

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

AMY TUCKER,
Respondent,

v.

THEODORE PARFET,
Appellant.

A133499

(Lake County
Super. Ct. No. FL201508)

I. INTRODUCTION

Theodore Parfet (Parfet) and Amy Tucker (Tucker) are the parents of seven-year-old Alex. Parfet appeals an order awarding Tucker attorney fees she incurred opposing Parfet's motions to modify child custody, visitation and child support. Parfet contends the trial court abused its discretion and committed prejudicial procedural error. We reject these contentions and affirm the attorney fees order. We also find that this appeal is frivolous and, therefore, we grant Tucker's motion for sanctions.

II. STATEMENT OF FACTS

A. Background

1. Petition to Establish Parentage

The parties met in 2002, lived together in Novato for a brief period and then moved to Michigan where Parfet purchased a residence near his family. Tucker discovered she was pregnant in July 2004 and Parfet ended the relationship shortly thereafter. Tucker then moved to Lake County where she had a network of friends and could operate her business as a dog breeder.

In February 2005, Tucker instituted this action by filing a petition to establish parentage. Parfet initially denied but ultimately admitted paternity. In May 2006, the court entered a judgment establishing that Parfet and Tucker are Alex's parents and granting them joint legal custody. Tucker was granted sole physical custody and Parfet was granted visitation.

2. *The November 2008 Custody Order*

After the judgment was entered, the parties had ongoing disputes about child custody, visitation and support which culminated in a 2008 trial before the Honorable Robert L. Crone. At the conclusion of the trial, Judge Crone made tentative findings which were subsequently incorporated into an order after hearing that was filed on November 26, 2008 (the November 2008 order).¹ Three of those findings provide the relevant background for this appeal.

First, Judge Crone modified the custody order by adopting a custody evaluator's recommendation to implement a multi-phase plan for joint physical custody. In adopting this plan, the court expressed concern about Parfet's prior efforts to compel Tucker to move Alex to Michigan. However, the court relied on Parfet's trial testimony that he was now committed to maintaining a home in Lake County.

Second, Judge Crone fixed Parfet's child support obligation at \$4,000 per month and ordered that this obligation would be retroactive to 2006. In reaching this decision, the court noted that there was a significant disparity between the income and net worth of these two parents; while Tucker's income was \$696 per month, Parfet was the beneficiary of a trust valued at between \$6,000,000 and \$7,000,000.

Finally, the trial court ordered Parfet to pay Tucker's litigation expenses, rejecting Parfet's claim that the amount of her attorney fee request was unreasonable. The court reasoned that, when the 2008 trial commenced, Parfet's goals were to relocate Alex to Michigan and to pay only guideline support and he "searched the country to put together

¹ Parfet elected to exclude the November 2008 order from the appellate record. Nevertheless, there is no dispute that the November 2008 order formalized the findings that Judge Crone made at the conclusion of the 2008 trial.

the best team” to support his claims. Tucker did not act unreasonably by attempting to “match the expertise level of [Parfet’s] experts.”

3. *The August 2010 Stipulation and Order*

In June 2010, Parfet a filed motion to modify the November 2008 custody order. In a supporting declaration, Parfet stated that he had traveled between his homes in Lake County and Michigan since 2006, but that he now planned to marry and reside in Michigan. He expressed concern that Tucker would use the planned move as an opportunity to thwart his efforts to spend time with Alex. Therefore, Parfet requested that the custody order be modified to permit Alex to live with Parfet in Michigan and to grant Tucker “liberal visitation.”

Tucker opposed Parfet’s motion. She argued, among other things, that Judge Crone’s decision to adopt a 50-50 timeshare custody plan was predicated on Parfet’s representation that he would maintain a home in Lake County because, the court found, it was not in Alex’s best interest to be shuttled back and forth from Michigan to California.

In August 2010, the parties executed a stipulation to modify the terms of the November 2008 order in light of Parfet’s decision to move to Michigan. The stipulation, which was facilitated by a mediator, was adopted by the court in an order filed August 11, 2010 (the August 2010 order). The August 2010 order provided, among other things, that (1) the parties would continue to share joint legal and physical custody; (2) Alex would be in Tucker’s primary care during the school year; (3) Tucker would enroll Alex in school in Lake County; and (4) if Tucker intended to move from Lake County she would give Parfet 60 days written notice of her plan.

