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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of IVY and LIANG  
SUN.

IVY SUN,  
Plaintiff and Respondent,  
v.  
LIANG SUN,  
Defendant and Appellant.

A128964

(Contra Costa County  
Super. Ct. No. MSD0603127)

Defendant Liang (Steven) Sun appeals from the judgment dissolving his marriage to plaintiff Ivy Sun and adjudicating a myriad of property issues.<sup>1</sup> At the outset of an extraordinarily comprehensive statement of decision, the trial court (Hon. Barry Goode) stated: “Ivy and Steven married on August 31, 1985 and separated on July 11, 2006. At trial they presented the following issues: (1) the characterization of two Oakmark fund

<sup>1</sup> At the commencement of its lengthy decision, the trial court stated: “As is customary in family law, the Court refers to the parties by their first names. Of course no disrespect is intended. See *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1 (‘Referring to the parties by their first names personalizes the opinion for the parties and, for other readers, makes the opinion easier to understand . . . . [T]he parties in marital dissolution actions are human beings and we use their first names, in part, to humanize a decision resolving personal legal issues which seriously affect their lives.’) Liang goes by ‘Steve’ or ‘Steven’, and the Court adopts that usage.” So do we.

accounts, (2) the amount of Steve’s [Family Code] § 2640<sup>2</sup> claim for reimbursement with respect to the family home, (3) responsibility for certain college loans taken out by Steve during the marriage, (4) division of credit card debt, (5) Steve’s various *Epstein/Watts*<sup>3</sup> claims, (6) Steve’s claim for reimbursement regarding a Dodge Intrepid, (7) Steve’s claims regarding certain items of personal property, (8) Steve’s claim for lost profits on the sale of the family home, (9) Ivy’s claim for a share of four non-retirement accounts, (10) permanent spousal support and (11) attorney fees.” Steve prevailed on items (1) and (9). He now challenges the trial court’s conclusions on most of the remaining issues.

The record on appeal consists of more than 1100 pages of reporter’s transcript, and six volumes of clerk’s transcript, four of which are devoted to trial exhibits.<sup>4</sup> There seems scant point to recapitulating this record if that would merely duplicate the 37-page statement of decision the trial court took such obvious pains to prepare. In light of the parties’ thorough familiarity with that document, the most economically efficient approach is to proceed directly to consideration of Steven’s contentions. However, we do so with a full and firm awareness governing that consideration.

The most fundamental principle of appellate review is that “ ‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *Ketchum v.*

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<sup>2</sup> Statutory references are to the Family Code unless otherwise indicated.

<sup>3</sup> Under *In re Marriage of Epstein* (1979) 24 Cal.3d 76, 84-85, a party who makes separate property contributions towards community obligations after separation is entitled to be reimbursed from community assets. Such offsets are commonly called “*Epstein credits*.” Conversely, where one spouse has the exclusive use of a community asset during the period between separation and trial, that spouse may be required to compensate the community for the reasonable value of that use. The right to such compensation is commonly known as a “*Watts charge*.” (See *In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 374.)

<sup>4</sup> And yet, while hearing objections to the tentative decision, the court bemoaned that “this was the one [case] where despite all the stuff that came in, I had the least usable information of any other trial that I’ve done.” The court also noted that it had “99 pages of notes from this trial.”

*Moses* (2001) 24 Cal.4th 1122, 1140; *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Walling v. Kimball* (1941) 17 Cal.2d 364, 373; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409.) “ ‘Where [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the [evidence] will be resolved in favor of the . . . trial court decision.’ ” (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531, quoting *In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

And, if a party has not brought the trial court’s attention to a particular defect in a proposed statement of decision, particularly a matter involving mathematical calculations, the party will not be allowed to argue the defect on appeal. This is a matter of simple fairness to the trial court and opposing counsel. (*In re Marriage of Arceneaux, supra*, 51 Cal.3d 1130, 1138; *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 998, 1002; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 400, p. 458.)

In general, there are two standards of review. The first is the abuse of discretion standard, which allows a reviewing court to reverse only if it concludes the trial court abused its discretion, which occurs “ ‘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.’ ” (*In re Marriage of Davenport, supra*, 194 Cal.App.4th 1507, 1524, quoting *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225-1226.)

The second standard of review is whether factual determinations made by the trial court are supported by substantial evidence. “In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact. ‘In brief, the appellate court ordinarily *looks only at the evidence supporting*

*the successful party, and disregards the contrary showing.*’ [Citation.]” (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

However, the concept of substantial evidence may not be precisely what must be measured for many of Steven’s claims. As will be seen, many of those claims involve amounts to which he argues he was entitled, but which the trial court denied him. In other words, he is complaining about a negative, the failure to find in his favor. He is particularly insistent that the failures to find in his favor fly in the face of his uncontradicted testimony. For these category of claims, a slightly different approach is appropriate.

In arguing for an *Epstein* or *Watts* credit, Steven had the burden of proof. (Evid. Code, § 500; *In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 822-823.) To the extent he believes his testimony, if uncontradicted, is by itself sufficient to compel a finding in his favor, he is mistaken. Witkin states that the uncontradicted testimony principle is subject to a number of exceptions and qualifications. (3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, §§ 102-106, pp. 159-164.) For present purposes, the most important exception is this: “An appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony, and a trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced. The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is

giving a wrong coloring to material facts.” (*La Jolla Casa deManana v. Hopkins* (1950) 98 Cal.App.2d 339, 345-346.)

There are numerous Supreme Court decisions to the same effect, with particular emphasis paid to whether the witness has an interest in the outcome of the case. (E.g., *Leonard v. Watsonville Community Hosp.* (1956) 47 Cal.2d 509, 518; *Hamilton v. Abadjian* (1947) 30 Cal.2d 49, 53; *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660; *Blank v. Coffin* (1942) 20 Cal.2d 457, 461-462; *Davis v. Judson* (1910) 159 Cal. 121, 128.) One additional factor we mention is not accepting uncontradicted testimony when other stronger or corroborating evidence could have been produced, but was not. (See Evid. Code, § 412; CACI No. 203; *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 979.)

