

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of EDWARD
VERDUZCO and KIMBERLEE
WERNER.

EDWARD VERDUZCO,

Appellant,

v.

KIMBERLEE WERNER,

Respondent.

D064532

(Super. Ct. No. D491181)

APPEAL from an order of the Superior Court of San Diego County, Edlene C.

McKenzie, Commissioner. Affirmed with directions.

Law Office of Patrick McCrary and Patrick L. McCrary for Appellant.

Stephen Temko for Respondent.

I.

INTRODUCTION

In this marital dissolution action between Edward Verduzco and Kimberlee Werner,¹ Edward, a retired City of San Diego (the City) police officer, appeals from a postjudgment order enforcing certain provisions of the dissolution judgment. The court found that Edward committed various acts that violated the terms of the judgment and constituted breaches of fiduciary duties that he owed to Kimberlee. The court further found that Edward acted with fraud and malice. Edward contends that (1) there was insufficient evidence to support the court's finding that he knew that a portion of the funds in his Deferred Retirement Option Plan (DROP) account was community property when he directed the San Diego City Employees' Retirement System (SDCERS) to pay all of the funds in the account to him; (2) the court erred in ordering him to purchase a life insurance policy for Kimberlee's benefit as a remedy for his failure to elect a survivor benefit option before he retired; (3) the court erred in ordering him to pay Kimberlee the total amount of the life insurance premiums that he would have paid over the 62-month period that he failed to maintain a life insurance policy for her benefit, as the judgment required; (4) the court erred in awarding the entire community interest in his SDCERS

¹ As is customary in family law cases, we will refer to the parties by their first names for convenience and clarity, intending no disrespect.

retirement benefits to Kimberlee based on his breach of fiduciary duty; and (5) the court's award of attorney fees to Kimberlee was excessive and improper. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Edward and Kimberlee were married in July 1990 and separated in April 2004. They had two children during the marriage—Elliot, born in 1993, and Jack, born in 1995. They entered into a written stipulation for judgment and the stipulated dissolution judgment was entered in December 2007.

The judgment included a "Security for Child Support" provision, which required that as long as Edward had a child support obligation, he would "provide \$125,000 per child of life insurance through his CNA policy, naming [Kimberlee] as beneficiary." The judgment also included the parties' agreement to continue funding the children's Uniform Gift to Minors Act (UGMA) accounts. The judgment provided that Kimberlee would fund Elliot's account and Edward would fund Jack's account.

The judgment included the parties' agreement that the community had an interest in Edward's 401(k) account "accrued by him through his employment with the San Diego Police Department," and that Edward had a separate property interest in the account based on contributions he made to the account prior to the marriage. The parties agreed to obtain a history of the 401(k) account "and determine what portion or dollar amount should be awarded to [Edward] as his sole and separate property, what portion or dollar

amount should be confirmed to the community, and what dollar amount should be credited to [Kimberlee] as her one-half share of the community property."

The parties also agreed that the community had an interest in an individual retirement account (IRA) in Edward's name, referred to as the "Primerica IRA." They agreed that although the Primerica IRA was primarily community property, Edward had "a separate property interest in this asset accrued by him after separation." The judgment provided that after Kimberlee's interest in Edward's 401(k) account was "quantified, the parties [would] divide the Primerica IRA in such a way as to compensate [Kimberlee] for her share of the community interest in the 401(k)." The entire 401(k) would be awarded to Edward subject to "equalization" of the Primerica IRA. The court retained jurisdiction over both accounts until the equalization was accomplished.

The judgment also included the parties' agreement "that the community has an interest in the [SDCERS] accrued by [Edward] through his employment." The parties agreed to jointly retain Kristine Pogalies to prepare a qualified domestic relations order (QDRO) "and any joinders required." Pogalies's fees were to be paid from the net sale proceeds of the family residence.

Kimberlee filed an order to show cause (OSC) in May 2012 asking the court to order Edward to comply with the stipulated judgment, "make any assets he has depleted whole again, and find that Edward breached his fiduciary duties." Kimberlee further requested that Edward be ordered to reinstate his life insurance policy and prepare the QDRO, and that the court appoint Kimberlee as custodian of Jack's UGMA and award

the life insurance policy that she was required to maintain for Jack's benefit under the judgment to her as her separate property. Kimberlee also requested an award of reasonable attorney fees and costs.

In her declaration in support of her OSC, Kimberlee stated that she and Edward agreed to delay preparation of the QDRO referenced in the judgment until Edward retired from the police department. According to Kimberlee, Edward "voluntarily retired" in 2009 but continued to work for the police department through their DROP program until February 2012. When Edward was asked to explain the DROP program at trial, he testified that "to [his] knowledge," it was a contract with the City to "enter the retirement side of the system" while continuing to work. His earnings from work went into a DROP account and the pay he received during the contract period was, in his words, "money that was accrued through my retirement from day one through my 23 years of . . . service credit." Thus, while Edward was in the DROP program, he was living off his retirement benefits while his regular pay went into his DROP account. Edward admitted that he did not share any of the community retirement benefits with Kimberlee while he was in the DROP program.

After Edward quit the DROP program in February 2012, Kimberlee reminded him that they needed to make an appointment with Pogalies to arrange preparation of the QDRO, as the judgment required. Edward said that he wanted find someone else to prepare the QDRO whose fees would be lower than Pogalies's fees. Kimberlee agreed but insisted that she and Edward meet with that person jointly. For several weeks

Kimberlee repeatedly asked Edward when they would meet with someone about preparation of the QDRO, and Edward made excuses for why he had not yet contacted anyone. Kimberlee suspected that Edward did not want to have the QDRO prepared, but she was puzzled because she thought that the QDRO would have to be completed before Edward could begin collecting his retirement benefits.

When Edward made his second support payment to Kimberlee after quitting the DROP program, Kimberlee asked him how he was supporting himself. Edward told her that he had just received his second retirement check from the City. Kimberlee "told him that he was not supposed to do that, that his retirement and other accounts were community property to be divided by the QDRO." Edward asserted that he should not have to continue to pay Kimberlee spousal support after he retired because he would not have enough money left after paying her both support and her share of his retirement benefits. He said that he intended to petition the court to stop Kimberlee's spousal support and "[t]hen we'll have the QDRO done."