B. *The Current Round of Litigation*

1. *Parfet’s Motions*

On December 14, 2010, Parfet filed a motion to modify custody, visitation and child support and for injunctive relief. In a supporting declaration, Parfet stated that he recently discovered Tucker was purchasing a home in Auburn, that Tucker had not given him notice of her plan to move, and that Parfet believed that she was “only moving out of Lake County to keep me from seeing our son and to cause a financial hardship for me.”

Parfet requested that the court restrain Tucker from moving out of Lake County and modify the custody order so that Alex could live with him in Michigan during the school year. Parfet also requested that the court reduce his child support obligation because he suspected that Tucker had been hiding her true income and because his own income had decreased since 2008 when the child support order was made.

After a hearing, the court denied Parfet's request for emergency injunctive relief, assigned a mediator and scheduled a contested hearing before Judge Crone. In the meantime, on January 14, 2011, Parfet filed an affidavit for contempt against Tucker and obtained an order to show cause. Parfet alleged Tucker committed eight distinct violations of the November 2008 and August 2010 custody orders, all stemming from her decision to move Alex out of Lake County.

Tucker opposed all of Parfet's motions arguing, among other things, that she had given Parfet proper notice of her plan to move to another county. Tucker also filed a request for sanctions for filing a frivolous contempt proceeding.

2. *Tucker's Attorney Fees Motion*

On January 19, 2011, Tucker filed a motion for attorney fees and costs. In a supporting declaration, Tucker stated that she agreed to participate in the 2010 mediation only after Parfet promised to pay her attorney fees. Tucker further stated that Parfet had paid some of her fees but there was an outstanding balance which Parfet refused pay and, as a consequence, Tucker's attorney was reluctant to represent her in the new matters. Tucker requested an order requiring Parfet to pay the outstanding balance of \$7,738.22. She also argued that Parfet's motions raised significant and complex legal and factual issues and stated that "I cannot hope to represent myself while [Parfet] is represented by one of the best family law attorneys in Lake County." Therefore, Tucker requested that the court "advance at least \$30,000 toward my attorney's fees and costs" to conduct the trial on Parfet's motions.

On March 15 and 16, 2011, the Honorable David W. Herrick conducted a hearing on Tucker's attorney fees motion. After the parties presented evidence, the court ordered Parfet to pay Tucker (1) the unpaid balance of Tucker's attorney fees in the amount of

\$7,700; and (2) an advance of \$30,000 for Tucker's future attorney fees and costs, without prejudice for future consideration of the payment of additional fees that may be incurred.

At the hearing before Judge Herrick, the parties stipulated that the contempt citation would be continued and resolved with Parfet's other motions because (1) they were all predicated on the same allegations regarding Tucker's conduct and motivations and (2) the parties wanted these matters to be resolved by Judge Crone who was already familiar with the background of this case.

3. *The 2011 Trial*

On June 21 and 22, 2011, Judge Crone conducted a consolidated trial on the contempt citation and Parfet's motions to modify child support, custody and visitation. By that time, Tucker had supplemented her motion for attorney fees with a separate request for sanctions for filing a frivolous contempt proceeding. (See Fam. Code, § 271.)

The contempt matter was heard first. At the conclusion of Parfet's case, the trial court granted Tucker's motion to dismiss five of the eight allegations of contempt for lack of proof. After all of the evidence was presented, the court discharged the order to show cause, finding that Parfet failed to prove that Tucker violated any provision of the custody orders.

During the second phase of the trial, the court admitted all of the evidence that had been submitted during the contempt phase pursuant to a stipulation between the parties. Parfet began to provide additional trial testimony but, after a private conference with counsel, withdrew his pending motions. Then, when Tucker's trial counsel, Lawrence Buchanan, raised the subject of Tucker's attorney fees, Parfet's counsel, Judy Conard, made this representation: "And we have discussed that. [¶] If Mr. Buchanan would submit to me, at his earliest convenience, whatever he believes the billing should be up to this point, I'll submit it to my client. If there's a dispute, we can put it on a Monday Law and Motion." Buchanan concurred in this plan and, after consulting with his client, agreed to withdraw Tucker's request for sanctions.

C. *This Attorney Fees Dispute*

1. *Background*

On July 15, 2011, attorney Buchanan filed a declaration for attorney fees and costs in which he stated that Parfet failed to respond to inquiries regarding the payment of his fees. He requested that the court enter an order requiring Parfet to pay attorney fees and costs in the sum of \$79,115, expert witness fees in the amount of \$4,200, and deposition expenses in the amount of \$681.05.