Although not a standard of review, if we are called upon to construe a statute, there is no deference given to the trial court’s construction because the meaning of a statute is a question of law requiring our independent review. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

### **The Trial Court Did Not Misapply Section 2640**

Section 2640 specifies that when dividing community property, a “party’s contributions to the acquisition of property in the community property estate” shall be reimbursed “to the extent the party traces the contributions to a separate property source.” (§ 2640, subd. (b).) Steven contends the trial court “erred in its interpretation” of this statute in that “At trial . . . Appellant claimed the right to be reimbursed for his separate property contribution to the purchase of the marital residence in the amount \$23,123.17. The Court found that Appellant was entitled to reimbursement of \$21,959.46 for his separate property investment, but also that the parties received a \$5,900.00 refund shortly after purchasing the marital residence and therefore discounted Appellant’s claim by this amount. This ruling was based solely on [Ivy’s] alleged testimony and disregarded not only Appellant’s testimony but also the documentary evidence submitted by Appellant and the applicable law.”

The trial court found that “When it comes to numbers, Steve admittedly had a terrible memory,” whereas “Ivy . . . testified that they received a refund on the purchase price of the house of \$5,900 because of some drainage problem. . . . Ivy seemed much more precise. The Court accepts her testimony that the refund was \$5,900.” Ivy’s testimony alone constitutes substantial evidence in support of the court’s finding. (Evid. Code, § 411, *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Because Ivy was able to trace the money, there was no “misapplication” of section 2640. (*Smith v. Superior Court, supra*, 39 Cal.4th 77, 83.)

It is clear from various comments in its statement of decision that the trial court did not entertain a high opinion of Steven’s credibility. In addition to the remark just quoted, the court twice characterized Steven’s testimony as “simply not credible.” This description was on top of “not particularly helpful,” “not easy to follow,” and particularly vague when it came to the couple’s finances.

### **The Trial Court Did Not Err In Its Disallowance Of *Epstein* Credits For Student Loans**

Section 2550 provides: “Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally.” This statute expresses only a general rule. (See *In re Marriage of Weiner* (2003) 105 Cal.App.4th 235, 239.) Its opening language proves that the rule is subject to exceptions. A so-called *Epstein* credit reimbursement is one such exception: “ ‘The rule denying reimbursement in the absence of an agreement therefor is based largely on the presumption the paying spouse intended a gift. [Citations.] . . . When the parties have separated in anticipation of dissolution of the marriage, the rational basis for presuming an intention on the part of the paying spouse to make a gift is gone. [¶] . . . [¶] So, we are persuaded the rule disallowing reimbursement in the absence of an agreement for reimbursement should not

apply and that . . . a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution.’ ” (*In re Marriage of Epstein, supra*, 24 Cal.3d 76, 84-85.) This principle is now codified in section 2626.

Steven sought an *Epstein* credit for “pre-separation loans acquired for the benefit of the parties’ children.” The trial court dealt with this claim as follows:

“During the marriage, Steven began taking out ‘Parents Plus’ loans so Michael and Tiffany could attend college. Loans incurred before the date of separation are community obligations. § 2622. In 2004 he borrowed \$17,243 for Michael’s freshman year. In 2005 he borrowed \$17,245. In 2006 he borrowed \$11,126 for Michael and \$9,476 for Tiffany.

“Michael’s first two loans were consolidated into a payment of \$374.06/month. The 2006 was being paid off at the rate of \$141.18 per month. Steve did not say what the monthly payment is for Tiffany’s 2006 loan.

“Steve testified that the student loans taken out prior to separation total \$55,090. He also testified that since July 2006 [the parties’ separation date] he has made 41 payments totaling \$15,336—but he did not say how much of that was for loans taken out prior to separation and how much was for loans taken out by him after separation.

“In his closing brief, Steve says the student loans that originated prior to the date of separation have a balance of \$44,482. (There was no testimony to support that number.) He asks that amount be paid from the proceeds of the sale of the community residence.”

“*College loan payments.* Steve’s testimony about this was not easy to follow. At its most specific, he testified as follows: Michael’s first two loans require payments of \$374.06 per month. Michael’s third loan requires payments of \$141.18 per month. Tiffany’s loans (pre- and post-separation) ‘probably’ results in payments of \$100 per month. He also testified that even if the community pays off the three pre-separation loans from the house proceeds, he will still have to make payments of \$600 to \$700 per month.

“These numbers do not add up. If one adds Michael’s pre-separation loan payments (\$374.06 plus \$141.18) and (call it) \$100 for Tiffany’s pre-separation loan, that results in payment of \$615.24 per month. If one adds all the (pre- and post-separation) loan payments (\$374.06 plus \$141.18 plus \$476.06) that results in payments of \$991.30 per month. If one subtracts \$615.24 from \$991.30 that leaves payments of \$376.06, not payments of \$600 to \$700.

“As noted above, some of the loans were taken out before and some after the date of separation. Steve simply did not offer any clear, credible testimony about the amount he actually paid attributable to loans made before the date of separation. Since he has failed to sustain his burden of proof, his *Epstein* claim fails.”

Even so, the trial court did not absolutely close the door to reimbursement: “The balance of the pre-separation college loans should be paid from community assets. Steve is to provide Ivy with an accounting showing the balance due on the Parents Plus loans that were taken out prior to separation.” If the parties were unable to agree on the balance, the court was willing to “set a twenty minute hearing to determine that amount.”<sup>5</sup>

Steven contends we should reverse on this point because the trial court abused its discretion by rejecting his claim. However, it seems quite clear that the court was—and still is—inclined to grant Steven reimbursement, *if he could substantiate his claim*. To the court’s mind, he had failed to produce that substantiation at trial.

Steven argues that the trial court “failed to take into consideration payments towards additional post-separation loans taken for the benefit of the parties’ oldest child.” But *Epstein* credits are only awarded for postseparation discharge of “preexisting community obligations.” In other words, payments made after separation that are not for pre-separation obligations do not count, just as the trial court consistently recognized.

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<sup>5</sup> This procedure was in response to Steven’s request that “I ask the Court to allow me to provide accounting.”

Steve next argues that the court could have found the figures if it had consulted “his Response to Petitioner’s Opposition to Respondent’s OSC to Sell House, Seek Work, Impute Income to Petitioner, Vacate Temporary Order and For Attorney’s Fees, Costs & Sanctions Against Respondent.” Just as it is “neither practical nor appropriate for us” as a reviewing court “to comb the record on [an appellant’s] behalf” (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 888), the same principle is, we believe, just as appropriate for a trial court. If Steven did not produce the appropriate evidence at trial, it was not the court’s responsibility to make good that deficiency. Moreover, the trial court was not required to believe Steven’s prior filing. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; *Kulko v. Superior Court* (1977) 19 Cal.3d 514, 519, fn. 1 [both to the effect that a trier of fact’s power to judge credibility also applies to written materials such as declarations].)