Over the next few days, Kimberlee investigated whether Edward had violated other provisions of the judgment. She discovered that he had failed to maintain the \$250,000 life insurance policy (\$125,000 per child) naming Kimberlee as the beneficiary. Edward told Kimberlee that the policy naming her as a beneficiary was still in effect, but a representative of Reassure America Life Insurance Company (Reassure), formerly known as CNA, informed her that Edward had allowed the policy to lapse for nonpayment of premiums.

Edward filed a declaration in response to Kimberlee's OSC, and a request for an order (RFO) modifying his support obligations. In his declaration he asserted that he had not breached any fiduciary duty and that "[a]ll funds are accounted for." He denied that he had canceled the life insurance policy in question. He stated that the policy had been paid through a payroll deduction for several years and he was "not accustomed to writing a check for the policy or making an electronic transfer to pay it." He averred that SDCERS discontinued the policy payments when he retired and he did not know that the policy had lapsed until Kimberlee notified him. He then obtained a new policy in the amount of \$250,000 with Primerica.

Regarding the DROP account, Edward acknowledged that on June 30, 2012, he "received the DROP fund in one lump sum of \$264,000 reduced by the taxes of \$59,000 for a net of \$205,000"² He stated that the community interest in the DROP account had not been determined, and that he had set aside \$100,000 in an interest-bearing account until the court determined Kimberlee's share, which Edward expected to be substantially less than \$100,000.³ He asserted that SDCERS had not directly sent Kimberlee's portion of the DROP account to her because she "failed to file the required joinder with SDCERS in order to have the funds sent directly to her."

² Edward's application to receive the entire DROP account in a single lump-sum cash payment is dated February 24, 2012.

³ The parties entered into a written stipulation in August 2012 that Edward would "immediately place \$100,000 [into his attorney's] client trust account"

Regarding Jack's UGMA account, Edward stated that after his income was reduced due to an on-the-job injury, he "incurred bills and still had to continue paying spousal support and child support to Kimberlee." Rather than seek a reduction in support from the court, he elected to borrow from the UGMA account. However, he maintained that he had since repaid the loan, plus interest, and that he had arranged an automatic payment to the account to keep it current.

Edward stated that he opened his 410(k) account six years before the marriage and that the account was about two-thirds community property and one-third his separate property. Regarding the Primerica IRA, Edward stated that he borrowed about \$7,900 from that account in December 2009 and another \$20,000 in June 2010 to pay bills.⁴ When he borrowed the money he believed that if he were unable to repay it by the time he retired and he and Kimberlee were ready to have a QDRO prepared, they could simply balance what he owed with his separate property funds in the 410(k) account.

Edward filed a motion in October 2012 to quash a subpoena that Kimberlee served on California Coast Credit Union (CCCU) demanding production of Edward's banking records going back to January 2008, and to modify a subpoena that Kimberlee served on SDCERS demanding documents concerning retirement and 401(k) benefits and distributions that Edward had received. In November 2012, Kimberlee filed a supplemental reply declaration regarding discovery she had obtained from CCCU,

⁴ The evidence admitted at trial established that the amount that Edward withdrew from the Primerica IRA in June 2010 was \$7,724.72, leaving a balance of \$473.63 in the account.

Reassure, and Primerica. She reported that in April 2008, when Edward stopped contributing to his IRA and Jack's UGMA account and let his Reassure policy lapse, he began withdrawing large sums of cash from ATM machines in casinos. In the following months, he withdrew nearly all of the funds from his IRA and Jack's UGMA account and those withdrawals "were followed immediately by trips to the casino."

The court held a hearing on November 29, 2012 regarding Kimberlee's OSC and Edward's RFO. The court ordered Edward to provide Kimberlee a proposed QDRO prepared by a firm called QDRO Helper that Edward unilaterally retained. If the parties could not reach an agreement regarding that draft QDRO by December 17, 2012, they were to contact Pogalies "to have the QDRO reviewed or redrafted as necessary." The court ordered the parties to split Pogalies's fee for preparing a QDRO. The court continued the hearing on Kimberlee's OSC and Edward's RFO to March 22, 2013. The court denied Edward's motion to quash on December 12, 2012. On December 18, Kimberlee notified Edward that she did not agree to the draft QDRO and asked him to cooperate in retaining Pogalies to prepare a QDRO.

Kimberlee filed an RFO in February 2013 asking the court to appoint an elisor to sign Pogalies's retainer agreement on behalf of Edward because Edward refused to retain Pogalies to prepare a QDRO. Kimberlee also requested sanctions against Edward under

Family Code⁵ sections 271, 2030, 2031, and 2032 for his failure to comply with the judgment and the November 29, 2012 order.

Trial was held on Kimberlee's OSC on March 22, April 19, and June 12, 2013. The court made it clear that the trial was solely on Kimberlee's breach of fiduciary duty claim. The court filed its Findings and Order After Hearing on July 24, 2013.

The court found that Edward knew that approximately 60 percent of the DROP lump sum payment he received was community property and "that those DROP monies should have been addressed in the parties' QDRO." The court found that Edward breached the fiduciary duty he owed to Kimberlee under sections 721⁶ and 1100⁷ by

⁵ All statutory references are to the Family Code unless otherwise specified.

⁶ Section 721, subdivision (b), provides that in transactions between themselves, spouses "are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners"

⁷ Section 1100, subdivision (e), provides: "Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request."

intentionally taking the entire DROP account and refusing to share those funds with Kimberlee, and that Edward's "actions were malicious as defined by Civil Code section 3294, in that he [acted] with a conscious disregard of [Kimberlee's] rights."⁸ The court further found that Edward's "actions constituted a fraud within the meaning of Civil Code section 3294, in that he concealed material facts with the intention of depriving his ex-wife of her property and legal rights."⁹ The court added that Edward's "actions prevented [Kimberlee] from rolling those monies into a tax-deferred account, thereby depriving her of the ability to thoughtfully manage her affairs. Therefore, [Edward] shall be solely responsible for any tax liabilities he has already paid." Based on its findings of malice and fraud, the court awarded Kimberlee 100 percent of the community interest in the DROP funds, which the court expected to be approximately 60 percent of the total amount of those funds, or \$158,403. The court ordered that the \$100,000 that the parties had agreed to put in Edward's counsel's trust account be released to Kimberlee "in partial satisfaction of the orders herein."

