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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of W.T. and MARIA L.
GURNEE

W.T. GURNEE,

Appellant,

v.

MARIA L. GURNEE,

Respondent.

D059672

(Super. Ct. No. D389414)

APPEAL from an order of the Superior Court of San Diego County, Robert C. Longstreth, Judge. Reversed and remanded.

W.T. Gurnee (Husband) appeals an order awarding attorney fees to his former wife, Maria L. Gurnee (Wife) to enable her to respond to his appeal of a prior order enforcing the judgment of dissolution that incorporated their marital settlement agreement (MSA). On appeal, Husband contends: (1) the trial court erred by awarding

Wife need-based attorney fees pursuant to Family Code¹ sections 2030 and 2032, rather than awarding attorney fees to the prevailing party pursuant to the MSA; (2) the trial court erred by concluding it was bound by the "law of the case" to follow another judge's prior award to Wife of need-based attorney fees pursuant to sections 2030 and 2032; and (3) he should be awarded attorney fees as the prevailing party under the MSA or, in the alternative, the matter should be remanded to the trial court for a determination of the prevailing party.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and Wife married in 1972 and separated in 1994. As of August 15, 1995, they entered into the MSA, which presumably was subsequently incorporated into the November 1995 marital dissolution judgment.² Section 50 of the MSA stated in pertinent part:

"N. Enforcement of Terms of Agreement - Fees and Costs

"Should it be necessary for either party to bring an action in this or any other court for the enforcement of any of the provisions of this Agreement, the prevailing party shall be entitled to an award from the other party of their reasonable attorneys' fees and costs incurred in the action, irrespective of either party's need or ability to pay at the time of such hearing, and irrespective of any fee provision of the Family Code of the State of California."

¹ All statutory references are to the Family Code unless otherwise specified.

² Although the record on appeal contains a copy of the MSA, it does not include a copy of the judgment of dissolution. However, because the parties do not dispute that the judgment was entered and incorporated the MSA, we assume the MSA was incorporated into that judgment.

In August 2008, Wife filed an order to show cause (OSC) requesting enforcement of the judgment and MSA. She requested reinstatement of her share of Husband's military retirement benefits, including the survivor benefit plan (SBP), payment of all retirement benefit arrears, section 271 sanctions, and attorney fees and costs.³ Husband opposed the OSC.

On January 19, 2010, after an October 2009 hearing on the OSC, the trial court (San Diego County Superior Court Judge Jeffrey S. Bostwick) issued its findings and order (2010 Order) granting much of the relief Wife sought. The court ordered Husband to pay Wife principal of \$23,790.33 in retirement pay arrears and interest of \$9,300.01. It also ordered Husband to cooperate in obtaining a \$100,000 life insurance policy with Wife as the sole beneficiary (in lieu of Wife's share of the SBP pursuant to the judgment), but requiring her to pay the policy premiums. Although the court denied her request for sanctions, it awarded her \$12,000 in attorney fees. In February 2010, Husband filed a notice of appeal, challenging the 2010 Order.

On August 11, 2010, Wife filed the instant motion for an award of need-based attorney fees pursuant to sections 2030 and 2032 to enable her to retain and employ appellate counsel to respond to Husband's appeal of the 2010 Order. Husband opposed the motion, arguing the parties expressly agreed in the MSA that reasonable attorney fees would be awarded to the prevailing party in an action to enforce the MSA and,

³ For more information regarding the facts and issues involved in the OSC proceeding, refer to our opinion in *In re Marriage of Gurnee* (Sept. 1, 2011, D056861) [nonpub. opn.] (*Gurnee I*).

accordingly, Wife had waived any right to obtain need-based attorney fees under sections 2030 and 2032. On March 2, 2011, the trial court (San Diego County Superior Court Judge Robert C. Longstreth) issued its findings and order (2011 Order) awarding Wife \$25,000 for statutory, need-based attorney fees to pay for her representation in Husband's appeal of the 2010 Order. Husband timely filed a notice of appeal challenging the 2011 Order.

