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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the Marriage of BRUCE and CHEW
HONG TEOH LEICHTY.

BRUCE LEICHTY,

Appellant,

v.

CHEW HONG TEOH LEICHTY,

Respondent.

F069875

(Super. Ct. No. 05CEFL06777)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. D. Tyler Tharpe, Judge.

Bruce Leichty, in pro. per., for Appellant.

Law Offices of Lenore Schreiber and Lenore Schreiber for Respondent.

-ooOoo-

In this appeal, a former husband challenges the trial court's denial of his motion to modify spousal support and the court's award of \$32,000 in attorney fees and costs to the former wife pursuant to Family Code section 271.¹

We conclude the trial court did not abuse its discretion in evaluating whether a material change of circumstances had occurred since the parties stipulated to spousal support of \$2,600 per month in May 2010. The husband's income increased in 2011, 2012 and 2013 and the trial court, in its role as trier of fact, did not err in disbelieving the husband's evidence regarding the grim future prospects of his law practice. Also, the trial court did not err when it determined that the 62-year-old wife's lack of effort towards becoming self-supporting and her paying off her home's mortgage were expected when the parties signed the stipulation in May 2010 and therefore do not constitute a change of circumstances.

As to the award of attorney fees and costs, section 271 does not require a noticed motion at the end of the proceedings and the husband received sufficient notice and an opportunity to be heard to satisfy subdivision (b) of section 271. Also, substantial evidence supports the trial court's express finding that the husband engaged in conduct that increased the cost of the litigation and its implied finding that the sanction would not impose an unreasonable financial burden on him.

We therefore affirm the trial court's orders.

FACTS AND PROCEEDINGS

The Parties

Appellant Bruce Leichy (Appellant) and respondent Chew Hong Teoh Leichy (Respondent) were married in 1981. Their sons were born in 1984 and 1987. The parties separated in November 2005. In September 2006, the court entered a judgment of dissolution of marriage with other issues being reserved.

¹ All unlabeled statutory references are to the Family Code.

The Stipulation Regarding Spousal Support

The reserved issues were not resolved until May 2010, when Appellant and Respondent entered into a stipulation that addressed spousal support, division of property, allocation of debts, and other matters. In connection with the stipulation, Appellant represented himself and Respondent was represented by counsel. The parties explicitly stated that the stipulation had been negotiated in California and “it shall be interpreted according to California law.”

The stipulation provided that Appellant would pay Respondent spousal support of \$2,600 per month, retroactive to February 1, 2010, until her death or remarriage. The stipulation did not identify any events that would lead to a reduction in the support payments. For instance, it did not state that spousal support would be reduced when Respondent began to collect social security benefits.² The stipulation did relieve Appellant of the obligation to pay for Respondent’s health insurance.

The stipulation also provided the family residence in Fresno would become Respondent’s separate property and she would assume responsibility for the mortgage owed to Chase Mortgage. The house was built in 1942 and has a variety of repair issues. The stipulation did not provide for a reduction of spousal support when the mortgage was paid off.

The stipulation did not address whether Respondent was expected to become self-supporting or warn her that the support payments might be reduced if she did not seek employment. The stipulation did contain a mutual release stating the parties’ intention that “there shall be, as between them, only those rights and obligations as are specifically provided in this Agreement, and that are or may be available to them by means of a motion to modify permanent support, as either may deem necessary.”

² Social security benefits were addressed in a provision stating that the parties retained their respective social security benefits, including derivative rights, as their separate property pursuant to federal law.

On May 13, 2010, the trial court approved the stipulation, signed it as an order, and entered it as a judgment on reserved issues. .

The Motion to Modify Support

Three years later, in June 2013, Appellant filed a motion to modify permanent spousal support based on (1) a significant change in his income, (2) Respondent's sharply lower expenses, (3) Respondent's eligibility to receive social security benefits,³ and (4) her failure to attempt to find employment.

In August 2013, Respondent filed papers opposing the motion to modify spousal support. In these papers, Respondent requested "attorney fees and costs pursuant to Family Code section 271."