⁸ Civil Code section 3294 defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id.*, subd. (c)(1).)

⁹ Civil Code section 3294 defines "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact know to the defendant with the intention . . . of depriving a person of property or legal rights or otherwise causing injury." (*Id.*, subd. (c)(3).)

Regarding Edward's SDCERS retirement benefits already paid to him, the court found that before Edward retired, Kimberlee made repeated requests that his monthly SDCERS checks be divided pursuant to the term of the judgment, but Edward "refused to cooperate with the preparation of the QDRO, signed forms requesting 100% of the monthly benefits, and has still failed to pay any of the monthly benefits to his former wife." The court found that Edward's "refusal to respond to [Kimberlee's] repeated written requests about his monthly SDCERS benefits and [his] actions in failing to ensure that [Kimberlee] was paid her community property SDCERS benefits violated his fiduciary duties and constituted fraud and malice" The court awarded Kimberlee 100 percent of the community portion of the SDCERS retirement benefits that had already been paid, and 100 percent of the "ongoing monthly community SDCERS benefits." The court awarded Edward 100 percent of his separate property interest in the "ongoing monthly SDCERS benefits."

The court noted that Edward "admitted to unilaterally removing" \$20,000 from the Primerica IRA and to later "removing an additional \$7,242" without notice to Kimberlee. The court further noted that Edward admitted "that he spent these community monies, in part, at local casinos." The court found that Edward "was required to disclose all material facts and information to [Kimberlee,]" and that "[h]e failed to do so." The court found that Edward's actions regarding the Primerica IRA were malicious and constituted a fraud. Consequently, the court awarded 100 percent "of the monies [Edward] wrongfully withdrew from the IRA to [Kimberlee], in the amount of \$27,242.72." The court ordered

that the balance of the IRA be divided equally between the parties, with Edward being solely responsible for any tax liabilities "incurred as a result of [his] wrongful taking"

The court found that Reassure sent Edward a letter in April 2008 "explaining that he had failed to pay [his premiums] and that his life insurance would be cancelled. The following month [Edward] received another letter explaining that his insurance had in fact been cancelled for lack of payment." The court found that "[Edward] willfully failed to . . . maintain the life insurance policy he was ordered to maintain. His actions caused [Kimberlee] to unwittingly become the insurer for [Edward's] life and provide the security for her own spousal support and their son's support. If [Edward] had died, [Kimberlee] would have been without the insurance benefits, without support and without retirement benefits [Edward] was required to provide." The court found that Edward's monthly life insurance premiums were \$87.22 and that Edward had failed to provide Kimberlee the benefit of his life insurance for 62 months. Accordingly, the court ordered Edward to pay Kimberlee \$5,407.64 (62 x \$87.22) "for his failure to maintain life insurance."

Regarding Edward's 410(k) account, the court noted Edward's testimony that the account was opened during the marriage and was community property, and that he had not withdrawn any money from the account after the date of separation. The court further noted: "[Kimberlee] testified at trial that she does not know whether [Edward] did or did not withdraw monies from that account after [the] date of separation, since [Edward] has

not produced a history of that account and only produced a statement from the community [401(k)] account after trial had begun."¹⁰ The court found that a statement from the 401(k) that Edward produced was insufficient to determine whether he had withdrawn any money from the account. Accordingly, the court ordered Edward to provide a history of the account "from the date of separation up to July 31, 2010 forthwith." The court reserved jurisdiction over distribution of the 401(k) account.

The court noted Edward's testimony that he failed to elect the survivor benefit plan option when he took his SDCERS benefits. The court further noted that Edward's expert, Madeline Hill, the owner of QDRO Helper, testified that it was now impossible to make that election. The court "anticipated that the community interest in the SDCERS monthly benefits awarded to [Kimberlee] will be approximately \$3,600 per month, with the exact amount to be determined." The court took judicial notice of the Social Security Administration's actuarial tables "showing that [Kimberlee] is anticipated to live another 27.73 years or 332.76 months. That is a total of approximately \$1,197,936 in combined benefits payable to [Kimberlee]." The court ordered: "Therefore, [Edward] shall purchase a life insurance policy in that amount for the period of the next 27.73 years. The life insurance benefit should decrease by approximately \$43,000 per year." The court reserved "jurisdiction to modify the amount of the insurance necessary to secure

¹⁰ Kimberlee testified that she requested information from Edward about the 401(k), and that the first time she obtained any information about the account was at trial. Her counsel in closing argument stated that *he* did not know whether there had been any withdrawals from the 401(k) account after the date of separation because the middle of trial was the "first time we saw a 410(k) statement."

[Kimberlee's] interest in the SDCERS pension and the decreasing life insurance obligation[,] depending on the exact amount of monthly benefits ultimately awarded to [Kimberlee]."11

Addressing attorney fees and costs, the court found generally that Edward had violated the terms of the judgment and that he "withdrew thousands of dollars from community accounts, took the entire lump sum retirement benefits, and refused to provide material facts and information about community assets in violation of . . . sections 721, and 1100." The court reiterated that Edward's "actions constituted malice and fraud within the meaning of Civil Code section 3294." The court summarized the various specific findings that it made throughout its order and concluded that Kimberlee "had no choice but to seek intervention from the court and request to be made whole." The court found that "these proceedings would have been completely unnecessary if [Edward] had simply complied with the terms of the Judgment of Dissolution of Marriage." The court awarded Kimberlee attorney fees and costs in the total amount of \$42,105.06, including \$29,458.16 for her OSC asking the court to order Edward to comply with the judgment; \$1,461.10 for a motion to compel discovery;

11 The court made Kimberlee the custodian of Jack's UGMA account and ordered Edward to "cooperate by signing whatever documents are necessary to accomplish that transfer" Edward does not challenge this ruling on appeal.