“Finally,” Steven concludes, “the Court should have taken Appellant’s testimony regarding the specific amounts paid each month and multiplied that amount by the number of months between separation and trial (41 months) to compute Appellant’s reimbursement claim much like the Court did with Respondent’s credits for payment of the expenses on the marital residence when computing Appellant’s *Watts* claim. CT II: 00426.” The difference with Ivy’s claim is that she submitted evidence to substantiate her payments (on the cited page of the clerk’s transcript the court refers to matters proven by Ivy “According to Exhibit 45”), while Steven did not. And just because the court was willing to accept Steven’s testimony concerning some of his figures, it does not follow that Steven was absolved from proving that he actually made payments for 41 months, certainly not when the court had already noted that “When it comes to numbers, Steve admittedly had a terrible memory.”

As previously shown, the trial court was within its province as the trier of fact to take account of Steven’s obvious interest and his failure to produce supporting documentation (Evid. Code, § 412; *Davis v. Judson, supra*, 159 Cal. 121, 128; *La Jolla Casa deManana v. Hopkins, supra*, 98 Cal.App.2d 339, 345-346), and from this to conclude that he had failed to carry his burden of proving a right to an *Epstein* credit. (*In*

*re Marriage of Braud, supra*, 45 Cal.App.4th 797, 822-823.) If Steven did not produce sufficient evidence at trial, it was not the court’s responsibility to do the job itself. Finally, given that the trial court’s willingness to receive additional information seems still open, we are particularly unimpressed with Steven’s patently untrue assertion that the trial court “failed to provide [him] with the . . . opportunity to establish the amount of his post-separation payments.”

**The Trial Court Did Not Err In Its Disallowance Of  
*Epstein* Credits For Credit Card Debt**

Concerning Steven’s claim for *Epstein* reimbursement of a credit card debt, the trial court found:

“Steve initially testified that as of July 31, 2006 there was \$11,973.99 in credit card debt. Later he testified that it was \$9,911. In his post-trial brief he asks that the latter sum be paid from the proceeds of the sale of the family residence. Ivy did not testify to the contrary or address it in her post-trial brief in any significant way. Thus, this debt is a community debt, and \$9,911 shall be paid directly to SeaWest out of the proceeds of the sale of the house.”

“In his closing brief, Steve asks for a credit of \$4,510.38 that he says he paid on the SeaWest account from the date of separation until the date of trial. There are two problems with this. One, he testified that the current balance of the SeaWest card is now higher than at the date of separation since he has continued to make changes to that account. Two, his testimony about what he paid was generally vague. He testified that the interest on the \$9,911 balance since the date of separation was ‘about’ \$4,500 since the date of separation. But he did not explain how he calculated that—an important omission—since he was simultaneously making additional charges on the card. Thus, he has failed to sustain his burden of proving what post-separation payments he actually made on community debt (as opposed to post-separation charges.) His *Epstein* claim fails.”

Steve’s attack on this finding is in two parts. The first part is to cite his own “clear, uncontroverted testimony at trial.” The second part is, again, to fault the trial

court for not doing the math for him.

The pages of the record cited by Steven (“RT III: 590, 597, 704; RT IA: 101” “RT III: 598; RT IA: 101”) do not support his claim, but actually support the finding. Steven testified that at the time of separation the parties had “About 11,000—something” of credit card debt, however “I cannot remember [the] exact amount.” He made monthly payments after the separation, and paid “Approximately \$4500” as interest, but he gave the interest rate as “13.99” and “12.96.” When expressly asked by Ivy’s attorney, Steven conceded that he had no documentation to support his claim. As for the second part of Steven’s attack, we have already rejected it.

Thus, again, there is no basis for overturning the trial court’s finding that “Steve simply did not offer any clear, credible testimony about the amount he actually paid attributable to loans made before the date of separation [and therefore] has failed to sustain his burden of proof . . . .” (Evid. Code, § 412; *Davis v. Judson*, *supra*, 159 Cal. 121, 128; *In re Marriage of Braud*, *supra*, 45 Cal.App.4th 797, 822-823; *La Jolla Casa deManana v. Hopkins*, *supra*, 98 Cal.App.2d 339, 345-346.)

### **The Trial Court Did Not Err In Its Disallowance Of *Epstein* Credits For Mortgage Payments On The Family Home**

The trial court’s treatment of the family home generated one of the most lengthy discussions in the statement of decision:

“Steve claims that the community is entitled to a credit of \$34,200 because Ivy had sole use and occupancy of the family home since September 2006 when Steve moved out. He also claims he is entitled to an *Epstein* credit for the mortgage payments he made after he moved out of the house.

“On or about August 10, 2006 Ivy filed a motion that sought, among other things, exclusive use of the family home. Judge Caskey granted that request in a temporary order signed August 10, 2006. The matter was set for hearing on September 1, 2006. On August 22, 2006 Steve filed a responsive declaration in which he stated his objection and wrote, ‘Either we continue to co-exist in our home separately and in separate rooms, as we have been doing for 2 1/2 years, or Petitioner can move out and I’ll remain in the

home pending sale.’ On August 24, 2006 Steve filed a motion to vacate the temporary order giving Ivy sole possession of the home. On that same day, Judge Caskey suspended the temporary order. The minute order from September 1, 2006 recites that Judge Baskin declined to modify the temporary orders made by Judge Caskey.

“On September 7, 2006, the matter came before Judge Caskey. The Order after Hearing (filed December 5, 2006) did not address Ivy’s request for exclusive possession. Thus, as of that date, the parties continued to enjoy (at least *de jure*) joint possession of the home.

“On March 19, 2007, Steve filed another Order to Show Cause. In it he asked, among other things, that Ivy be given exclusive temporary use, possession and control of the family home. He noted, ‘[s]he is already in de facto sole possession of such property.’ He declared that he is living with his 92 year old mother. That OSC was set to be heard on April 25, 2007.

“Although she did not take a clear position on the issue, Ivy’s response stated, ‘Respondent is too cheap to obtain his own place to live and CHOOSES to live primarily with his 92 year old mother and live-in girlfriend from China.’ She also declared that she was paying all the utilities, which were transferred into her name as of the beginning of the year. By stipulation, that hearing was continued to July 17, 2007. The minute order from that date does not address the issue. There is no Order After Hearing.

“On March 31, 2008, Ivy obtained a Domestic Violence Temporary Restraining Order. The DV-110 and DV-100 indicate that Steve had already moved out of the family home. After a trial, on June 23, 2008, the Court issued a Restraining Order After Hearing. It effectively barred Steve from the house, but provided a civil standby for him to retrieve his personal belongings.

