in awarding a section 2030 request, was as follows: At the April 10, 2009, hearing, the court stated that it believed Amy had sufficient assets to pay fees. It then stated, without any apparent reference to the record: “There is a house here. There are assets. If you need to be paid attorney’s fees, it comes out of her share of the community property if there is any such community property. If there isn’t, then it—when you litigate, you have to pay your lawyers. [¶] The 2030 argument does not apply five years later with the history that is in the case. It applies at the outset because there should be parity when one party has more money [than] the other. [¶] But once one side has abused the process and there are discovery sanctions and 75,000 dollars that you owe the other side, in my mind— . . . it would be inappropriate to give 2030 fees when you owe them money. [¶] You choose to litigate, you pay your lawyer. If you can’t afford it, it is what it is. And in this context, with this history, I am sorry. When people are fair with one another and they are honest with one another and there is no agenda, that is one thing. But this has gotten out of hand.” The court continued: “If you choose to continue to litigate, it is what it is. I mean, I think the record speaks for itself. . . . [¶] It would [not be] fair for me to give you 2030 fees with this record. She owes them money.” (*Ibid.*)

The court’s brief mention of Amy’s ability to pay fees is belied by the record and, therefore, is not a valid ground on which to deny fees. The court’s remaining rationale for denying attorney fees to Amy was thus threefold: (1) Amy and her previous counsel

had been responsible for discovery and litigation abuses in earlier matters; (2) Amy had been sanctioned \$75,000 for those litigation abuses and had not yet paid these sanctions; and (3) Amy's former attorney had been sanctioned \$10,000 for discovery abuses.

The court did not give any consideration to Gilbert's resources and Amy's needs, despite the glaring difference between the two, a difference that came up repeatedly during this litigation when, on numerous occasions, Amy's attorney stated that he was unable to hire or examine expert witnesses because of a lack of funds. The trial court each time denied Amy these funds, without undertaking the statutorily mandated analysis, even though it is well established that "a considerable disparity of income and assets between [wife] and [husband] [is] a strong indication [wife] was entitled to a needs-based award of additional attorney fees. (*Tharp, supra*, 188 Cal.App.4th at p. 1315.)

Even more striking is the fact that Amy was seeking fees to defend against *Gilbert's own motion*, a motion that sought to eliminate entirely the \$4,459 monthly child support Gilbert had been ordered to pay. Moreover, while the motion was pending, Gilbert stopped paying, or paid slowly or in reduced amounts, his child support. Not only did Gilbert put Amy in a difficult financial position by filing this motion, he compounded it by not paying child support properly and promptly.

The trial court, however, concluded that because the past actions of Amy and her former attorney had resulted in sanctions, it was justified in denying any further fee request made by Amy, regardless of the circumstances. The public policy behind section 2030 "strongly favors settlement as the primary means of resolving legal disputes. This is especially true in marital dissolution litigation where it is so clearly in the financial and emotional interests of the parties, especially where they have children, to reach an expeditious and final resolution of their dispute. This result can most easily and most rapidly be reached where each spouse has reasonable and able counsel representing them with some assurance they will be fairly compensated for their services, consistent with the financial circumstances of the parties." (*In re Marriage of Hatch, supra*, 169 Cal.App.3d at p. 1221.) In short, the public policy of leveling the playing field between

financially disparate spouses was never considered. Instead, the trial court seemed to believe the past was prologue, and thus ignored the factors it was required to consider.

As the *Alan S.* court put it “a pendente lite fee award should be the product of a nuanced process in which the trial court should try to get the ‘big picture’ of the case, i.e., ‘the relative circumstances of the respective parties’ as the statute puts it. (§ 2032, subd. (a).)” (*Alan S.*, *supra*, 172 Cal.App.4th at p. 254.) Here, the big picture looked something like this: Amy did not file the litigation which she sought fees to defend, and therefore could certainly not be viewed as the litigious party as she had formerly been seen; Amy had hired new counsel and none of the issues the court continually cited as justification for denying her fees was present any longer; Amy had no income and Gilbert’s failure to pay child support had put her in an even more difficult financial position than she was already in. In stark contrast to Amy, Gilbert had just earned a \$1.2 million after tax profit on a stock sale, and had borrowed \$1.3 million from his parents to build a house. He had a 401k account valued at \$500,000 and owned parts of family businesses.

Gilbert obviously has access to considerable funds. “Where the wife is as financially disadvantaged as compared to the husband as is true here, ‘The obligation to provide for the wife is not subordinate to those owed other persons. If necessary the husband must invade his investments to provide the wife with the sinews to conduct her litigation with him.’ [Citation.] Money is the mother’s milk of more than politics.” (*In re Marriage of Hatch*, *supra*, 169 Cal.App.3d at p. 1221.)

This matter is remanded for a reconsideration of Amy’s section 2030 fee requests in light of our opinion.

C. Section 3557 Fees

Amy also contends that she is entitled to attorney fees pursuant to section 3557 fees: Section 3557, subdivision (a)(1) provides for an award of fees to a custodial parent in an action to enforce “(A) An existing order for child support; (B) A penalty incurred pursuant to Chapter 5 (commencing with Section 4720) of Part 5 of Division 9; (C) A supported spouse in an action to enforce an existing order for spousal support. . . .”

Amy is not, however, attempting to enforce an existing order for child support. Although she may have done so in a separate action, section 3557 is inapplicable here.

D. Section 271 Attorney Fees

Amy also argues that the trial court abused its discretion in denying her request for sanctions under section 271. “We review a family court’s decision to grant or deny attorney fees under sections 271 or 2107, subdivision (c) under an abuse of discretion standard. [Citation.] ‘While sanctions are discretionary, the term judicial discretion implies absence of arbitrary determination, capricious disposition, or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered together also with the legal principles essential to an informed, intelligent and just decision. [Citation.] Therefore, the court must examine the entire record in determining whether the ultimate sanction should be imposed. [Citations.]’ ” (*Tharp, supra*, 188 Cal.App.4th at p. 1316.)

The trial court failed to exercise its discretion with regard to Amy’s request for section 271 sanctions, very possibly because it had concluded that its rationale for denying Amy’s section 2030 fee request applied to any fee request made by Amy. We remand for a consideration of this request, particularly in light of our recent decision in *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531-1532 (section 271 sanctions justified by wife’s filing of unnecessary motions which caused husband to incur substantial fees to establish “simple proposition.”)

IV. DISPOSITION

The matter will be remanded for reconsideration of Amy’s requests for fees under section 2030 and consideration of her request for sanctions under section 271. The remand shall, however, be to a different trial court judge. In all other respects, the

trial court's order is affirmed. Amy shall recover her costs on appeal including, in an amount deemed appropriate by the trial court, attorney fees.

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.