\$1,674.50 for an RFO to appoint an elisor; and \$4,864.40 to respond to Edward's motion to quash subpoenas.¹²

III.

DISCUSSION

A. *Sufficiency of the Evidence to Support the Court's Findings Regarding the DROP Account*

Edward contends that there was insufficient evidence to support the court's finding that when he took for himself the entire DROP account in a lump sum payment, he knew that approximately 60 percent of the account was community property and that the DROP funds should have been addressed in the parties' QDRO.

"We review factual findings of the family court for substantial evidence, examining the evidence in the light most favorable to the prevailing party. [Citation.] In reviewing evidence on appeal, all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences must be indulged in order to uphold the trial court's finding. [Citation.] In that regard, it is well established that the trial court weighs the evidence and determines issues of credibility and these determinations and assessments are binding and conclusive on the appellate court." (*In re Marriage of Hill and Dittmer* (2011) 202 Cal.App.4th 1046, 1051-1052.)

We conclude that substantial evidence supports the court's finding that Edward knew that a portion of the DROP account was community property when he received the

¹² The amounts listed in the court's breakdown of its attorney fee award add up to \$37,458.16, not \$42,105.06.

entire account in a lump sum payment. On direct examination at trial by Kimberlee's counsel under Evidence Code section 776, Edward testified that he did not believe that there was any community property interest in the lump sum payment he received from the DROP program. However, he later testified that when he first met with a DROP representative, the representative told him that Kimberlee was entitled to a portion of the DROP funds. Edward admitted that when he filled out forms requesting the DROP account, he elected to receive the entire account and did not request a calculation to determine Kimberlee's share. He further admitted that when Kimberlee asked him about the DROP funds in an e-mail, he did not know what to tell her because he had not received them yet. He testified that he later signed a form requesting that the entire account be paid to him and never responded to Kimberlee's query about how she was going to get her share of the DROP funds. Counsel then asked Edward, "So if everything you told me is true just now, how did you think Kimberlee was going to get the DROP funds if you took them all?" Edward responded, "I don't know."

On cross-examination, Edward's counsel asked him if he thought there would be a community property interest in the DROP account when he entered the DROP program. Edward answered "Yes." He then testified that a counselor at SDCERS had calculated the community property interest in the account and that Kimberlee's interest "came out to 29 percent and some points."¹³ He further testified that when he received the money

¹³ It is not clear from Edward's testimony whether the interest that "came out to 29 percent" was the entire community property interest in the DROP account or Kimberlee's

from the DROP account, he did not believe that it was his sole and separate property. He stated that he set aside a portion of the money because "if there was 29 percent, I wanted to have that portion available." He later reiterated that when he asked for distribution of the DROP funds, he believed them to be community property. Based on Edward's own testimony, the court could reasonably find that Edward knew that a portion of the DROP account was community property when he elected to take the entire account for himself.

Edward argues that Kimberlee was not damaged by his taking the entire DROP account because he set aside \$100,000 in a trust account to protect Kimberlee's interest in the account. However, the court expressly stated in the portion of its order addressing the DROP account that "*[a]fter [Kimberlee] discovered the multiple breaches of [Edward's] fiduciary duties, the parties' attorneys agreed to put \$100,000 in trust.*" (Italics added.)

Edward applied to receive the entire DROP account in February 2012 in advance of his DROP retirement date of March 3, 2012. Edward did not put \$100,000 into his attorney's client trust account until August 2012, *after* Kimberlee filed her OSC. Thus, the court could reasonably find that Edward's election to take the entire DROP account for himself

one-half share of the community property interest. The court's finding that Edward knew that approximately 60 percent of the DROP lump sum payment he received was community property reflects that the court construed Edward's reference to "29 percent" to be a reference to Kimberlee's share. In any event, the court did not make a finding on the community property percentage of the DROP account in the appealed order. The court simply awarded 100 percent of the community interest in the account to Kimberlee and noted that the community interest was "*expected to be approximately 60 [percent,] . . . with the exact amount to be suggested by the attorney ordered to prepare the QDRO.*" (Italics added.) The court reserved jurisdiction to determine the exact amount of the community interest in the DROP account.

was a breach of fiduciary duty and constituted malice and fraud because he did not intend to share any of the account with Kimberlee *at the time he made the election*, and that he acted to protect Kimberlee's share of the account only after she obtained counsel and filed her OSC.

Kimberlee's testimony at trial sufficiently supports the court's finding that Edward's taking the entire DROP account for himself prevented Kimberlee from rolling her share of the account into a tax-deferred account, "thereby depriving her of the ability to thoughtfully manage her affairs." Kimberlee testified that her intention was to take her share of the DROP account and roll it over into a tax-deferred account. She testified that in anticipation of receiving the DROP funds, she had spoken with a financial planner who recommended "a couple of different funds" to her, and that she "didn't want to pay . . . the withholding consequences of cashing [her share of the DROP account]."

Section 1101, subdivision (a) provides: "A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate." Section 1101, subdivision (h) provides: "Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100

percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty."

The trial court reasonably found that Edward caused the community property portion of the DROP account to be transferred to him, intending to keep the entire amount for himself, in breach of his fiduciary duty to Kimberlee, and that his actions constituted fraud and malice within the meaning of Civil Code section 3294. The court found that Edward's breach of fiduciary duty impaired Kimberlee's interest in the community property portion of the DROP account because it prevented her from rolling her share of the account into a tax-deferred account. Based on those findings, the court acted within its statutory authority in awarding Kimberlee 100 percent of community interest in the DROP account.

B. Insurance Policy to Replace Kimberlee's Survivor Benefits

Edward contends that the trial court erred in ordering him to purchase a life insurance policy as a remedy for his failure to elect a survivor benefit option under his retirement plan. Edward argues that there is no order in the judgment that required him to elect a survivor benefit option and further maintains that he had no notice that Kimberlee would raise this issue at trial.

Kimberlee's counsel questioned Edward about the survivor benefit election at trial. Counsel had Edward read into the record the following language from the "Survivor Benefits" section of the SDCERS Community Property Handbook: "If the member or former spouse dissolves their marriage before the member retires, the member may still

provide a survivor benefit to the former spouse by selecting one of the four retirement options which are described in the member handbook." Edward testified that he did not elect to provide Kimberlee a survivor benefit and did not discuss with her whether she wanted to opt for a survivor benefit.