“Steve argued that Ivy had exclusive use of the house since September 2006. Ivy argues that since Steve had the right to come back to the house she should not be subject to any Watts charge until the date of the Temporary Restraining Order.

“The cases do not support Ivy’s position. There is nothing that suggests there has to be a legal right, or a court order, for the exclusive use of a community asset before a

*Watts* charge is imposed. See, e.g., *In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 373, *In re Marriage of Bell* (1996) 49 Cal.App.4th 300, 311.

“From the testimony, it appears that Steve moved out of the family residence in September 2006. Ivy says he had ‘access’ to the house and came back from time to time. Steve says he came only occasionally when his children were back from school visiting, or once when his mother created an emergency at the pool. (It does appear that Steve and his mother used the swimming pool at the complex from time to time.) But fundamentally, Ivy had the use of the house; Steve lived elsewhere. Steve is entitled to a *Watts* credit.

“However the *Watts* charge should begin as of January 2007. From July 2006 to January 2007 the situation was quite equivocal. The parties were skirmishing over who would have what degree of use of the house. Steve fought for, and won, the right to co-occupy it. At the time, it could not be clear to anyone whether he was living with his mother only temporarily, or whether he would be returning. Ivy certainly did not have quiet possession of the house.

“Norm Stanley, an expert realtor, testified that the fair rental value of the house was \$2,245 a month in 2007, \$2,400 a month in 2008, and \$2,300 a month in 2009. For each, he assumed the rental value should be decreased by an assumed vacancy of two or three weeks a year.

“Ivy testified she paid the mortgage, insurance, property taxes, maintenance and home owners association dues from January 2007 until the house was sold. According to Exhibit 45 she paid an average of \$1,846 per month in 2007; \$2,269 per month in 2008; and \$1,915 per month in 2009.

“So, the following calculation is made: [Here is set out a graph.]

“Thus, the community is entitled to a *Watts* charge of \$10,210. Ivy must pay Steve half that amount, i.e., \$5,105.

“Steve also sought an *Epstein* credit. He testified that he paid the mortgage for a few months, beginning in August 2006. The mortgage payment varied from time to time. However, Steve testified that he paid \$10,061.22 in mortgage payments from August

2006 to January 2007. That is approximately \$1677 per month.

“Steve’s claim for an *Epstein* credit is misplaced. The law provides, ‘[w]ith respect to the “payment credits,” the seminal case of *In re Marriage of Epstein*[, *supra*,] 24 Cal.4th 76 holds that ‘ “a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution. However, . . . reimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse’s duty to support the other spouse . . . .” ’ [Citations.]

“Similarly, *Watts* says, ‘In *In re Marriage of Smith* (1978) 79 Cal.App.3d 725, one spouse was seeking reimbursement for the use of separate funds to pay community obligations after separation. The court concluded that in some cases reimbursement should be allowed, stating: “[W]e are persuaded the rule disallowing reimbursement in the absence of an agreement for reimbursement should not apply and that, as a general rule, a spouse who, after the separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution. However, there are a number of situations in which reimbursement is inappropriate, so reimbursement should not be ordered automatically. Reimbursement should not be ordered if payment was made under circumstances in which it would have been unreasonable to expect reimbursement, for example, where there was an agreement between the parties the payment would not be reimbursed or where the paying spouse truly intended the payment to constitute a gift or, generally, where the payment was made on account of a debt for the acquisition or presentation of an asset the paying spouse was using and the amount paid was not substantially in excess of the value of the use.” (*Id.*, at p. 747.) This language was specifically approved and adopted by the Supreme Court in *In re Marriage of Epstein*[, *supra*] 24 Cal.3d 76, 85-85.’ *In re Marriage of Watts*[, *supra*,] 171 Cal.App.3d 366, 373.

“Steve did not start paying spousal support until January 2007. As noted above,

from July 2006 to January 2007 the situation was unsettled. It was not clear who was going to get the use of the house. More important, during that time, Steve was not paying spousal support. So, his payment of the mortgage was the least he could do to provide shelter to his wife of twenty-one years; the wife for whom he had been the principal earner until they separated.

“He gets no *Epstein* credit for 2006.”

Steven contends he should be given an *Epstein* credit of \$10,061.22.

Steven does not challenge the court’s findings that he did not finally move out of the marital residence until September 1, 2006, exactly when his obligation to pay spousal support commenced (although he did not begin paying that support until January 2007, four months after being ordered to do so), and that Ivy did not begin making the mortgage payments on the marital residence until February 2007.<sup>6</sup> Thus, for all of 2006 Steven was either not complying with the support order or making payments for the house he continued to occupy, if on an intermittent basis (a point discussed more fully, below). It would be patently unfair to saddle Ivy with the sole responsibility to make the payments for a house she was still in some sense sharing with Steven. In addition, an *Epstein* credit “is not appropriate when paying the community obligation amounts to discharging a duty of support.” (*In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 624, fn. 5; see *In re Marriage of Epstein, supra*, 24 Cal.3d 76, 85.)

### **The Trial Court Did Not Abuse Its Discretion In Calculating The *Watts* Charge**

Steven contends that the *Watts* charge of \$10,210 should be \$28,341.52. He asserts that the trial court should not have started the charge as of January 2007 because this was “in direct contradiction” to the court’s finding that Steven moved out of the

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<sup>6</sup> Although it was not mentioned in the statement of decision, the support obligation was ordered by Judge Caskey as a part of the hearing conducted on September 7, 2006, although it was not memorialized until an order was filed a month later. We note that in concluding that Steven began paying this obligation in January 2007, the court may have been doing him a favor, considering that Steven testified he started payments “sometime in March or April” of 2007.

marital residence in September 2006. Steven also insists the court's calculation is skewed because it should not have allowed Ivy "any credit for the payment of any household expenses, including the mortgage, until February 2007," and because "the Court failed to remove the amounts listed for property taxes." Citing *In re Marriage of Hebring* (1989) 207 Cal.App.3d 1260, 1272, Steven concedes he is not entitled to reversal unless he demonstrates abuse of discretion.

Initially, the claim is waived because, in its current form, it was not presented to the trial court. When objecting to the tentative decision, Steven pitched his claim at the far higher figure of \$51,815.58 representing "the revised *Watts* credit for rental." Because the trial court was never asked to consider the lower figure now advances, the point was forfeited. (*In re Marriage of Eben-King & King, supra*, 80 Cal.App.4th 92, 117; *In re Marriage of Hinman, supra*, 55 Cal.App.4th 998, 1002; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 400, p. 458.) Moreover, even if we did reach the merits of Steven's contention, he would not prevail.