DISCUSSION

I

Interpretation and Effect of the MSA's Attorney Fee Provision

Husband contends in this appeal that the trial court erred in its 2011 Order by awarding Wife need-based attorney fees under sections 2030 and 2032 because she waived her right to statutory fees when she agreed to the MSA's provision for awards of attorney fees to the prevailing party. In response, Wife argues that although she agreed to that attorney fee provision in the MSA, it had the effect of only supplementing, and not replacing, her statutory right to need-based fees and therefore the court did not err in its 2011 Order by awarding her attorney fees under sections 2030 and 2032.

A

In general, parties to a dissolution proceeding, or a proceeding to enforce or otherwise relating to a dissolution judgment, have certain statutory rights to need-based attorney fee awards. Section 2030 requires an award of pendente lite attorney fees to a party in a dissolution proceeding, or any proceeding subsequent to entry of a dissolution judgment, if the court finds there is a disparity in access to funds to retain counsel and

one party has the ability to pay for legal representation of both parties and the award is reasonably necessary to pay the other party's attorney fees for maintaining or defending the proceeding. (§ 2030, subds. (a)(1), (a)(2).) Section 2032 provides that a section 2030 fee award must be just and reasonable under the circumstances, considering the need for the award to enable each party to have sufficient financial resources to present his or her case adequately. (§ 2032, subds. (a), (b).)

However, parties to a dissolution proceeding or to an action relating to a dissolution judgment may *waive* (e.g., pursuant to a marital settlement agreement) their rights to need-based attorney fee awards under sections 2030 and 2032 (to the extent those fees are not related to child custody or support matters). (See, e.g., *In re Marriage of Guilardi* (2011) 200 Cal.App.4th 770, 774-775; *Fox v. Fox* (1954) 42 Cal.2d 49, 53 [express waiver]; *Lesh v. Lesh* (1970) 8 Cal.App.3d 883, 892 [express waiver]; *Gottlieb v. Gottlieb* (1957) 155 Cal.App.2d 715, 720 [express waiver]; *Taliaferro v. Taliaferro* (1962) 200 Cal.App.2d 190, 198 [implied waiver]; *Grolla v. Grolla* (1957) 151 Cal.App.2d 253, 260 [implied waiver]; 11 Witkin, Summary of Cal. Law (10th ed. 2005) Husband and Wife, § 187, p. 257 [if a marital settlement agreement expressly waives claims for attorney fees, the court cannot award fees]; cf. *In re Marriage of Joseph* (1990) 217 Cal.App.3d 1277, 1284-1285 [parties cannot waive statutory authorization of awards of attorney fees relating to child custody or support].) The determination whether parties have waived their statutory rights to awards of attorney fees incurred in postdissolution proceedings generally depends on their expressed intent in any marital settlement or other agreement. We apply general rules of contract interpretation in

determining whether parties have waived their rights to awards of attorney fees under sections 2030 and 2032. (See generally *In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439 ["Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretation of contracts generally."].)

"As a question of law, the interpretation of a [contract] is reviewed de novo under well-settled rules of contract interpretation. [Citation.] 'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation. [Citation.]" ' " (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.) Contract language is ambiguous when it is susceptible to two or more reasonable constructions. (*Ibid.*)

B

In awarding Wife need-based attorney fees to oppose Husband's appeal of the 2010 Order, the trial court did *not* decide the issue of whether the parties waived their statutory rights to need-based attorney fee awards and agreed in the MSA that only the prevailing party would be entitled to an award of reasonable attorney fees and costs. Rather, as discussed below, the court concluded it was bound by the "law of the case" and

followed the prior trial judge's award of need-based statutory attorney fees to Wife in the 2010 Order. Nevertheless, the trial court commented that if it "was deciding this [issue] in the first instance, [it] would deny the attorney fees award," apparently based on its interpretation of the MSA's attorney fee provision.