Kimberlee's counsel then had Edward read the following sentence from the SDCERS Community Property Handbook: "The parties are strongly encouraged to address the issue of survivor benefits in their domestic relations order." After Edward had read these provisions, counsel asked Edward, "But you didn't obtain a domestic relations order before you made the election to cut Kim out of her survivor benefit, did you?" Edward answered, "There was no way to calculate and prepare a domestic relations order at the time I was given this choice." Madeline Hill later testified that "a lot of issues became irrevocable upon [Edward's] retirement; . . . survivor benefits, once they're elected at the time of retirement, are irrevocable and cannot be changed. So those are all issues that could have been addressed if [Kimberlee or Edward] had retained someone to draft the DRO prior to [Edward's] retirement, which unfortunately, in this case, didn't happen."

In closing argument, Kimberlee's counsel stated, "[Edward] told us he did not elect a survivor benefit plan with respect to the ongoing retirement benefits that would be available to [Kimberlee] until her death. Madeline Hill told us that now that [Edward] neglected to make that election that we cannot go back in time and unwind that. That survivor benefit plan option is lost. [¶] I don't know exactly how much . . . of the

retirement benefit on a monthly basis from SDCERS the court is going to award to [Kimberlee]. . . . [B]ut when [Edward] dies[,] if he predeceases her, her income from that source stops. The only way I can come up with to make her whole would be to have [Edward] purchase a life insurance policy. . . . He would buy a life insurance policy sufficient to pay [Kimberlee] those monies until she is expected to die."

Edward's counsel also addressed the survivor benefits issue in closing argument, arguing that requiring Edward to obtain a life insurance policy as a remedy for his failure to select a survivor benefit option was "postjudgment. . . . It was not contemplated in the MSA . . . that he had ongoing payments provided to her for his retirement. It was not mentioned in the MSA that he is supposed to provide another life insurance policy, and when he signed the documents he signed them because he was an employee getting retired and there was nothing in his mind that . . . he was trying to screw her out of money or commit some kind of oppression or fraud."

Thus, the parties litigated the issue of whether Kimberlee was entitled to a remedy for Edward's failure to elect a survivor benefit plan, and Edward did not object at trial that he had insufficient notice of the issue. "It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion.'" (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 27, quoting *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.) "This rule applies even when no notice was given at all. [Citations.] Accordingly, a party who appears and contests a motion in the court below cannot object on

appeal . . . that he had no notice of the motion or that the notice was insufficient or defective." (*Tate v. Superior Court, supra*, at p. 930; *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288-1289 [parties waived issue of defective notice of motions for terminating sanctions by opposing the motions without objecting to defective notice].) Because Edward contested Kimberlee's request that he obtain a life insurance policy to remedy his failure to elect a survivor benefit option and did not object that he had insufficient notice of the issue at trial, he has waived his objection to the sufficiency of notice on appeal.

Although there is no order in the stipulated judgment requiring Edward to elect a survivor benefit for Kimberlee, the judgment acknowledged the community's interest in Edward's SDCERS retirement benefits and required that the parties jointly retain Pogalies to prepare a QDRO and any required joinders. Edward's own expert witness, whom Edward retained to prepare a proposed QDRO, testified that Kimberlee would not be entitled to a survivor benefit to protect her interest in the SDCERS retirement benefits unless she and Edward had agreed to it, or it was incorporated into a domestic relation order or otherwise ordered by the court *prior to Edward's retirement*, neither of which occurred in this case. If the parties had jointly retained Pogalies or someone else to prepare a QDRO before Edward began taking his retirement benefits, Kimberlee would have had the opportunity to seek a survivor benefit through an agreement with Edward or a court order. Thus, the court could reasonably determine that the appropriate way to replace the survivor benefit option that Kimberlee lost was to order Edward to purchase a

life insurance policy that would provide Kimberlee with essentially the same benefit that she would have had if he had elected a survivor benefit.

C. *Restitution for Failure to Maintain Life Insurance for Kimberlee's Benefit*

Edward contends that the trial court erred in ordering him to pay Kimberlee \$5,407.64 for his failure to maintain a life insurance policy for Kimberlee's benefit, as the judgment required. Edward first argues that he had no notice or opportunity to be heard on this issue because in Kimberlee's OSC, she requested that Edward be ordered to reinstate his life insurance policy; she did not request monetary compensation for his failure to maintain the policy.

The record shows that Edward was aware at trial that Kimberlee was seeking "damages" for his failure to maintain his life insurance policy for her benefit. Edward's counsel asked Edward, "And do you know that [Kimberlee is] seeking damages because your life insurance policy was canceled?" Edward answered, "Yes." In closing argument, Kimberlee's counsel requested monetary compensation for Edward's failure to maintain his life insurance policy. Counsel asserted that Edward stopped making payments on his policy in April 2008, and that the premium payments were \$87.22 per month. Counsel stated that he was not certain that Edward had obtained a replacement policy in April 2012, but assuming that Edward had done so, counsel argued: "He made her the insurer for those four years or however long it was, so if he would have died she would have been left with no security. The life insurance policy already set the value of that insurance at \$87 and 22 cents a month, so I'm asking that you order that [Edward]

pay [Kimberlee] \$4,186 for her becoming . . . the insurer of his life . . . until he reinstated [the policy]."¹⁴

Edward's counsel asserted in closing argument that Edward had not canceled his life insurance policy. Counsel argued, "He has no knowledge of any canceled life insurance policy that was canceled in 2008. He has always been insured through SDCERS, but SDCERS did make a mistake when signing the documents of his retirement at the beginning of 2012. That error stopped payments for the life insurance policy for approximately one and a half months. When [Edward] learned of it he corrected the SDCERS error immediately by getting another policy, which covers the requirements under the [judgment]."