Steven's first point is misplaced. He may have moved out in September 2006, but the trial court found that "the situation was quite equivocal" because Steven was in and out of the house and seeking "the right to re-occupy it." As the trial court pointed out to Ivy, "There is nothing that suggests there has to be . . . exclusive use of a community asset before a *Watts* charge is imposed." Thus, even if Steven *had* completely and irrevocably moved out, it would not compel imposition of a *Watts* charge. It follows that no abuse is shown with the trial court fixing the commencement of the *Watts* charge at January 2007.

Steven's second point is equally misplaced. The trial court concluded that "According to Exhibit 45 [Ivy] paid an average of \$1,846 per month in 2007." Looking at the page of Exhibit 45 for 2007, it is clear that the court looked at the "\$22,152.79" for "Mortgage," divided by 12 which produced the number 1846. It defies common sense to imagine Ivy remaining in the house without making mortgage payments. Finally, the \$3,601.47 for "Property Tax" played no part in the equation used to calculate Ivy's monthly rent.

## **The Trial Court Did Not Err In Its Disallowance Of *Epstein* Credits For Personal And Household Expenses**

The trial court further found: “Near the end of trial, Steve testified that starting in mid-2006 he paid a number of bills ‘for Ivy’, including PG&E, trash hauling, water, AT&T, Cable TV, car registration and others. They amounted to perhaps \$3500. He does not explain the theory on which he would be entitled to ‘reimbursement’ for these payments. Most were presumably not community expenses—unless one construes some part of the PG&E and water bill as necessary to maintain the community asset pending sale. But Steve said nothing more than he paid them. He did not explain how they measure up against the authorities cited above. It is not clear whether they were a gift, a payment in the nature of spousal support, or what. The Court declines to award him any reimbursement for this potpourri of claims.” Steven contends that he was entitled to reimbursement under sections 2623 and 2626.<sup>7</sup>

The trial court did not mention section 2623 and 2626 because Steven did not cite them when objecting to the tentative decision. This argument is consequently forfeited. (*In re Marriage of Eben-King & King, supra*, 80 Cal.App.4th 92, 117; *In re Marriage of Hinman, supra*, 55 Cal.App.4th 998, 1002; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 400, p. 458.)

Given its severe reservations about Steven’s credibility, and the absence of supporting documentation, the trial court was within its province as the trier of fact to

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<sup>7</sup> “Debts incurred by either spouse after the date of separation but before entry of a judgment of dissolution of marriage or legal separation of the parties shall be confirmed as follows: [¶] (a) Debts incurred by either spouse for the common necessities of life of either spouse or the necessities of life of the children of the marriage for whom support may be ordered, in the absence of a court order or written agreement for support or for the payment of these debts, shall be confirmed to either spouse according to the parties’ respective needs and abilities to pay at the time the debt was incurred. [¶] (b) Debts incurred by either spouse for nonnecessaries of that spouse or children of the marriage for whom support may be ordered shall be confirmed without offset to the spouse who incurred the debt.” (§ 2623.)

“The court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial.” (§ 2626.)

take account of Steven's obvious interest and his failure to produce supporting documentation and conclude that there was no substantial evidence of "[d]ebts incurred by [Ivy] after the date of separation but before the entry of a judgment of dissolution" within the scope of section 2623. (Evid. Code, § 412; *Davis v. Judson*, *supra*, 159 Cal. 121, 128; *In re Marriage of Braud*, *supra*, 45 Cal.App.4th 797, 822-823; *La Jolla Casa deManana v. Hopkins*, *supra*, 98 Cal.App.2d 339, 345-346.)

A different analysis produces the same result. Section 2623 is inapplicable because Steven was not attempting to have the debts "confirmed" as Ivy's. Because Steven had already paid and was seeking reimbursement, section 2626 would appear to govern. But that statute expressly gives the trial court discretion to order reimbursement "for debts paid after separation but before trial." Given Steven's deficient showing that debts had actually been paid, we could not conclude that a discretionary determination not to order reimbursement exceeded the bounds of reason and thus constituted an abuse of that discretion. (*Shamblin v. Brattain*, *supra*, 44 Cal.3d 474, 478-479; *In re Marriage of Davenport*, *supra*, 194 Cal.App.4th 1507, 1524.)

### **The Trial Court Did Not Err In Its Disallowance Of *Epstein* Credits For 2005 Tax Payments**

The trial court found: "In his post-trial brief, Steve claims he is entitled to an *Epstein* credit for having used his post-separation separate property to make tax payments for tax years 2004 and 2005. At trial he only testified about the 2004 tax year, saying he paid additional taxes and penalties following an audit that disclosed that Ivy had cashed out an IRA in 2004 and did not tell him, so it went unreported in their 2004 returns. (Ivy testified she told him, at the end of 2004, about the withdrawal. But she agreed they did not file timely.) At first he said he paid between \$5,000 and \$6,000 in taxes and penalties. Later he said he paid \$4,000 'probably.' Later still, he said he paid \$5,319 for 2004 *and* 2005; of that he said \$1,300 was for 2005. (He said the return was filed late because Ivy refused to file jointly until 2006. But he never testified about why that resulted in an underpayment of \$1,300, if indeed, it did.) This was all symptomatic of Steve's inability to testify to numbers. Although his later testimony seemed to be more

precise, there were too many numbers offered on this point. Accordingly, the Court takes the ‘lowest common denominator’ and finds Steve is entitled to an *Epstein* credit of \$4,000 for the 2006 tax debt arising out of the 2004 tax year.”

Steven contends he should have received an *Epstein* reimbursement of \$1,319.21 for 2005, this figure representing tax due on Ivy’s unreported income that she kept secret from him.

The court’s analysis is not the easiest to follow because it appears to treat Steven’s tax payments for 2004 and 2005 on the same basis. Thus, it seems strange that an *Epstein* credit was made for 2004 but not for 2005. However, on closer inspection, a reason for this differentiation does emerge.