Appellant's reply papers asserted that "an award of attorney's fees under Family Code Section 271 is not warranted since [Respondent] has accumulated a comfortable asset cushion and has no debt, and can afford attorney's fees more easily than [Appellant]" and that his modification request "has obviously been filed out of necessity."

After multiple continuances and the filing of additional papers, a contested hearing⁴ began on April 29, 2014, and was completed on May 2, 2014. At the time of the hearing, Appellant had recently turned 60 and Respondent was 62 years old. Both parties testified and presented exhibits. Appellant called a certified public accountant as a witness.

³ Appellant's declaration in support of his motion asserted that Respondent's eligibility for social security benefits would begin in November 2013 when she reached 62 years of age and estimated that her benefits would be at least \$650 per month. The trial court rejected this prediction, finding that Respondent would not be eligible for social security benefits until November 2017. On appeal, Appellant states he abandoned the contention about social security benefits before trial.

⁴ For purposes of this opinion, we use the terms contested hearing and trial interchangeably.

The Trial Court's Decision

On May 8, 2014, the trial court filed a ruling on Appellant's motion to modify permanent spousal support and Respondent's request for sanctions. The court found no material change of circumstances since the entry of the May 2010 stipulation and order and, as a result, denied Appellant's motion. The court also found Appellant engaged in conduct related to his motion that increased the cost of litigation and awarded attorney fees and costs in favor of Respondent in the amount of \$32,000. The docket in the appellate record shows that neither party filed any objections or requests with respect to the ruling before the trial court filed its May 23, 2014, order stating the ruling filed May 8, 2014, would be the order of the court. A notice of entry of the order was filed in June 2014.

Subsequent Proceedings and Appeal

In June 2014, Appellant filed a motion for a new trial under Code of Civil Procedure section 657 or an order vacating or setting aside the May 23, 2014, order under Code of Civil Procedure section 663. Appellant also submitted a request for order staying the sanctions order and advancing the hearing to a date before July 10, 2014. The day after this request was "received" by the clerk of court, the trial court filed an "Order on Ex Parte Request for Emergency Order" denying the request. The order stated that Appellant had failed to provide a declaration establishing good cause for waiver of the notice requirement.

On July 8, 2014, Appellant filed a notice of appeal.

DISCUSSION

I. MODIFICATION OF PERMANENT SPOUSAL SUPPORT

A. Principles Governing Modifications

A motion for modification of spousal support may be granted only if there has been a material change of circumstances since the support order was entered. (*In re*

Marriage of Biderman (1992) 5 Cal.App.4th 409, 412 (*Biderman*.) The moving party has the burden of showing a material change of circumstances since the last support order was made. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) The requirement for a material change of circumstances applies even if the prior amount of spousal support was established by agreement. (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982 (*McCann*.)

When determining whether a material change of circumstances occurred, the trial court considers the same statutorily prescribed criteria that are relevant to initial orders of spousal support. (*In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 928; see § 4320 [criteria for spousal support].) The criteria include ability of the supporting spouse to pay, the needs of each party based on the standard of living established during the marriage, the obligations and assets of each party, and the balance of hardship to each party. (§ 4320, subs. (c)-(e), (j); see *McCann, supra*, 41 Cal.App.4th at p. 982 [inquiry considers all factors affecting need and ability to pay].)

In general terms, a change of circumstances is “material” if it has great significance or is of such a nature that knowledge of the item would affect a person’s decision-making. (*In re Marriage of Bodo* (2011) 198 Cal.App.4th 373, 391-392.) In the context of a marital settlement agreement, the relevant decision makers are the spouses and, therefore, materiality is evaluated with reference to their knowledge and decision making at the time of the agreement. (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398 (*Dietz*.) When spouses enter a stipulation setting permanent spousal support, they do not have perfect knowledge of the future. Consequently, their *expectations* about the future are relevant to whether a material change of circumstances has occurred. In other words, “[a] material change of circumstances may be in the form of unrealized expectations.” (*In re Marriage of Lautsbaugh* (1999) 72 Cal.App.4th 1131, 1133.) If *unrealized* expectation can constitute a material change of circumstances, it follows that *realized* expectations ordinarily do not constitute a material change of circumstances.