Buchanan attached copies of his itemized billing statements as an exhibit to his declaration. In his declaration, Buchanan also included a table in which he broke down his billed hours into 14 different categories. One category, which is relevant to an issue on appeal, was for “Court appearances (including Contempt of Court trial),” for which Buchanan stated that he billed a total of 21.15 hours.

Parfet opposed the attorney fees motion on one ground—that he could not be compelled to pay fees relating to the defense of a contempt citation. Parfet reasoned that, since a contempt citee has a due process right to legal representation, the county was responsible for paying Tucker’s fees if she could not afford an attorney. Parfet also filed a declaration of his attorney, Judy Conard, who opined that Buchanan’s fees were unreasonable because his billing practices were confusing, he performed unnecessary tasks, and he pursued unsound theories. Conard also complained that the “charging of interest under these circumstances is unconscionable.”

On July 19, 2011, Judge Crone heard the attorney fees motion. At the hearing, the court stated that Buchanan had made a prima facie showing of entitlement to fees and, at least twice, the court asked Parfet’s counsel to support her contention that the amount of the fee request was unreasonable. Ultimately, attorney Conard requested additional time to make that showing, which the court granted. The matter was continued until August 5, 2011.

On August 1, 2011, Parfet filed an “Argument” in opposition to the request for attorney fees. Parfet made objections to the following seven components of the attorney fees request: (1) the expert’s fees; (2) time billed for responding to a request for

production of documents; (3) all fees and costs associated with the contempt citation; (4) time billed for conducting and reviewing a deposition; (5) time billed on “Special Master issues”; (6) time spent on the motion to modify support; and (7) time spent reviewing case files.

Parfet also attached a “chart” to his written Argument which he used to show what he believed would be “reasonable time necessary for a Family Law Specialist” to respond to motions to modify child support, custody and visitation. In that chart, Parfet addressed each category of work that Buchanan had listed in his declaration. For example, for work that Buchanan categorized as “Court appearances,” Parfet subtracted time spent on the contempt proceeding, which he estimated to be nine hours, and limited the time he included in this category to “only actual time in court,” which he estimated to be three hours.

On August 5, 2011, Tucker filed a “Response” to Parfet’s Argument. Tucker specifically addressed Parfet’s seven objections to the attorney fees request, providing factual and legal support for each challenged fee item. Tucker also requested that the trial court consider awarding fees as a sanction pursuant to Family Code, section 271.

At the continued hearing on August 5, Parfet’s counsel highlighted some of Parfet’s objections to the fee request but she did not make any reference to the “chart” that was attached to the her written “Argument.” For example, Conard argued that Buchanan acted unreasonably by spending so much time investigating the extent of Parfet’s financial resources. Parfet’s counsel also argued that Tucker had withdrawn her request for sanctions at the end of trial and that there was no basis for an award of sanctions in any event.

At the conclusion of the continued hearing, the trial court took the matter under submission and advised the parties that it would review all the evidence before making a final decision. Specifically, Judge Crone stated: “And I’m going to take it under submission and go through this in detail. And then I’ll issue a written ruling.”

2. *Judge Crone's Orders*

On September 1, 2011, the court filed a “Ruling on [Tucker’s] Request for Attorney’s Fees” pursuant to which it awarded Tucker the fees requested in Buchanan’s July 15, 2011, declaration “minus any interest included in those billings.” In its order, the court adopted the legal authority and reasons set forth in Tucker’s written “Response” to Parfet’s written “Argument,” with the express caveat that it was not relying on Family Code section 271. In this regard, the court stated that the “fee award is not made upon the basis of sanctions but upon the Court’s finding that the amount of hours billed, at the rate billed, was reasonable under the circumstances of this case.”

In reaching its decision, the court acknowledged that significant time and money had been spent, but it concluded that Tucker’s expenditures were reasonable under the circumstances in light of Parfet’s financial resources and demonstrated willingness to use those resources to fund litigation against Tucker. The court explained: “[Parfet’s] apparent wealth is both a blessing and a curse. He has the ability to finance his side of the litigation at any monetary level for preparation or presentation. [Tucker], who has very limited financial resources, has to prepare fully to be able to meet a full and vigorous presentation by [Parfet] on his request to modify custody and his request to lower child support.”