Because we conclude below the trial court erred in relying on the "law of the case" doctrine in awarding Wife need-based attorney fees on appeal, there is an initial question of law whether Husband and Wife in the MSA waived their statutory rights to awards of need-based attorney fees and instead agreed to awards of attorney fees only to the prevailing party and, if so, the identity of the prevailing party. Section 50(N) of the MSA provides:

"Should it be necessary for either party to bring an action in this or any other court for the enforcement of any of the provisions of this Agreement, the *prevailing party shall be entitled to an award from the other party of their reasonable attorneys' fees and costs incurred in the action, irrespective of either party's need or ability to pay at the time of such hearing, and irrespective of any fee provision of the Family Code of the State of California.*" (Italics added.)⁴

In this case there has been no final determination whether there has been a waiver of need-based statutory attorney fees or, if so, the identity of the prevailing party and we are therefore unable to determine whether the 2011 Order is correct. We know only that the trial court granted the Wife's request for pendente lite statutory attorney fees in the 2011 Order because it felt bound by the prior trial court's award of statutory attorney fees

⁴ The parties apparently do not dispute, and could not reasonably dispute, that the proceedings leading to the 2010 Order and Husband's appeal of that Order are proceedings to enforce the MSA.

in the 2010 Order. Although Husband appealed the 2010 Order, including the need-based statutory attorney fee award to Wife, we held in *Gurnee I* that Husband waived his appeal of the attorney fee award by not first raising the issue in the trial court. The attorney fee award in the 2010 Order is therefore final. There has not, however, to date been a final determination in this case of whether the prevailing party provision in the MSA prevails over the statutory attorney fee provisions, or, if it does, whether Wife or Husband, if either, is the prevailing party. We therefore address whether the trial court's 2011 Order must follow the 2010 Order under law of the case principles.

II

Law of the Case

Husband contends the trial court erred by concluding in its 2011 Order it was bound by the "law of the case" to follow the prior judge's 2010 Order awarding Wife statutory need-based attorney fees.

A

In *Gurnee I*, we discussed the trial court's reasoning for awarding Wife \$12,000 in attorney fees incurred below in the OSC proceeding to enforce the MSA. (*Gurnee I*, *supra*, D056861, at pp. 24-25.) In awarding Wife attorney fees in the OSC proceeding, the trial court stated:

"[Section] 2030 fees. The court finds that [Husband's] income gross is in excess of [\$]6,000 a month. [Wife's] income hovers around [\$]1400 a month. His income is four to five times more than hers. Since there's no support order . . . in place, there's no equalization of these incomes. His income just outstrips her income by three times, almost four times, I guess.

"Her expenses, [\$]19,000 in round numbers, in attorney fees in this matter. The court has taken into consideration the complexity of the litigation. The court made findings about their incomes. Any other relevant findings as to fees under [section] 4320; in other words, sort of an overlapping analysis, . . . his [expenses] are [\$]9300 a month. Her expenses are significantly less, [\$]1850 a month. I said [\$]1400. Really it's \$500 in salary and [\$]1100 in public assistance. That's [\$]1600 in round numbers for her in materials of income. [\$]12,000 in fees [are awarded]." (*Gurnee I, supra*, D056861, at p. 24.)

As we noted in *Gurnee I*, Husband did *not* object to the award based the court's use of the wrong standards in determining whether to award Wife attorney fees and, if so, in what amount. (*Gurnee I*, at p. 25.) Husband did not argue in the OSC proceeding below that attorney fees should be awarded pursuant to the MSA's prevailing party provision rather than the statutory, need-based attorney fee provision. (*Ibid.*) In awarding Wife attorney fees, the court stated in the 2010 Order:

"6. On the issue of attorneys' fees, the Court finds that [Husband's] income exceeds that of [Wife] and that there is no existing support order to equalize the income of the parties. The Court also considers the complexity of the litigation, the amount of fees incurred by [Wife], and the income and expenses of both parties. The Court orders [Husband] to contribute to [Wife's] fees in the amount of \$12,000, which shall be paid by [Husband] to [Wife] within 60 days. . . ." (*Gurnee I, supra*, D056861, at p. 25.)