Therefore, a trial court determining what constitutes a change of circumstances must give effect to the intent and reasonable expectations of the parties expressed or implied in their marital settlement agreement. (*Dietz, supra*, 176 Cal.App.4th at p. 398; see *Biderman, supra*, 5 Cal.App.4th at p. 413.) For example, in *Biderman*, the court considered whether the 12-month support order was entered with the implicit expectation that the husband's clinical depression would improve and permit him to resume employment or, alternatively, that the assets awarded to him would generate sufficient income for his support. (*Biderman, supra*, at p. 413.) The court adopted the latter interpretation, based on the finding in the prior support order that the assets should generate sufficient income to competently care for the husband during his lifetime. (*Id.* at pp. 413-414.)

B. Appellate Review

1. *Basic Principles of Appellate Practice*

Some of the basic rules of appellate review play a large role in the outcome of this appeal. The most fundamental of these rules is that appellate courts presume the trial court's order is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*)). To prevail, appellants must overcome this presumption by affirmatively demonstrating error. (*Ibid.*; *In re Marriage of Bowen* (2001) 91 Cal.App.4th 1291, 1301 (*Bowen*) [appellant has the *burden* of proving error].)

The presumption of correctness is the foundation for the rule of appellate practice that, when the appellate record is silent on a matter, the reviewing court must indulge all intendments and presumptions that support the order or judgment. (*Denham, supra*, 2 Cal.3d at p. 564; *Bowen, supra*, 91 Cal.App.4th at p. 1301.) The intendments and presumptions indulged by the appellate court include inferring the trial court made implied findings of fact that are consistent with its order. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143

(*SpeeDee*) [when applying abuse of discretion standard of review to a trial court’s order, appellate courts must accept trial court’s implied findings of facts that are supported by substantial evidence].⁵

The foregoing principles are relevant to Bruce’s arguments about (1) the trial court’s reasoning on matters not explicitly set forth in the court’s written ruling or (2) evidence not mentioned. For example, Appellant argues the trial court’s reasoning was suspect because it “never explicitly discussed the circumstances that pertained in 2010, or [Appellant’s] uncontroverted testimony as to changes.” The lack of an *explicit* discussion on these and other points is not error and the silence on these points is resolved by this court indulging all intendments that support the trial court’s order. (See *Bowen, supra*, 91 Cal.App.4th at p. 1301.)

2. *Standard of Review—Abuse of Discretion*

The modification of a spousal support order is dependent upon the facts and circumstances of the particular case, and the propriety of an order granting or denying the modification is committed to the discretion of the trial court. (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7.) The trial court’s exercise of that discretion will not be disturbed unless an abuse of discretion is shown as a matter of law. (*Ibid.*) An abuse of discretion exists where, considering all the relevant circumstances, the trial court exceeded the bounds of reason or it can fairly be said that no judge reasonably would have made the same order under the same circumstances. (*Ibid.*)

When reviewing an order *granting* a motion for modification of spousal support, appellate courts often set forth the principle that, where there is no substantial evidence of

⁵ Appellant appears to argue that the doctrine of implied findings applies only to statements of decision issued after a court trial. We reject this argument and conclude the doctrine applies to an order denying a motion to modify spousal support. (See *SpeeDee, supra*, 20 Cal.4th at p. 1143 [doctrine applies to order on motion to disqualify counsel]; *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 744-745 [doctrine applies to order granting preliminary injunction].)

a material change of circumstances, the order will be overturned for an abuse of discretion. (E.g., *Dietz, supra*, 176 Cal.App.4th at p. 398.) When the trial court has *denied* the motion for modification of spousal support, application of the abuse of discretion standard is different. For instance, one practice guide has stated that an abuse of discretion occurs when the trial court fails to modify “despite overwhelming evidence triggering a mandatory statutory modification.” (Hogoboom & King, *Cal. Practice Guide: Family Law* (The Rutter Group 2015) ¶ 17:136, p. 17-53.)