In its order, the court also stated that its “ruling does not stand for the proposition that in contempt proceedings (§ 1218 C.C.P.), that the respondent in such action is entitled to attorney’s fees.” As the court explained, the circumstances of this case were unique because the contempt allegations were inextricably intertwined with Parfet’s other motions. In this regard, the court observed that Parfet’s motions were all based on the same premise, i.e., that Tucker’s move was motivated by a desire to interfere with Parfet’s relationship with his child. The court also noted that the parties had stipulated that all of the evidence from the contempt phase of the trial was also relevant to the custody phase.

On September 29, 2011, the trial court filed a statement of decision and a separate order after hearing. In its statement of decision, the court confirmed that it had reviewed

all of the relevant evidence prior to making its ruling, stating: “This court has reviewed the pleadings filed by both parties on the issue of attorney’s fees and costs, including the itemized billing statements of Mother’s attorney and the court has considered the argument made by both parties on this matter including each parties points and authorities.”

The statement of decision also incorporated the substance of the trial court’s September 1, 2011, order, including the factual and legal bases for its conclusion that Tucker’s attorney fees and costs were reasonable. Finally, the court made this observation: “This court has now determined that Mother’s attorney’s fees and costs were reasonable, however if Father is unwilling to accept this court’s decision, this court will then allow Mother to conduct further proceedings with respect to a further request for attorney’s fees and costs under Family Code § 271, payable as sanctions.”

On October 12, 2011, Parfet filed a notice of appeal from the September 29, 2011, orders.

III. DISCUSSION

A. *Issues Presented and Guiding Principles*

On appeal, Parfet does not dispute that there is a statutory basis for awarding attorney fees to Tucker. (See Fam. Code, §§ 7605, 7640.²) Nor does he attempt to show that the amount of the attorney fees award was unreasonable or unsupported by the evidence. (See, e.g., *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127,

² Family Code section 7605 states, in part: “(a) In any proceeding to establish physical or legal custody of a child or a visitation order under this part, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation to preserve each party’s rights by ordering, if necessary based on the income and needs assessments, one party, except a government 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.”

Family Code section 7640 states: “The court may order reasonable fees of counsel, experts, and the child’s guardian ad litem, and other costs of the action and pretrial proceedings, including blood tests, to be paid by the parties, excluding any governmental entity, in proportions and at times determined by the court.”

1134 [“The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination.”].)

Instead, Parfet argues that the attorney fees order must be reversed because the trial court abused its discretion, both in the way that it evaluated Tucker’s fee request and in the way that it issued the statement of decision. Our review of these claims of error is framed by three settled rules.

First, Parfet bears the burden of showing that the court abused its discretion. (*Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 642.)

Second, a “judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) To overcome this presumption of correctness, Parfet must provide an adequate record which “states what was done by the trial court and demonstrates error.” (Eisenberg, et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2011) ¶ 8:19, and authority cited therein.)

Third, even “ [w]hen the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, at trial. Article VI, section 13 [of the California Constitution] admonishes us that error may lead to reversal only if we are persuaded “upon an examination of the entire cause” that there has been a miscarriage of justice. In other words, we are not to look to the particular ruling complained of in isolation, but rather must consider the full record in deciding whether a judgment should be set aside.’ [Citation.]” (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 336.)

B. Analysis

1. The Trial Court’s Review of the Fee Request

Parfet’s primary claim of error is that Judge Crone abused his discretion by failing to actually review the relevant evidence before he granted the motion for attorney fees.

To support this claim, Parfet relies on *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295 (*Tharp*), a case that he characterizes as “very similar” to the present case.

Tharp, supra, 188 Cal.App.4th 1295, was an appeal from an order denying a motion for attorney fees and sanctions in a marital dissolution action. The *Tharp* court applied an abuse of discretion standard of review but underscored that a proper exercise of discretion requires actual consideration of the appropriate factors for evaluating an attorney fee request. In this regard, the record showed that the trial court “affirmatively” refused and failed to exercise its discretion. Specifically, the trial court repeatedly stated that it had not and would not review the billing statements submitted by appellant’s attorney. (*Id.* at p. 1314.) Furthermore, the trial court failed to conduct a need-based analysis, notwithstanding the evidence establishing that there was a considerable disparity of income and assets between the parties. (*Id.* at pp. 1314-1315.) Under these circumstances, the *Tharp* court reversed the order denying appellant attorney fees, finding that the trial court abused its discretion by “failing to exercise the discretion with which it [was] vested.” (*Id.* at p. 1312.)