Thus, Edward opposed Kimberlee's request for monetary compensation for his failure to maintain life insurance by unsuccessfully asking the court to find that he had not intentionally allowed his policy to lapse, and that the period of lapse was only about one and a half months. At no point during the trial did Edward oppose Kimberlee's request for monetary compensation for his failure to maintain life insurance on the ground that he had not received sufficient notice of the request. Consequently, as we discussed above, Edward has waived his objection to the sufficiency of notice on appeal.

¹⁴ As noted, the court awarded Kimberlee \$5,407.64 (62 months x \$87.22) for Edward's failure to maintain life insurance. Kimberlee's counsel requested a lesser amount at trial because at that time he did not know how long Edward had been uninsured. After he requested \$4,186 in closing argument, he explained, "That's presuming [the period Edward was uninsured was] four years. I don't know exactly how long it is."

(*Tate v. Superior Court, supra*, 45 Cal.App.3d at p. 930; *Reedy v. Bussell, supra*, 148 Cal.App.4th at pp. 1288-1289.)

On the merits, Edward cites *Cramer v. Biddison* (1968) 257 Cal.App.2d 720 (*Cramer*) for the proposition that when an obligor spouse violates an order to maintain life insurance, the remedy is to impose a constructive trust against the spouse's estate. *Cramer* is inapposite. *Cramer* involved an action by a former wife against the estate of her deceased former husband to recover proceeds of life insurance policies that the husband was obligated to maintain for his minor children under the terms of a stipulated judgment. The judgment required the husband to " 'maintain insurance on his own life with death benefits of not less than \$15,000.00 for each of the minor children, or a total of \$45,000.000,' " and required the husband to make the wife the primary beneficiary of the policy or policies. (*Id.* at p. 723.) However, in violation of the judgment, the husband made his estate the beneficiary of all of his life insurance policies except one \$12,000 policy, of which the wife was the beneficiary. (*Ibid.*) After the husband died and his estate allegedly collected proceeds from the subject insurance policies in the amount \$58,003.13, the wife filed an action against the executors of the estate to establish a constructive trust in the amount of \$33,000. (*Id.* at pp. 723-724.) The wife appealed an order dismissing her action after the court sustained the executors' demurrers to her second amended complaint. (*Id.* at p. 723.) The Court of Appeal decided that the first cause of action alleging that the executors were constructive trustees of \$33,000 of the insurance proceeds they had received stated a justiciable claim because Civil Code

section 2224¹⁵ authorized imposition of a constructive trust under the alleged facts. (*Cramer, supra*, at pp. 724-726.)

Thus, the issue in *Cramer* was whether the wife could maintain a cause of action for constructive trust against *the beneficiary of the life insurance in question*, which happened to be the deceased husband's estate. *Cramer* does not support a general proposition that when a spouse violates an order to maintain life insurance, the remedy is to impose a constructive trust against the spouse's estate; rather, *Cramer* merely supports the proposition that when a spouse is ordered to maintain insurance for the benefit of the other spouse and the obligor spouse violates that order by changing the beneficiary of the policy to someone other than the obligee spouse, the obligee spouse has a valid cause of action for constructive trust on the proceeds of the insurance policy paid to the named beneficiary upon the insured spouse's death. In the present case, Edward did not violate the judgment by changing the beneficiary of his life insurance policy; he violated the judgment by allowing his policy to lapse. There is no basis for Kimberlee to bring an action for constructive trust under *Cramer* unless and until Edward changes the beneficiary of the life insurance ordered in the judgment to someone other than Kimberlee and dies while the judgment's requirement to maintain the insurance for Kimberlee's benefit is still in effect (i.e., while he still has a child support obligation).

¹⁵ Civil Code section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Under section 290, "[a] judgment or order made or entered pursuant to [the Family Code] may be enforced . . . by any other order as the court in its discretion determines from time to time to be necessary." Section 290 gives the trial court discretion to determine the appropriate remedy for violation of a judgment or order. (*In re Marriage of Trainotti* (1989) 212 Cal.App.3d 1072, 1075.) The court here found that Edward failed to maintain the required life insurance policy for Kimberlee's benefit for 62 months, and that the monthly premium for the lapsed policy was \$87.22. Accordingly, Edward profited in the amount of \$5,407.64 (62 x \$87.22) by allowing the policy to lapse. By ordering Edward to pay Kimberlee that amount as a remedy for Edward's failure to maintain the required insurance, the court essentially required Edward to disgorge the amount by which he was unjustly enriched by his failure to maintain the insurance.

The court's remedy was not an abuse of discretion. The Court of Appeal in *Meister v. Mensinger* (2014) 230 Cal.App.4th 381 explained the remedy of disgorgement for unjust enrichment: "Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. [Citations.] There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. [Citation.] 'Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position.' [Citation.] However, '[m]any instances of "liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed . . . includ[ing] cases

involving the disgorgement of profits . . . wrongfully obtained" [Citation.] "[T]he public policy of this state does not permit one to 'take advantage of his own wrong' " regardless of whether the other party suffers actual damage. [Citation.] Where "a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be `unjust . . . the defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched." ' [Citations.]

"The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. [Citations.] Disgorgement may include a restitutionary element, but it " 'may compel a defendant to surrender all money obtained through an unfair business practice . . . regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.' " [Citation.] Without this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct.' [Citation.]" (*Meister v. Mensinger, supra*, 230 Cal.App.4th at pp. 398-399.)

"Disgorgement of profits is particularly applicable in cases dealing with breach of a fiduciary duty, and is a logical extension of the principle that . . . fiduciaries cannot profit by a breach of their duty. Where a person profits from transactions conducted by him as a fiduciary, the proper measure of damages is full disgorgement of any secret

profit made by the fiduciary regardless of whether the principal suffers any damage." (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 543.)¹⁶ Having effectively found that Edward breached his fiduciary duty to Kimberlee and secretly profited by allowing his court-ordered life insurance policy to lapse for 62 months, the court did not abuse its discretion by ordering Edward to disgorge the amount of his secret profit by paying that amount to Kimberlee.