In *Gurnee I*, we concluded Husband waived or forfeited any contention that the trial court erred by awarding Wife \$12,000 in attorney fees for the OSC proceeding because he did not raise his MSA "prevailing party" theory or argument below. (*Id.* at p. 26.)

Before we issued our opinion in *Gurnee I*, Wife filed the instant motion for an award of need-based attorney fees pursuant to sections 2030 and 2032 to enable her to retain and employ appellate counsel to respond to Husband's appeal of the 2010 Order.

Husband opposed the motion, arguing the parties expressly agreed in the MSA that reasonable attorney fees would be awarded to the prevailing party in an action to enforce the MSA and, accordingly, Wife had waived any right to obtain need-based attorney fees under sections 2030 and 2032. At the hearing on Wife's motion, the trial court stated it had reviewed the prior trial judge's decision awarding Wife attorney fees in the 2010 Order and concluded it was bound by the "law of the case" to also award Wife attorney fees on appeal pursuant to sections 2030 and 2032, rather than pursuant to the MSA's prevailing party attorney fee provision. The court stated: "I think I'm going to go with my initial reaction, which [is] it [i.e., the issue of the MSA's prevailing party attorney fee provision] had to be at least implicitly in front of [Judge Bostwick] if he's going to award fees. And therefore, because I think there is value, inconsistent results across judicial officers when there has been a ruling, I think if there's going to be a later ruling either by the same judicial officer or [a] different one that is consistent with that, we have show . . . [a] change in law or change in facts or clearly erroneous and so forth, I can't find that either of those standards have been met. [¶] So then I figure I will do the same thing that Judge Bostwick [did]." Accordingly, the trial court followed the prior trial judge's decision and awarded Wife section 2030 attorney fees on appeal of \$25,000.

B

Husband asserts the trial court erred by applying the doctrine of the "law of the case" and concluding it must award Wife attorney fees on appeal under section 2030 based on the prior trial judge's decision awarding Wife section 2030 attorney fees in the OSC proceeding. To the extent the trial court so relied on the "law of the case" doctrine

in awarding Wife attorney fees on appeal in the 2011 Order, we agree with Husband that the court erred.

"Under the law-of-the-case doctrine, the determination *by an appellate court* of an issue of law is conclusive in subsequent proceedings in the same case. [Citation.] The doctrine applies only if the issue was actually presented to and determined *by the appellate court*. [Citation.] The doctrine is one of procedure that prevents parties from seeking reconsideration of an issue already decided absent some significant change in circumstances." (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273 (*Yokely*), italics added.) Furthermore, "the law-of-the-case doctrine governs only the *principles of law* laid down by an appellate court, as applicable to a retrial of fact" (*People v. Boyer* (2006) 38 Cal.4th 412, 442.) "[T]he doctrine applies only to *an appellate court's decision on a question of law*; it does not apply to questions of fact." (*People v. Barragan* (2004) 32 Cal.4th 236, 246, italics added.) In this case, the trial court apparently felt compelled to follow the reasoning of a prior *trial judge's* ruling on a prior request by Wife for attorney fees in the OSC proceeding. However, to the extent the trial court cited the doctrine of the "law of the case" as support for its ruling on Wife's motion for attorney fees on appeal, it erred. That doctrine applies only to rulings by appellate courts and not trial courts. (*Yokely*, at p. 1273; *Boyer*, at p. 442; *Barragan*, at p. 246.) Therefore, to the extent the prior trial judge ruled on a question of law in awarding Wife attorney fees

incurred in the OSC proceeding, the doctrine of the law of the case does not apply to bind any subsequent trial or appellate court on that question of law.⁵

Although Wife concedes the doctrine of the law of the case did not apply in this case, she nevertheless argues Husband "invited" the trial court's error in applying that doctrine by his representation to the court that the issue of the MSA's prevailing party attorney fee provision had been expressly presented to, and considered and rejected by, the prior trial judge when it awarded Wife attorney fees incurred in the OSC proceeding.⁶ "The 'doctrine of invited error' is an 'application of the estoppel principle.': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citation.] . . . [T]he doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting

⁵ Wife does not cite, and we are unaware of, any other doctrine or principle of law requiring the trial court to follow the prior trial judge's decision awarding Wife section 2030 attorney fees incurred in the OSC proceeding. (Cf. *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1361 [recognizing "general principle that one trial court judge may not reconsider and overrule a ruling by another trial court judge, unless the first judge is unavailable"]; *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876-877 [same].) We note that in this case the trial court did *not* reconsider the ruling of the prior trial judge awarding Wife section 2030 attorney fees of \$12,000 incurred in the OSC proceeding, but rather followed that prior judge's reasoning in applying section 2030 to award Wife \$25,000 in attorney fees on appeal pursuant to section 2030 rather than the MSA's prevailing party attorney fee provision.

⁶ Wife cites Husband's reply to the trial court's question whether the MSA's attorney fee provision had been presented to the first trial judge. Husband represented to the court that "[t]he argument was made." Husband further stated: "What [the first trial judge] did was he said that [section] 2030 applies, your Honor, as opposed to the provisions of the [MSA]." However, the trial court stated that its review of the record did not show the first trial judge ruled on that issue (i.e., the applicability of the MSA's prevailing party attorney fee provision).

therefrom in the appellate court. [Citations.] . . . [T]he doctrine has not been extended to situations wherein a party may be deemed to have induced the commission of error, but did not in fact mislead the trial court in any way—as where a party "'endeavor[s] to make the best of a bad situation for which [it] was not responsible.'" (Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 403.) "[T]he invited error doctrine requires affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party." (Huffman v. Interstate Brands Corp. (2004) 121 Cal.App.4th 679, 706.)

Wife does not persuade us that the doctrine of invited error applies in the circumstances of this case to bar Husband from challenging the trial court's award to Wife of need-based attorney fees on appeal pursuant to section 2030. Although the record supports an inference Husband represented to the trial court that he had raised the issue of the MSA's prevailing party attorney fee provision in opposing Wife's prior request for section 2030 attorney fees in the OSC proceeding, Husband did *not*, in so doing, affirmatively seek to have the trial court follow, pursuant to the law of the case or otherwise, the reasoning of the prior trial judge in awarding Wife those OSC attorney fees. On the contrary, Husband argued the trial court should not award Wife attorney fees pursuant to section 2030, but rather should deny her fee request pursuant to the MSA's prevailing party attorney fee provision. Husband's affirmative representation to the trial court did not demonstrate that he made "a deliberate tactical choice" to mislead the trial court such that it would apply the doctrine of the law of the case. (Huffman v. Interstate Brands Corp., *supra*, 121 Cal.App.4th at p. 706.) Accordingly, the doctrine of

invited error does not apply to bar Husband from challenging the trial court's erroneous application of the doctrine of the law of the case. (*Ibid.*; *Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 403.)

Wife also argues that *had* Husband's representation to the trial court been true, then his argument now would be barred by collateral estoppel. Alternatively stated, she argues that if Husband had expressly raised the issue of the MSA's prevailing party attorney fee provision in opposing Wife's request for attorney fees in the OSC proceeding, then the first trial judge's ruling on that issue would preclude Husband from raising or challenging that ruling. Wife's argument is not persuasive. First, as we concluded in *Gurnee I*, Husband did *not* argue in the OSC proceeding below that attorney fees should be awarded pursuant to the MSA's prevailing party provision rather than the statutory, need-based attorney fee provision. (*Gurnee I*, *supra*, D056861, at p. 25.) Therefore, that issue was *not* actually litigated in the OSC proceeding. An issue must have been actually litigated in a prior proceeding for collateral estoppel to apply. (*Yokely*, *supra*, 183 Cal.App.4th at p. 1273.) Second, the issue was *not* necessarily decided in the prior proceeding. (*Ibid.*) Finally, the first trial judge's decision awarding Wife section 2030 attorney fees of \$12,000 incurred in the OSC proceeding was *not*, contrary to Wife's assertion on appeal, "final" at the time the trial court in this case ruled on Wife's instant motion for an award of attorney fees on appeal. Collateral estoppel cannot apply unless the prior decision is final. (*Ibid.*) Husband appealed the first trial judge's decision in the 2010 Order, including its award to Wife of section 2030 attorney fees incurred in the OSC proceeding. On March 2, 2011, the trial court in the instant