Tharp is not even arguably similar to the present case. The *Tharp* trial court denied an attorney fees motion after affirmatively refusing to consider evidence that would have supported an award. Nothing comparable to that happened in this case. Here, the trial court *granted* an attorney fees motion and there is no dispute on appeal that the award is supported by substantial evidence. More to the point, Judge Crone never made any statement which could be construed as a refusal to review Buchanan’s fee request. To the contrary, the record before us confirms that the trial court did review the relevant evidence.

At the first hearing on the attorney fees motion, the trial judge was already very familiar with the relevant evidence. Judge Crone observed that Buchanan’s declaration and backup records constituted a prima facie showing of his entitlement to fees. The court also stated that attorney Conard had failed to support the statement in her declaration that the amount of the fee request was unreasonable. Then, at the conclusion of the continued hearing that was conducted after Parfet was afforded another opportunity

to support his contentions, the court took the matter under submission so that it could go through the relevant evidence in detail before issuing a written decision.

The content of the court's September 1, 2011, order is additional proof of the trial judge's substantial familiarity with the pleadings and evidence. In that order, the court granted a request that Conard made in her declaration to deny Buchanan interest on his unpaid fees. Furthermore, although the court expressly adopted most of the arguments in Tucker's August 5 pleading, it expressly declined to rely on Family Code section 271 because, as Parfet argued at the continued hearing, Tucker withdrew her motion for sanctions. Finally, the court spent significant time addressing Parfet's claim that he was not required to pay fees relating to the contempt citation which was the *only* legal argument that Parfet raised in opposition to the fee request.

Finally, in the statement of decision, the court expressly confirmed that it had reviewed all of the pleadings and evidence and that it had considered all of the arguments advanced by the parties prior to making its discretionary decision to award Tucker her reasonable attorney fees and costs.

On appeal, Parfet insists that *Tharp, supra*, 188 Cal.App.4th 1295 provides a legal basis for his claim of error. According to Parfet, there were "clear and blatant misstatements" in Buchanan's billing records which Judge Crone ignored even though Parfet pointed them out to him. Parfet cites *Tharp* for the proposition that the trial court's alleged disregard of these blatant errors "is proof on its face that the Court did not review Respondent's attorney's billing records and thus the Order must be overturned."

First, Parfet's interpretation of *Tharp* is unsound. Nothing in the reasoning or outcome of that case supports Parfet's notion that he can establish that the trial court failed to review a piece of evidence simply by finding an error in that evidence. Indeed, such a presumption is inconsistent with the settled law. To carry his burden on appeal, Parfet must overcome a presumption of correctness. Neither *Tharp* nor any other authority of which we are aware supports Parfet's self-serving notion that he can carry that burden by assuming that the trial court erred.

Second, Parfet totally ignores the fact that the record below is inconsistent with his contention that the trial court did not review the relevant evidence. “When the record clearly demonstrates what the trial court did, we will not presume it did something different.” (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384, superseded by statute on another ground as stated in *Kearney v. Foley & Lardner* (2008) 553 F.Supp.2d 1178, 1183-1184.)

Third, even if we were inclined to entertain this unsound theory, Parfet fails to provide evidentiary support for his contention that Buchanan’s billing records were “clearly inaccurate” or that he brought the alleged errors to the attention of the trial court. Despite his bold and inflammatory language, Parfet identifies only one allegedly obvious inaccuracy in the billing statements. He contends that Buchanan “billed 21.5 hours for court time” when the “Court records and Appellant’s records clearly show 12 hours.”

The record citations that Parfet provides in connection with this argument, which do not include a single reference to a court record, do not establish that there was an obvious error in Buchanan’s billing statements. “When an appellant’s brief makes no reference to the pages of the record of where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made. [Citations.] We can simply deem the contention to lack foundation and, thus, to be forfeited. [Citations.]” (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.) In any event, our independent review of the record discloses facts which are inconsistent with Parfet’s contention that the trial court affirmatively ignored an obvious billing error for time Buchanan billed for court appearances.

First, Buchanan did not bill 21.5 hours for “court time” as Parfet contends on appeal. In fact, his billing statements did not separate out time spent in court from time spent traveling to and from the courthouse and conducting various other tasks relating to the appearance.³ In his declaration, Buchanan did estimate that he billed 21.15 hours for

³ The record contains evidence that after the 2008 trial, Tucker experienced difficulty locating an attorney in Lake County who was willing to represent her in the subsequent round of litigation that Parfet initiated against her. Ultimately, Tucker

“Court appearances,” but he did not state or in any way suggest that this category of work was limited to time that he spent in the courtroom itself.