D. *Award of Entire Community Interest in SDCERS Retirement Benefits to Kimberlee*

Edward contends that the court erred in awarding the entire community interest in his SDCERS retirement benefits to Kimberlee based on his breach of fiduciary duty. He argues that there is insufficient evidence to support the court's finding that he failed to cooperate with Kimberlee in the preparation of a QDRO. He additionally argues that there was no damage or impairment to the community interest in his retirement benefits

¹⁶ Although the appealed order does not include an express finding that Edward's failure to maintain the life insurance policy required by the judgment constituted a breach of fiduciary duty, the court limited the trial upon which the order is based to Kimberlee's breach of fiduciary duty claim, which included Edward's failure to maintain his court-ordered life insurance policy. The court found that Edward willfully failed to maintain his life insurance policy and that his actions caused Kimberlee to "unwittingly . . . provide the security for her own spousal support and their son's support." Later in the order, where the court granted Kimberlee's request to change the beneficiaries of the life insurance policy that *she* was required to maintain under the judgment to her sisters, the court generally found that Edward "repeatedly violated his fiduciary duties to [Kimberlee], perpetrated a fraud within the meaning of Civil Code section 3294 and behaved maliciously within the meaning of Civil Code section 3294 as discussed above." Thus, the court impliedly found that Edward's failure to maintain his life insurance policy was a breach of his fiduciary duty to Kimberlee.

caused by an act alleged to be a breach of fiduciary duty, and the court therefore erred in finding a breach of fiduciary duty.

The court's finding that Edward failed to cooperate in the preparation of a QDRO is supported by substantial evidence. The judgment required the parties to *jointly* retain Pogalies to prepare a QDRO. As noted in the statement of facts, Kimberlee filed a declaration in support of her OSC, in which she stated that after Edward quit the DROP program, she reminded him that they had agreed in the stipulated judgment to retain Pogalies to prepare a QDRO. Edward wanted to find someone else to prepare the QDRO and Kimberlee agreed, but insisted that she and Edward meet with that person jointly. However, Edward did not find someone else to prepare the QDRO and made excuses for his failure to do so. He began drawing his retirement benefits without a QDRO and without informing Kimberlee. When Edward told Kimberlee that he had been receiving monthly retirement checks, Kimberlee was "stunned." She told Edward that his retirement was community property that had to be divided by the QDRO and she insisted that they immediately make an appointment with Pogalies, as they had originally agreed. Edward changed the subject and complained about having to pay Kimberlee spousal support. He said, "I'm looking into petitioning the court to stop your support. Then we'll have the QDRO done." Kimberlee's declaration alone provides substantial evidence to support the court's finding that Edward "failed and refused to timely cooperate with the preparation of a QDRO."

Edward's own testimony at trial further evidenced his failure to cooperate with Kimberlee to obtain a QDRO. Kimberlee's counsel asked Edward, "Is there any reason prior to [your] signing the request requesting the totality of the DROP funds that you didn't jointly hire Ms. Pogalies to prepare a QDRO so that that could occur per the terms of the judgment?" Edward answered, "No." Kimberlee testified that she sent Edward e-mails suggesting that they meet with Pogalies to get the QDRO prepared and suggesting dates and times, but Edward did not respond.

After Edward began drawing his retirement and it was too late to elect a survivor benefit for Kimberlee, he unilaterally retained Hill to prepare a QDRO. The proposed QDRO that Hill prepared, without consulting Kimberlee, provided that Kimberlee's share of the retirement benefits would revert to Edward after Kimberlee's death. Hill testified that the QDRO could have instead provided that Kimberlee's share of the retirement benefits would go to beneficiaries that she named. Kimberlee did not agree with the proposed QDRO that Hill drafted and communicated her disagreement to Edward through counsel. At trial, Kimberlee testified that she wanted to participate in the preparation of the QDRO. She wanted to ask the preparer questions and see the relevant documents. Her attorney sent a number of letters to Edward's attorney "explaining that we just wanted cooperation with the existing court order to contact Pogalies." Kimberlee testified that she and her counsel never "got any cooperation with hiring Ms. Pogalies." The evidence sufficiently supports the court's finding that Edward failed to cooperate in the preparation of a QDRO.

The court's finding that Edward failed to cooperate in the preparation of a QDRO is not the only finding upon which the court based its award of the entire community interest in the SDCERS retirement benefits to Kimberlee. Regarding retirement benefits already paid, the court found that before Edward retired, Kimberlee "made repeated requests that [Edward's] monthly SDCERS checks be appropriately divided pursuant to the terms of the parties' judgment." The court found that in addition to refusing to cooperate with the preparation of the QDRO, Edward "signed forms requesting 100% of the monthly benefits, and has still failed to pay any of the monthly benefits to [Kimberlee]." The court found that Edward breached his fiduciary duties by refusing "to respond to [Kimberlee's] repeated written requests about his monthly SDCERS benefits" and by "failing to ensure that [Kimberlee] was paid her community property SDCERS benefits." Regarding ongoing benefits, the court found that the failure to prepare a QDRO before Edward began taking his retirement benefits "made it impossible for the QDRO to address the DROP payments and for [Kimberlee] to exercise her right to a Survivor Benefit Plan." With respect to both retirement benefits already paid and ongoing retirement benefits, the court reasonably found that Edward's actions constituted breaches of his fiduciary duties under section 1100, and constituted malice and fraud within the meaning of Civil Code section 3294.¹⁷

¹⁷ As noted above, the court found that Edward committed fraud in taking the entire DROP account "in that he concealed material facts with the intention of depriving [Kimberlee] of her property and legal rights." With respect to the SDCERS benefits that Edward elected to take without notice to Kimberlee, the court found that Edward's

Edward argues that the court erred in finding that he breached his fiduciary duty regarding the SDCERS benefits because none of his actions impaired the community interest in his retirement benefits. We disagree. Edward impaired Kimberlee's share of the community interest in the SDCERS benefits by taking his retirement without informing Kimberlee and without first preparing a QDRO, which resulted in Kimberlee's permanent inability to seek a survivor benefit.