Often, appellate courts have not drawn the distinction between grants and denials of motions for modification of spousal support because, when the trial court’s findings of fact are supported by substantial evidence, the evidence is not overwhelming and does not require a contrary finding. Nevertheless, the arguments presented by Appellant warrant a discussion of how the distinction between grants and denials, which is rooted in the fact that the moving party has the burden of proving a change of circumstances, affects the application of the abuse of discretion standard on appeal.

3. *Legal Significance of Burden of Proof in Trial Court*

When an appellant is challenging an express finding in favor of the party with the burden of proof, the finding will be upheld if supported by substantial evidence. (See *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.) Similarly, when the appellant is challenging an implied finding in favor of the party with the burden of proof, the reviewing court will infer the existence of that implied finding only if it is supported by substantial evidence. (*Smith v. Adventist Health System/West, supra*, 182 Cal.App.4th at p. 745 [superior court’s implied findings of fact are accepted if supported by substantial evidence]; *In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 549 [implied finding that former wife’s needs were not currently being met was supported by substantial evidence].)

In contrast, when the appellant had the burden of proof in the lower court’s proceeding and the trier of fact explicitly or implicitly concluded the appellant did not carry the burden, “the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. [Citation.]” (*Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership* (2015) 238 Cal.App.4th 370, 390.) Thus, we have joined other courts in recognizing that “it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment.” (*Valero v. Board of Retirement of Tulare County Employees’ Assn.* (2012) 205 Cal.App.4th 960, 965.) Under the finding-compelled-as-a-matter-of-law standard, the finding was required only if the appellant’s evidence was (1) uncontradicted and unimpeached and (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*In re I.W., supra*, 180 Cal.App.4th at p. 1528.)

In his opening brief, Appellant addressed the standard of review, arguing: “There is no substantial evidence to support an absence of changed circumstances.” His reply brief “asks that the Court of Appeal squarely face the fact that it may need to break new ground in the course of determining whether ‘substantial evidence’ exists on a finding that necessarily involves the totality of the evidence.” We squarely face and decide the standard of review question by concluding the finding-compelled-as-a-matter-of-law standard, not the substantial evidence standard, applies to whether there was a change of circumstances—an issue on which Appellant had the burden of proof. Thus, we do not break new ground, but apply established principles of appellate review.

4. Findings Regarding Witness Credibility

Appellant argues that the trial court “should have also acknowledged that a number of the changes in financial circumstance that [he] testified about were uncontroverted.” Appellant’s view of uncontroverted testimony brings us to the rule of law applicable to implied findings of fact as to a witness’s credibility. Credibility

findings by a trial court, expressed or implied, are difficult to challenge successfully because appellate courts give those findings great deference and appellants are confronted with one of the most demanding tests for establishing error.

If the trial court finds a witness is credible, an appellate court must accept that credibility finding unless the testimony is incredible on its face, inherently improbable or wholly unacceptable to reasonable minds. (*Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 786; see *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201 [a trial court’s credibility findings cannot be reversed on appeal unless that testimony is incredible on its face or inherently improbable].)

In contrast, when a trial court finds all or part of a witness’s testimony is *not* credible, appellate courts apply the following rule: “A trier of fact is free to disbelieve a witness, even one uncontradicted, if there is any rational ground for doing so. [Citations.]” (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1043.) Rational grounds for disbelieving a witness include the factors listed in Evidence Code section 780, which include the witness’s interest in the matter. (Evid. Code, § 780, subd. (f); see *Pierce v. Wright* (1953) 117 Cal.App.2d 718, 723 [court is not bound to believe interested witness].)

Therefore, Appellant’s reliance on his “uncontroverted testimony” does not demonstrate trial court error because “the trier of facts is not required to believe everything that a witness says even if uncontradicted. [Citations.]” (*Guerra v. Balestrieri* (1954) 127 Cal.App.2d 511, 515.)