Second, as reflected in our factual summary above, Parfet did not oppose this attorney fees motion on the ground that Buchanan miscalculated the time he billed for court appearances, notwithstanding the fact that he was afforded multiple opportunities to formalize his objections. Had he raised this objection on appeal, it seems obvious that Buchanan would have clarified that his billing for court appearances was not limited to time spent actually appearing in a courtroom.

Third, this record supports the conclusion that Parfet has always understood that the statement in Buchanan’s declaration about the amount of time he billed for court appearances was not limited to time spent in the courtroom itself. As reflected in our factual summary above, the chart that Parfet included in his written “Argument” in opposition to the fee request included a proposal to limit Buchanan’s fees for court appearances to time actually spent in the courtroom for non-contempt matters. In our view, this chart is evidence that Parfet clearly understood that Buchanan’s practice was to use the term “Court appearances” to refer to travel time and other tasks relating to a court appearance and not just to time spent in the courtroom. Although Parfet may have disagreed with that approach, he did not object that there was a mathematical miscalculation in the billing records themselves.

Thus, contrary to Parfet’s contentions on appeal, the record does not establish that the trial court ignored “clearly inaccurate” billing statements when it made its ruling in this case. The only other reason that Parfet offers for accusing the trial court of failing to conduct a proper review of the evidence pertains to the proceeding that Judge Herrick conducted prior to the 2011 trial. According to Parfet, Judge Crone ignored Judge Herrick’s pre-trial order which contained a finding that the fees he awarded to Tucker were sufficient to “do the job,” and which established that there was no sound basis for

retained Buchanan, a Santa Rosa attorney, to represent her in the August 2010 mediation after Parfet agreed to pay Tucker’s attorney fees. During the 2010 trial, it took Buchanan one and one-half hours to travel to the courthouse in Lake County.

awarding Tucker additional fees after she withdrew her sanction request at the conclusion of the trial.

This argument misconstrues a very clear record. Tucker requested an *advance* from Judge Herrick. The court granted that request without prejudice should the advance prove to be insufficient. Judge Herrick made that point clear at the hearing on the attorney fees motion and in his minute order which is a part of the appellate record. Indeed, Judge Herrick's ruling was so clear that, at the end of the trial, Parfet's counsel expressly acknowledged that she and her client contemplated there would be a supplemental fee request. Furthermore, it appears that the only reason that Tucker withdrew her request for sanctions was that Parfet's counsel tacitly acknowledged that an additional fee award would be appropriate.

To summarize, Parfet's claim that this trial court failed or refused to review the evidence relevant to the attorney fees motion prior to making its ruling is not supported by any evidence in this record. The record before us shows that Judge Crone was very familiar with every aspect of this case and that he properly exercised his discretion by making the attorney fees award that is the subject of this appeal.

C. *The Statement of Decision*

Parfet's second theory on appeal is that the trial court abused its discretion by committing "procedural irregularities" in connection with the issuance of the statement of decision. Specifically, Parfet contends that the trial court (1) failed to review Parfet's timely objections to Tucker's proposed statement of decision, and (2) denied Parfet the opportunity to file additional objections to a second proposed statement of decision that Tucker submitted to the court.

Parfet fails to identify any evidence in this record which supports his contentions that his objections were timely or that the trial court did not review them. Instead, Parfet asks us to assume that the court did not review his objections in light of the fact that his objections and the statement of decision were both filed on the same day. According to Parfet, "[b]ecause of the timing of these filings, it is apparent the Court abused its discretion" This theory is illogical; nothing prevented the court from reviewing the

objections and then filing a statement of decision that same day. Furthermore, this theory is inconsistent with the presumption of correctness which governs this appeal. (See *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133.)

Parfet intimates that we can infer that the trial court failed to consider his objections from the fact that it did not credit any of those objections. As we have already explained, such an inference is legally unsound. Furthermore, for the record, we reject Parfet's factual premise that, in formulating his objections, he "was very specific" in identifying errors in Tucker's proposed statement of decision. Parfet's objections were very general and very argumentative.