Although the court starts off by stating that “At trial” Steven “only testified about the 2004 tax year,” it is clear that he did bring up the 2005 tax year in his testimony. But the clear majority of that testimony was about 2004. The only express reference to 2005 was that Steven testified “the return was filed late because Ivy refused to file jointly until 2006. But he never testified about why that resulted in an underpayment of \$1,300, *if indeed, it did.*” The language we have italicized clearly evinces a degree of skepticism that amounts to disbelief. Now it becomes clear. The court does accept, possibly because there is some oblique corroboration from Ivy, that Steven paid the couple’s taxes in 2004 and that, despite his varying numbers, he was entitled to a credit at the lowest figure—\$4,000—what the court termed “the lowest common denominator.” (The import of this remark, we believe, is that the court accepted the smallest of all the amounts mentioned by Steven.) In short, the court accepted Steven’s testimony concerning “tax debt arising out of the 2004 tax year,” but not for 2005. The bottom line is that court did not believe that Steven carried his burden of substantiating his claim to 2005. Steven has not demonstrated that the court's distinction was erroneous. (Evid. Code, § 412; *Davis v. Judson*, *supra*, 159 Cal. 121, 128; *In re Marriage of Braud*, *supra*, 45 Cal.App.4th 797, 822-823; *La Jolla Casa deManana v. Hopkins*, *supra*, 98 Cal.App.2d 339, 345-346.)

### **The Trial Court Did Not Err In Its Disallowance of *Epstein* Credits For Automobile Payments**

The trial court found: “Steve claimed that he bought a 2001 Dodge Intrepid in 2003 with \$9,000 of separate property assets. (He did not recall the source of the separate property.) Although he took title in his name, Ivy was the one who used the car on a daily basis. He claims that she totaled the car, by not maintaining it. He asserts she should pay him the value of the car. [¶] Ivy testified the car is gone. She drove it until after the parties separated. Eventually it needed \$4,000 worth of repairs. Instead of spending that money, she traded in the car on a 1996 Toyota. She paid \$2,000 for the Toyota. [¶] Cars deteriorate. The Court does not accept Steve’s argument that this was necessarily waste. His claim with respect to the Intrepid is denied.”

The crux of Steven’s attack on this finding is, again, reliance on his unrebutted testimony to establish that the vehicle was his separate property. Again, the trial court was within its province as the trier of fact to take account of Steven’s obvious interest and his failure to produce supporting documentation. Again, the trial court was not required to accept this testimony at its face value as conclusively establish the separate property nature of the purchase. (Evid. Code, § 412; *Davis v. Judson, supra*, 159 Cal. 121, 128; *In re Marriage of Braud, supra*, 45 Cal.App.4th 797, 822-823; *La Jolla Casa deManana v. Hopkins, supra*, 98 Cal.App.2d 339, 345-346.)

With that established, the vehicle became just another one of the innumerable acquisitions in the life of a marriage that are acquired with community property funds and become a community asset. Once the vehicle is so viewed, Ivy had the usual spousal powers of management, control, and disposition. (§ 1100, subd. (a).)

### **The Trial Court Did Not Abuse Its Discretion In Fixing the Amount Of Spousal Support**

This is how the trial court resolved the issue of spousal support:

“The court has considered all of the factors identified in Family Code § 4320. It starts with the marital standard of living (‘MSOL’).

“Ivy testified that they lived a somewhat frugal life. She described it by saying she bought no jewelry or makeup and shopped at a thrift store. She did the housework and the yard work. She spoke of vacations in different parts of her testimony. Sometimes she said there were few vacations other than an occasional camping trip. On another day she testified that they went to Yosemite, Los Angeles and other places. However, they lived in a nice home in Danville, in a neighborhood that is at least middle class. They raised two children, both of whom went on to college with their parents’ financial assistance.

“It appears that the family’s standard of living was inflated somewhat by the use of money from family in China that Steve spent for the benefit of this community. For example, he testified that he took \$30,000 out of an account in Angela’s<sup>8</sup> name and used it to buy a Ford E-150 conversion van. (He used that van, not Angela.) Steve also testified that he used money he received from China to support his family. However, as is common with Steve’s earlier testimony, it was more conceptual than numeric; more impressionistic than precise.

“Late in the proceeding, he testified that his net earnings for the early 1990’s ranged from a low of \$27,000 to something in the \$30,000 range. Yet, he testified, their family expenses were on the order of \$50,000 a year. He said the source of the extra spending was his separate assets, including interest on the investment in his relative’s restaurant (that ultimately failed) and the money that was being sent to him from China.

“The parties income, as reported by Steve’s Social Security Earnings Report was:

| <b>“Year</b> | <b>‘Taxed Social Security Earnings’</b> |
|--------------|---|
| “2001        | 75,076                                  |
| “2002        | 79,880                                  |
| “2003        | 83,540                                  |
| “2004        | 87,900                                  |
| “2005        | 90,000                                  |

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<sup>8</sup> Angela was Steve’s daughter from a prior marriage.

“With that as background, the Court addresses each of the § 4320 factors:

“(a) *Extent to which earning capacity of each is sufficient to maintain marital standard of living (including job market; education or training needed; impact of domestic duties on earning capacity).* Steve could maintain the standard of living for himself alone. But he cannot support two households at the MSOL on his current income.

“Nor is Ivy able to maintain the MSOL by herself. She has not worked full time since about the time Michael was born in February 1986. At the present time, she is earning paltry sums as a teacher of Chinese in three different schools a total of eight hours a week—trying to patch together enough part-time work to add to her support. It is very unlikely that she has the earning capacity to support herself, at least not now.

“One important factor is the extent to which Ivy’s earning capacity was impaired during marriage. The parties implicitly agreed that Steve would be the bread-winner; Ivy would be a stay-at-home Mom and raise the children and help with Steve’s mother who lived with them for some period of time. Steve testified that Ivy was always dependent upon him to earn the money to pay the household’s necessities. In short, Ivy was out of the job market for two decades. She is making efforts to find work now, but it will be a long struggle to find enough work to support herself. The skills she used when she was employed are out of date. She has taken some courses to try to learn Microsoft software such as Word and Excel, but she has had a hard time absorbing the material. Currently she is earning \$1200-\$1300. She should be earning more.

“(b) *Contribution of supported party to other’s education, training and/or licensure.*

There was no evidence of this.

“(c) *Supporting party’s ability to pay, earning capacity, earned and unearned income, assets standard of living.* Steve has an ability to pay spousal support. He is earning to capacity, given a reasonable employment schedule. He has current average monthly income of \$8,789.

“(d) *Needs of each (based on MSOL)*. Ivy testified that her monthly expenses (exclusive of the adult children’s expenses) are approximately \$5,500 per month. But that was while she was still in the Danville home for which she was making mortgage, tax, insurance, homeowner’s association dues and maintenance payments of approximately \$2,365 a month. She never testified to the amount of rent she is paying now. Exhibit 45 gives some indication of her monthly expenses. Excluding rent, they are about \$3,224 per month. If one adds rent of \$2,000 a month, that comes very close to the \$5,500 figure Ivy stated. The Court estimates her needs at \$5,250 a month.