C. Lack of Explicit Discussion of Section 4320 Factors Was Not Error

Appellant contends the trial court erred by failing to discuss all the factors identified in section 4320 and the absence of an explicit discussion constitutes reversible error standing alone. Appellant cites *In re Marriage of Cheriton* (2001) 92 Cal.App.4th

269 (*Cheriton*) for the principle that the failure to consider and apply the statutory factors constitutes an abuse of discretion. (*Id.* at p. 305.) In *Cheriton*, the appellate court stated:

“From the detailed statement of decision, it is apparent that the court was well aware of [respondent]’s substantial assets. But it does not appear that the court took those assets into account or otherwise analyzed [respondent]’s ability to pay spousal support in balancing the statutory factors. To the contrary, it seems clear that the court did not do so. Failure to consider and apply the statutory factors constitutes an abuse of discretion. [Citations].” (*Id.* at p. 305.)

Based on this conclusion, the appellate court remanded the matter with directions for the trial court to consider all applicable statutory factors, including the former husband’s ability to pay. (*Cheriton, supra*, 92 Cal.App.4th at p. 306.)

Procedurally, *Cheriton* did not involve a motion to modify spousal support. It involved the trial court’s *original* determination of child support, spousal support and attorney fees. (*Cheriton, supra*, 92 Cal.App.4th at p. 279.) Consequently, *Cheriton* does not establish a principle of law that a written ruling on a motion to modify spousal support must explicitly address each statutory factor. Moreover, there is no principle of law that holds the absence of a discussion of a section 4320 factor demonstrates the trial court failed to consider the factor. As a matter of common sense, courts can consider matters that are not discussed in a written ruling. (See *Gonzales v. Interinsurance Exchange* (1978) 84 Cal.App.3d 58, 63 [“consider” means to view attentively; to fix the mind on, with a view of careful examination; to think on with care; to ponder].)

Another basis for distinguishing *Cheriton* from the present case is that in *Cheriton* the failure to consider and apply the statutory factor was “clear.” (*Cheriton, supra*, 92 Cal.App.4th at p. 305.) Such clarity does not exist in the present case. At most, the record in this case is ambiguous. For instance, when the court told the parties that there would be no written posthearing briefs, it stated: “This case has been extensively briefed to points and authorities and trial briefs, so I don’t think anymore paperwork is necessary.” This statement supports the inference that the court was familiar with the

parties' papers and, because those papers addressed the statutory factors, supports the further inference that the trial court considered the factors as discussed by the parties. Unlike the situation presented in *Cheriton*, it is not "clear" that the trial court failed to consider a factor. In short, the appellant in *Cheriton* carried her burden of demonstrating error, but the requisite clarity has not been established in this case.

In summary, it was enough for the trial court to explicitly address the four points presented in Appellant's motion as constituting the change of circumstances. We need not remand for a more detailed explanation.

D. Change of Circumstance—Reduction in Appellant's Income

"The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living" (§ 4320, subd. (c)) are among the circumstances a trial court must consider when determining whether to modify spousal support. (*Dietz, supra*, 176 Cal.App.4th at p. 396.)

Appellant's declaration in support of his motion to modify spousal support asserted the first and most important reason for his modification request was "that I can't pay that amount [of support] any longer. My income is greatly reduced, through no fault or inaction of my own." He also claimed the \$2,600 of monthly support payments had "contributed to [his] overwhelming debt problems." We will analyze Appellant's claim of a significant change in income by (1) identifying the circumstances that existed when the May 2010 stipulation and order was signed, (2) comparing that starting point or baseline to the circumstances that existed when the trial court entered its May 2014 order, (3) ascertaining the difference (i.e., the change) between those two sets of circumstances, and (4) determining whether that change was material.