Parfet also contends that the trial court denied him the opportunity to file objections to a second version of the proposed statement of decision. According to Parfet, Tucker submitted a second proposed statement of decision during a time that she knew Parfet's counsel was unavailable to respond to it. Parfet further contends that this second proposed statement of decision became the court's statement of decision. We summarily reject this argument because Parfet has failed to carry his burden of providing an adequate record to support it. The appellate record does not contain any version of a proposed statement of decision or any information about when Tucker served her proposal(s). Nor is there any evidence that the trial court adopted a second version of Tucker's proposed statement of decision.

Even if we could be persuaded that there was some procedural error relating to the issuance of the statement of decision, it would not be a ground for reversal because Parfet has failed to establish that he suffered any prejudice. (See *In re Marriage of McLaughlin*, *supra*, 82 Cal.App.4th at p. 336.) In his appellate brief, Parfet asserts that he "has been absolutely prejudiced by [Tucker's] late serving of its Statement of Decision and by the Court's failure to consider Appellant's pointed out inconsistencies between the Statement of Decision and what the evidence actually showed." However, he fails to support this assertion with *any* substantive analysis whatsoever. Instead he bases his claim of prejudice on the assumption that his objections were not only valid but would have altered the outcome of this proceeding. We reject this erroneous assumption.

D. *Sanctions*

As noted in our introduction, Tucker has filed a motion for sanctions against Parfet alleging, among other things, that this appeal is frivolous and dilatory. (See Code Civ. Proc., § 907 [“When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.”]; Cal. Rules of Court, rule 8.276(a)(1) [“On motion of a party or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs under rule 8.278, on a party or an attorney for: [¶] (1) Taking a frivolous appeal or appealing solely to cause delay”].)

1. *Background*

Tucker’s sanction motion is supported by a declaration from attorney Buchanan, who continues to represent her on appeal. Buchanan attests to the following facts: After this appeal was filed, Tucker initiated a proceeding in the trial court to recover her attorney fees for this appeal and for another round of litigation now pending in the lower court. Parfet was ordered to pay Tucker \$10,000 so that she could defend this appeal. Parfet made that \$10,000 payment, although it was not timely made. During a mediation, Parfet took the position that he would not agree to settle the attorney fees matter unless Tucker agreed to increase Parfet’s timeshare with their son.

On July 31, 2012, this court notified the parties we would consider imposing sanctions on Parfet for filing a frivolous appeal and we invited Parfet to address the question. Attorney Conard, who continues to represent Parfet on appeal, filed a three paragraph letter brief opposing the motion for sanctions.

Parfet’s cursory opposition is two-pronged. First, he takes the position that Tucker has failed to establish that this appeal is totally without merit or that he has an improper motive. Second, Parfet contends that the part of Buchanan’s declaration which recounts settlement discussions is incompetent hearsay because his assertions are not supported by evidence of an actual written settlement offer. According to attorney Conard, the “actual settlement offer” that Parfet made to Tucker does not contain any discussion of a new timeshare agreement.

2. *Analysis*

“An appeal is frivolous and warrants the imposition of sanctions ‘when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]’ [Citations.]” (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 337; see also, *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*); *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 31.)

This appeal is frivolous under both of these standards. Every argument that Parfet made on appeal is based on a questionable if not patently erroneous interpretation of the record. Furthermore, Parfet relied on obviously inapposite case law and employed legal presumptions which are inconsistent with settled principles of appellate review. Finally, Parfet cast aspersions on the trial judge without any factual justification. Under these circumstances, any reasonable attorney would agree that this appeal is totally without substantive merit and therefore frivolous. (See *Flaherty, supra*, 31 Cal.3d at p. 650.)

The “complete lack of merit of the appeal supports the inference that the only motive for this appeal was delay.” (*Town of Woodside v. Gava* (1989) 213 Cal.App.3d 488, 494.)⁴ Beyond that, there is additional evidence of Parfet’s dilatory motive. Parfet has never disputed the family court’s authority to require him to pay a reasonable amount of Tucker’s attorney’s fees in light of the significant financial disparity between these parties. (See Fam. Code, § 7604.) Nevertheless, every round of litigation that he has initiated has been delayed and exacerbated by his resistance to paying Tucker’s fees. This time around, there is evidence that Parfet and his counsel made representations

⁴ “ ‘While each of the above standards provides *independent* authority for a sanctions award, in practice the two standards usually are used together “with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.” [Citations.]’ [Citation.]” (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶¶ 11:102 to 11:104, pp. 11-36.1 to 11-36.2 (rev. # 1, 2009).)

about Parfet’s willingness to pay reasonable fees which were inconsistent with their actual litigation strategy, i.e., to resist paying any fees for as long as possible.