“Steve did not testify about his needs. On Exhibit 8 he lists monthly expenses of \$5,442. However, \$1,200 of that is for ‘student loans.’ Those will be paid down, to a considerable extent, as a result of this decision. Steve testified that if the community portion of the loans is paid with the proceeds of the sale of the house, he will still have to pay \$600 a month on the remaining loans. That is not entirely credible. However, accepting that at face, once this decision is implemented, Steve will have his monthly expenses reduced by \$600. In addition, a considerable portion of his monthly expenses relates to a \$500 per month payment on the SeaWest VISA card. This decision will result in a substantial part of that being paid down, reducing his monthly payment. If he saves \$250 a month on that then monthly expenses will be \$4,592.

“This means the parties’ needs are similar. Steve’s are \$4,592; Ivy’s \$5,250. Given the imprecision in the parties’ testimony and the age of the Income and Expense Declarations that are in evidence, it is probably fair to say they each need about \$5,000 a month plus or minus.

“(e) *Obligations and assets of each*. Ivy has been borrowing money from friends. According to Exhibit 45 she has borrowed at least \$48,570. According to Exhibit 1, she also owed money on a VISA card (\$2,100 in October 2008.) These numbers are matched by her attorney fees. According to her counsel’s declaration (filed December 14, 2009) she still owes \$59,739.83 in fees.

“Her assets are limited, essentially to her share of the proceeds of the house. There is a balance of \$375,309.06 in an attorney trust fund as of November 30, 2009.

That means Ivy will get approximately \$145,565. After repayment of the loans she has taken from friends, she will have slightly more than \$100,000. If she must pay the remaining \$60,000 in attorney fees she will have less than \$40,000 left. In a real sense, this litigation has impoverished her.

“Steve also has some debt. He will have the residual Parents Plus loan to pay off. He will have some reduced debt on the SeaWest VISA account (perhaps \$6,000), and he still owes his attorney \$10,000. However he will have substantially more assets than Ivy. He will get about \$183,863 in house proceeds. After paying his debts, he will likely have in excess of \$150,000. In addition, he will have some unquantified interest in the Oakmark accounts.

“As noted above, the parties have failed to agree on a Qualified Domestic Relations Order. Neither offered any evidence regarding the amount of retirement income that will be available to either party. Thus, the Court is unable to include that in its analysis.

“(f) *Duration of the marriage.* This was a long term marriage, lasting just less than 21 years.

“(g) *Ability of supported party to engage in employment without unduly interfering with interests of children.* At this point, the children are grown. (One is in college.) It would not interfere with their interests if Ivy were to work.

“(h) *Age and health of the parties.* Steve is 62; Ivy is 61. Neither is in good health. Ivy testified that she has pain in both wrists for which surgery has been recommended. She also had eye surgery from which she has partially recovered. She has arthritis in her back and cannot lift much weight without pain; she also has asthma. Steve had a heart attack in 2006 and was out of work for approximately two months. He had another in November 2007 and was in the hospital for three days. Over time he has had a total of eight stents inserted into his arteries. He takes medication for his heart condition.

“(i) *Documented domestic violence and consequences.* Ivy has a domestic violence restraining order against Steve. It was granted after the court heard testimony at

a long-cause hearing. Ivy testified credibly to some prior physical abuse by Steven. But there was far more evidence of verbal and psychological abuse. Steven is an overbearing man. Ivy is timorous; perhaps more so as a result of the abuse she suffered.

“(j) *Immediate and specific tax consequences.* There was no testimony of any unusual tax consequences. The general rule prevails; spousal support is deductible to the payor and includible in the income of the recipient.

“(k) *Balance of hardships to each party.* On balance, Ivy is suffering the greater hardship, although neither party is without difficulty. Ivy has health problems coupled with the difficulty of re-entering the job market after a very long absence. She is not making very much money and has been borrowing from friends and relatives to get by. Steve has had serious heart trouble and has had to relocate from the family home. However he appears hale and remains fully employed at a good job. Moreover, Steve will leave the marriage with significant assets; Ivy will not.

“(l) *Goal that supported party be self-supporting within a reasonable time (generally within one-half the length of the marriage except in lengthy marriage).* This was a long term marriage. Given Ivy’s health and abilities, it is unlikely that she will be self-supporting in the near future, if ever.

“(m) *Criminal conviction.* There was no evidence of this.

“(n) *Other just and reasonable factor.* See below.

“Considering all these factors, the Court concludes that Steve should pay Ivy spousal support of \$2,650 per month effective February 1, 2010. Ivy has reasonable expenses of approximately \$5,000 a month and income of approximately \$1,300 a month. That leaves her short by \$3,700 a month. But Ivy is capable of earning more than she is. She is using her language skills to teach Chinese at various venues. But she is working too few hours a week. It appears that she is not seeking to employ herself as fully as she might. She should, rather easily, be able to increase her income by \$1,000 a month or more, just by teaching more.

“Steve is more than able to pay spousal support, since his income exceeds his expenses. However it is not fair to require Steve to make up more of the shortfall

between Ivy's current income and expenses as Ivy asks. The \$3,000 a month she seeks would leave Steve with only \$5,789. After taxes, he might not have enough to cover his reasonable expenses.

“This will not leave Ivy at the marital standard of living. And, depending on how much of the Oakmark funds are his, it is unlikely to leave Steve at that standard either. But Steve is in the stronger position, and after this long term marriage, he has a real obligation to continue to support his spouse.”

Steven acknowledges that the support order may be overturned only if we conclude the trial court abused its broad discretion over this issue. (*In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454-455; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283.) He states that he “does not contend that the Court’s finding that [Ivy] is entitled to some award of permanent spousal support is an abuse of discretion, only that the Court’s analysis of the parties’ incomes and reasonable expenses and its determination that \$2,650.00 per month was a reasonable amount of permanent spousal support, were abuses of discretion and must therefore be reversed and remanded to the trial court.” However, he does not submit what would be an acceptable figure.<sup>9</sup>

Steven argues the court “miscalculated” Ivy’s current expenses “because the Court failed to subtract the \$19,147.04 associated with maintaining the former marital residence.” This brings us back to Ivy’s Exhibit 45, the spreadsheet of “Ivy’s Expenses.” It does indeed show \$19,147.04 for Ivy’s “mortgage.” But it is undisputed that Ivy was no longer living in the house she had shared with Steven. Instead, as plainly noted by the court, she was now renting. Thus, the figure should not, and was not, taken literally. The court went on to posit a monthly rent of \$2,000. Although Steven did challenge the basis for the \$19,147.04 in his objections to the tentative decision, he did not challenge the court’s estimation of Ivy’s current rent. His attempt to do so now is thus forfeited. (*In re Marriage of Eben-King & King, supra*, 80 Cal.App.4th 92, 117; *In re Marriage of*

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<sup>9</sup> In his objections to the tentative decisions, Steven pegged the “appropriate” amount as \$800 per month.