Kimberlee relies on *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34 (*Rossi*) to essentially argue that because Edward intended to take all of the SDCERS retirement benefits for himself and elected to do so without her knowledge, the court could properly award 100 percent of the community interest in the SDCERS retirement benefits to Kimberlee under section 1101, subdivision (h), without an express finding that her share of the community benefits was impaired. In *Rossi*, the wife filed a petition for dissolution shortly after she won \$1,336,000 in the California lottery. (*Rossi, supra*, at p. 36.) The wife did not disclose her lottery winnings in her schedule of assets and debts, her final declaration of disclosure, or her income and expense declaration. (*Id.* at p. 37.) The parties entered into a marital settlement agreement (MSA) in which they warranted that they had no undisclosed property of any kind other than the property specified in the MSA, and agreed that if a court were to later determine that a party possessed any

actions "constituted fraud and malice using the same legal authorities and described above [in connection with the DROP account]."

property not specified in the MSA, that party would pay the other party " 'on demand an amount equal to the full market value of such property' " (*Ibid*, italics omitted.)

Two years after judgment of dissolution was entered, the husband learned of the wife's lottery winnings and filed a motion seeking, among other relief, 100 percent of the winnings under section 1101, subdivision (h). (*Rossi, supra*, 90 Cal.App.4th at p. 38.) The trial court found that the wife breached her fiduciary duties under sections 721, 1100, and other statutes, and that she intentionally breached her warranties and representations in the MSA by fraudulently failing to disclose her lottery winnings. (*Id.* at p. 39.) The court found that the wife's failure to disclose her winnings constituted fraud, oppression, and malice within the meaning of Civil Code section 3294 and section 1101, subdivision (h). (*Ibid.*) The court awarded the husband 100 percent of the lottery winnings under the terms of the judgment and MSA and section 1101, subdivisions (g) and (h). (*Ibid.*)

The Court of Appeal in *Rossi* concluded that the evidence sufficiently supported the trial court's findings that the wife's intentional concealment of the lottery winnings constituted fraud within the meaning of Civil Code section 3294, and that the winnings were community property. (*Rossi, supra*, 90 Cal.App.4th at pp. 40-41.) The *Rossi* court decided that because the evidence supported a finding of fraud under Civil Code section 3294, "[t]he family court properly concluded that under these circumstances, [the husband] was entitled to 100 percent of the lottery winnings under section 101, subdivision (h)." (*Id.* at p. 42.)

Rossi supports the trial court's award of 100 percent of the community interest in Edward's SDCERS retirement benefits to Kimberlee. The evidence supports the court's finding that Edward breached his fiduciary duty to Kimberlee and acted with malice and fraud within the meaning of Civil Code section 3294 by concealing material facts and taking his monthly SDCERS retirement benefits with the intent to deprive Kimberlee of her share of the retirement benefits. The court reasonably found that Edward refused to respond to Kimberlee's repeated requests about his monthly SDCERS benefits, refused to cooperate with the preparation of a QDRO, and "has still failed to pay any of the monthly benefits to [Kimberlee]." Because the court reasonably found that Edward's actions constituted malice and fraud within the meaning of Civil Code section 3294, the court acted within its statutory authority and discretion in awarding Kimberlee 100 percent of the community interest in the SDCERS benefits under section 1101, subdivision (h).

E. *Award of Attorney Fees*

Edward contends that the court improperly awarded attorney fees as sanctions under section 271. He additionally argues that if the award was based on need and ability to pay under section 2030, it was improper because the court did not make a finding of need and ability to pay. Kimberlee responds that sanctions were not at issue in the trial of her breach of fiduciary duty claims. She contends that the court awarded attorney fees under section 1101, subdivision (h), based on Edward's wrongful conduct, and not under section 2030 based on need and ability to pay.

The record supports Kimberlee's position. At trial on June 12, 2013, the court noted that Kimberlee had filed a separate RFO requesting sanctions under section 271, and that the RFO requesting sanctions was "trailing." The court set the hearing on that RFO for July 19, and stated, "I'm going to render my decision first before we start the [section] 271 sanction motion."

In closing argument Kimberlee's counsel specifically asked the court to award attorney fees under section 1101, subdivision (h) in addition to 100 percent of the community interest in the DROP funds and SDCERS retirement benefits based on Edward's fraud and malice. The court in its written order did not cite the statutory authority under which it awarded Kimberlee attorney fees. However, in the "Attorney's Fees and Costs" section of the appealed order, the court stated that Edward "withdrew thousands of dollars from community accounts, took the entire lump sum retirement benefits, and refused to provide material facts and information about community assets in violation of . . . sections 721 and 1100." As noted, sections 721 and 1100 describe the fiduciary relationship and duties between spouses. The court reiterated that Edward's "actions constituted malice and fraud within the meaning of Civil Code section 3294." Based on the court's references to Edward's breaches fiduciary duty and its express finding in the attorney fee award that Edward's actions constituted malice and fraud under Civil Code section 3294, we construe the attorney fee award as having been made under section 1101, subdivision (h), as Kimberlee's counsel requested in closing argument.

The trial court has discretion to award attorney fees as an additional penalty under section 1101, subdivision (h) for conduct by a spouse that amounts to fraud, oppression, or malice within the meaning of Civil Code section 3294. (*Rossi, supra*, 90 Cal.App.4th at p. 42.) As we discussed above, the court reasonably found that Edward's breaches of fiduciary duty constituted malice and fraud within the meaning of Civil Code section 3294. Based on that finding, it was not an abuse of discretion for the court to award Kimberlee attorney fees.

As noted, the amounts listed in the court's breakdown of its attorney fee and cost award add up to \$37,458.16 rather than \$42,105.06, the total amount that the court awarded. It is not clear whether the court intended to award the difference of \$4,646.90 as additional attorney fees and costs above the total of the amounts specified in its breakdown of the award, or whether the court simply made an arithmetic error. Consequently, we will direct the court to amend its order to address the discrepancy by either explaining the basis for its award of any additional attorney fee and costs not specified in its breakdown of the award, or correcting the total amount of the award to equal the sum of the fees and costs specified in its breakdown.

IV.

DISPOSITION

The trial court is directed to amend the order after hearing filed July 24, 2013 to either correct the total amount of the award of attorney fees and costs, or explain the discrepancy between the sum of the specified components of the award and the total amount of the award. In all other respects, the order is affirmed. Kimberlee is awarded her costs on appeal.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.