“When deciding the amount of sanctions to impose, courts may consider ‘the amount of respondent’s attorney fees on appeal; the amount of the judgment against appellant; the degree of objective frivolousness and delay; and the need for discouragement of like conduct in the future’ [Citation.]” (*Keitel v. Heubel, supra*, 103 Cal.App.4th at p. 342.)

In the present case, the degree of objective frivolousness and delay is extremely high. Furthermore, there is evidence that the delay not only benefited Parfet but also unfairly prejudiced both Tucker and her attorney. Indeed, pursuing a meritless appeal of an attorney fee award under the circumstances of this case flies in the face of the very purpose of the Family Code attorney fees statutes. Unfortunately, the record before us contains strong evidence that delay tactics such as this are part of a larger and ongoing litigation strategy. Thus, the amount of sanctions must be sufficient to discourage like conduct in the future.

Clearly, awarding Tucker her appellate attorney fees is not a sufficient sanction for filing this frivolous appeal. Tucker has already initiated proceedings in the trial court to recover her attorney fees on appeal and has obtained a partial payment of those fees. Thus, although we find that Tucker’s appellate fees are also recoverable as a sanction, we will defer to the trial court to calculate and award appellate fees when this case is remanded.⁵

Tucker has requested that we order Parfet to pay her \$25,000, in addition to her attorney fees, as a sanction for filing this frivolous appeal. However, she does not explain how she calculated the amount of this proposed sanction. We will impose a \$15,000 sanction against Parfet which appears to be in line with sanctions imposed by

⁵ For the record, our resolution of this appeal does not preclude the trial court from imposing an additional sanction on Parfet under Family Code section 271, something the court indicated that it might be inclined to do.

other appellate courts “in like situations.” (See *In re Marriage of Gong & Kwong*, *supra*, 163 Cal.App.4th at p. 520.)

Furthermore, we join other courts in recognizing that the respondent is not the only party damaged by a frivolous appeal. “ ‘Others with bona fide disputes, as well as the taxpayers, are prejudiced by the wasteful diversion of an appellate court’s limited resources.’ [Citations.] The handling of this appeal has imposed a burden on this court.” (*In re Marriage of Economou* (1990) 223 Cal.App.3d 97, 107; see also *Huschke v. Slater* (2008) 168 Cal.App.4th 1153, 1161; *Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 449.) “ ‘Accordingly, an appropriate measure of sanctions should . . . compensate the government for its expense in processing, reviewing and deciding a frivolous appeal. [Citation.]’ [Citations.]” (*Pierotti v. Torian*, *supra*, 81 Cal.App.4th at p. 35.)

Currently, sanctions payable to the court for filing a frivolous appeal range from \$6,000 to \$12,500. (See *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 294.) Therefore, in the present case we order an additional sanction payable to the court clerk in the amount of \$6,000. We impose this sanction on Parfet’s trial and appellate counsel, Ms. Conard. An attorney “ ‘has a professional responsibility not to pursue an appeal that is frivolous . . . just because the client instructs him or her to do so. [Citation.]’ Further, it is the attorney’s duty ‘[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just’ [Citations.]” (*Keitel v. Heubel*, *supra*, 103 Cal.App.4th at pp. 342-343.) In the present case, Conard violated these duties by facilitating the presentation of this frivolous appeal and by advancing arguments which exceed the bounds of both common sense and sound advocacy.

IV. DISPOSITION

The September 29, 2011, attorney fee orders are affirmed and this case is remanded so that the trial court can award appellate attorney fees to Tucker.

Parfet shall pay \$15,000 to Tucker in addition to her appellate attorney fees as a sanction for filing this frivolous appeal. Attorney Conard shall pay \$6,000 to the clerk of this court as a sanction for facilitating the prosecution of this frivolous appeal. The clerk

of the court is directed to deposit the payment directly into the general fund. Attorney Conard and the clerk of this court are each ordered to forward a copy of this opinion to the State Bar upon return of the remittitur. (Bus. & Prof. Code, §§ 6086.7, subd. (a), 6068, subd. (o)(3); *Pierotti v. Torian*, *supra*, 81 Cal.App.4th at pp. 37-38.)

All sanctions shall be paid no later than 15 days after the date the remittitur is filed.

Tucker is awarded costs on appeal.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.