*Hinman, supra*, 55 Cal.App.4th 998, 1002; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 400, p. 458.)

Steven next attacks the court finding that his current monthly income is \$8,789. In footnote 51 of its statement of decision, the court explained that this figure “was determined by taking the pay stub attached to Exhibit 8 (Steve’s Income and Expense Declaration dated October 9, 2008) and putting the \$73,971 year to date gross pay figure and the September 13 end of pay period date into a Dissomaster’s YTD feature to get an average monthly income.”

Steven argues “the Court failed to take into consideration that [Ivy’s] *net* income available each month” was \$5,059.47. However, Steven concedes that Ivy testified she earned between \$1,200 and \$1,300 per month. That figure was the one accepted by the trial court. That ends the matter. (Evid. Code, § 411; *In re Marriage of Mix, supra*, 14 Cal.3d 604, 614.)

#### **The Trial Court Did Not Abuse Its Discretion In Denying Steven’s Request For Attorney Fees**

Concerning the parties’ requests for attorney fees, the trial court ruled as follows:

“Each party seeks attorney fees. They stipulated to submit the matter by post-trial declaration. The Court has received a declaration from each counsel, filed December 14, 2009.

“According to Steve’s counsel, he has paid more than \$85,000 in attorney fees and owes another \$10,000. That’s a total of \$95,000.

“According to Ivy’s counsel, she has paid \$94,671 and owes another \$59,739.83. That’s a total of \$154,410.83.

“Between them, they have spent a quarter of a million dollars in fees. That’s appalling. They have disputed, principally, the claim to \$327,000 in the Oakmark Funds. The difference between their positions on all other claims does not amount to more than another \$100,000. Thus, they have spent \$250,000 fighting over \$425,000. That is not reasonable.

“Steven blames Ivy. He says he made repeated proposals to mediate the dispute, to settle the matter, and to avoid litigation. He says Ivy’s attorney ran up fees unreasonably. By way of example, he submits a series of stipulations proposed by Steve’s former attorney, to which, it appears, there was little or no response.

“Ivy blames Steven. She says he did not cooperate in discovery, withheld information about the Oakmark and predecessor accounts and was generally stubborn, pigheaded and obstinate. She says that discovery was made much more expensive than necessary.

“There is enough blame to go around on all sides. The Court understands that it is difficult to get a straight story from Steven when it comes to numbers, details, or accounts. His instinct seems to be to respond with agitated bluster rather than simple facts. During the period of the litigation when Ivy invited him to come to the house to get whatever documents he needed, he seems not to have done that. Instead, he preferred to complain that he did not have the documents. In the latter stages of the litigation, he was constantly producing documents at the last minute, like a magician with a hatful of rabbits, all the while complaining that Ivy was hoarding the documents.

“Still, that does not account for the expenditure of \$154,000 in attorney fees. The Court has read carefully the bills submitted by Ivy’s counsel. There is insufficient detail to explain what was being done to justify such enormous fees. In addition, as Steve argues, Ivy’s counsel spent a certain amount of time just spinning wheels. For example, she made a motion to join Peter and Chao Sun, incurred costs to have them ‘served’ in Taiwan, and then never perfected joinder. Thus, on the key issue in the case [i.e., the Oakmark funds], there was far less useful information (and jurisdiction) than there should have been.

“Similarly, for all this spending, the statements from Oakmark and the predecessor financial institutions—which would have disclosed what amounts were deposited and when—were not put in evidence in any comprehensive way. Ivy sought to prove commingling, but introduced none of the most important documents that should bear on the key question in the litigation.

“The Court understands that the ‘out-spouse’ often has the greater burden in acquiring information, resulting in higher attorney fees. But even discounting for that, the Court is unable to conclude that Ivy’s attorney fees were ‘reasonable’; indeed the contrary seems more likely. Were the Court to discount Ivy’s fees to a more reasonable level, it might find that each side incurred ‘reasonable’ attorney fees of approximately \$100,000. However the Court is loathe to find that a combined expenditure of \$200,000 is ‘reasonable’ given the stakes in this case.

“The parties are sharing (almost) equally the equity in their house. From that they will pay just about equal amounts of (quasi-reasonable) attorney fees. Since they are about in parity on that score, the Court finds it unreasonable to award either any fees from the other. Each party’s request for fees is denied.”

With respect to the court’s finding against Ivy on the Oakmark funds issue, Steven characterizes Ivy as pressing a “frivolous claim” that was “summarily denied” by the trial court. The trial court ultimately found against Ivy, but it never employed the word “frivolous,” and it devoted eight pages to the issue in the statement of decision. The only other point on which Steven relies is that Ivy did not respond to his offers to settle. From this Steven thinks we should see an abuse of discretion.<sup>10</sup>

We see it very differently. Like the trial court, we look to the entire picture prior to entry of the judgment. As mentioned at the very beginning of this opinion, most of the issues were contested at Steven’s initiative. Far more than half of the statement of decision is devoted to rejecting issues raised by Steven. For Steven to try to cherry-pick a mere two points that he thinks favor him is, to put it as blandly as possible, hardly reflective of the entire picture.

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<sup>10</sup> It is somewhat puzzling that Steven invokes section 271 in his argument. Section 271 is a sanction statute (§ 271, subd. (a) [“An award of attorney fees and costs pursuant to this section is in the nature of a sanction”]), not the general Family Code attorney fee provisions (see §§ 2030-2034), and was never mentioned by the trial court in the statement of decision.

Even more telling is Steven’s avoidance of what is obviously the smoking gun in the trial court’s reasoning, i.e., that the parties “spent \$250,000 fighting over \$425,000” in assets, which the court found “appalling.” Steven ignores the trial court’s finding that “There is enough blame to go around on all sides,” and the excoriation of his litigation tactics.

“[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] ‘[T]he trial court’s order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]’ [Citation.]” (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) Steven comes nowhere near satisfying this stringent standard.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.