matter issued the 2011 Order awarding Wife \$25,000 for attorney fees on appeal. On September 1, 2011, we issued our opinion in *Gurnee I* affirming the 2010 Order, which included the first trial judge's attorney fee award. Therefore, the first trial judge's ruling was not "final" until after our opinion in *Gurnee I*. Because the first trial judge's ruling lacked at least three of the requirements for application of collateral estoppel, Husband is not precluded from challenging the trial court's application of the doctrine of the law of the case and/or award to Wife of attorney fees on appeal pursuant to section 2030 rather than pursuant to the MSA's attorney fee provision. (*Yokely*, at p. 1273.)

III

Remand

Husband contends that, assuming the MSA prevailing party provision applies, we should award him attorney fees because he clearly was the prevailing party in the OSC proceeding below or, in the alternative, remand the matter to the trial court for a determination of the prevailing party. Wife disagrees and asserts we should affirm the 2011 Order because she clearly was the prevailing party in the OSC proceedings. Based on the record on appeal, we cannot conclude, as a matter of law, that either party clearly was the prevailing party entitled to attorney fees pursuant to Section 50(N) of the MSA.

In an action on a contract, Civil Code section 1717 permits an award of attorney fees to the prevailing party. Civil Code section 1717, subdivision (b)(1), provides that "the party prevailing on the contract shall be the party who recovered *a greater relief in the action on the contract.*" (Italics added.) "When a party obtains a 'simple, unqualified win' ' by completely prevailing on, or defeating, the contract claims in the

action and the contract contains a provision for attorney fees, the successful party is entitled to attorney fees as a matter of right, eliminating the trial court's discretion to deny fees under [Civil Code] section 1717." (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533, 1538.) However, "[i]f neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) When determining the prevailing party under Civil Code section 1717, a trial court must "compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) "A trial court has wide discretion in determining which party is the prevailing party under [Civil Code] section 1717, and we will not disturb the trial court's determination absent 'a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence.'" (*Silver Creek*, at p. 1539.)

Based on our review of the record in this case, as well as our opinion in *Gurnee I*, we conclude neither Husband nor Wife obtained a simple, unqualified win, or a complete victory on all the contract claims, in the OSC proceeding. (*Silver Creek, LLC v. BlackRock Realty Advisors, Inc.*, *supra*, 173 Cal.App.4th at p. 1538; *Scott Co. v. Blount, Inc.*, *supra*, 20 Cal.4th at p. 1109.) Although Wife appears to have obtained much of the relief she sought in her OSC, she did not obtain all the relief she sought. Therefore, the

determination of which party was the "prevailing party" in the OSC proceeding under Civil Code section 1717 and the MSA's attorney fee provision must be made by the trial court in the first instance in the exercise of its wide discretion. (*Silver Creek*, at p. 1538; *Scott Co.*, at p. 1109.)

Because we have determined the trial court erred in issuing its 2011 Order based on the 2010 Order as the law of the case, there has been no final determination in this case whether an award of attorney fees is appropriate under the need-based statutory authority of section 2030 or under the MSA prevailing party attorney fee provision. This is an issue that should be resolved in the first instance by the trial court. We therefore remand this case to the trial court to resolve that issue. In addition, in the event the trial court determines the MSA prevailing party provision is applicable to the 2011 Order, the trial court must then determine whether Husband or Wife, if either, is the prevailing party. We remand the matter to the trial court to make those determinations.

DISPOSITION

The 2011 Order is reversed and the matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.