1. Evidence Regarding Actual Income

The main source of Appellant's ability to pay is the income from his law practice. The starting point or baseline for his income at the time the stipulation and order was signed is established by his income and expense declaration dated April 29, 2010. Appellant signed the stipulation on May 3, 2010, four days after signing the declaration. In the 2010 declaration, Appellant stated he was a self-employed lawyer who worked about 50 to 60 hours per week and had an average monthly income of \$5,000 (after all business expenses) over the last 12 months. In that same declaration, Appellant also asserted his financial situation had changed significantly over the last 12 months because his law office income had "dropped precipitously"; he was "getting only a trickle of new cases"; and his income from the last month was a negative \$2,000.

For purposes of this appeal, we will presume the trial court impliedly found that the declaration contained an accurate calculation of Appellant's average monthly income for the 12 months preceding the execution of the declaration.⁶ Therefore, when Appellant signed the stipulation and agreed to pay spousal support of \$2,600 per month until Respondent's death or remarriage, he knew his income for the previous 12 months had been about \$60,000 and his expenses during the last month had exceeded his revenue. This income of \$60,000 per year (or \$5,000 per month) will be regarded as the baseline figure and compared to Appellant's subsequent income to ascertain the change of circumstances relating to his income.

For the 2010 calendar year, Appellant's income improved from the monthly average of \$5,000 stated in his April 2010 declaration. His 2010 federal income tax

⁶ Appellant's prestipulation assertion that a precipitous drop in income had occurred is supported by attachments to his April 29, 2010, declaration that state the income from his law practice was \$152,010 in 2008 and \$303,751 in 2009. His claim of a \$5,000 average monthly average over the previous 12 months—a period that contains eight or nine months from 2009—implies that most of his 2009 income of \$303,751 was realized in the first quarter of 2009.

returns showed his gross receipts were \$191,671, his total expenses were \$111,323, and his resulting income was \$80,348. His income also improved in 2011 (\$94,486) and 2012 (\$105,164).

The documentation for Appellant's income for 2013 is not directly comparable to the prior years because he incorporated his law practice as a Subchapter S corporation effective July 1, 2013. Based on Schedule C of his federal tax returns, his income for January through June of 2013 was \$39,804. The income attributed to him through his Subchapter S corporation for the last half of 2013 was \$379,175. When these two figures are added to the \$20,000 in wages he received from the corporation, Appellant's 2013 income totaled \$438,979.

The jump in income in 2013 resulted from the settlement of a contingency fee case in which Appellant represented the widow of Louis Mariani, a man who died in one of the planes involved in the September 11, 2001, terrorist attacks.⁷ In September 2013, a New Hampshire probate judge approved the settlement and \$1,340,000 was paid into Appellant's trust account.⁸ Later that month, Appellant transferred \$304,000 from the trust account to his corporation as partial payment of the account receivable that had accrued over the life of the case. In December 2013, Appellant received an additional \$100,000 in fees from that case.

Appellant's income from the time he signed the 2010 stipulation through 2013, the year in which he filed his motion for modification of spousal support, can be summarized

⁷ The settlement involved the widow, her stepdaughter and the estate's probate administrator. The widow received \$1,340,000 as her distributive share of the Mariani estate. It appears that most of the estate's funds came from a wrongful death action filed in the United States District Court for the Southern District of New York, which was settled for \$3.75 million in 2010 and produced a net amount for the estate of \$2,952,392. Additional information about the litigation is set forth in three published decisions by the Second Circuit of the United States Court of Appeals.

⁸ The settlement agreement and mutual general release approved by the New Hampshire court was received into evidence in this litigation as Respondent's Exhibit H.

as follows. His income for the 12 months preceding the execution of the 2010 stipulation was about \$60,000. After the stipulation, his annual income increased to approximately \$80,000 (2010), \$94,000 (2011), \$105,000 (2012), and \$439,000 (2013). In light of this increase, the evidence could not compel a finding as a matter of law that Appellant's actual poststipulation income changed in a manner that decreased his ability to pay spousal support.

2. *Evidence of 2014 Income and Future Income*

Based on the increase in Appellant's income through 2013, his claim that circumstances changed and reduced his ability to pay spousal support rests on the evidence relating to the income he earned in early 2014 before the contested hearing and his prospects for earning income after that hearing.

The evidence relevant to Appellant's income in early 2014 and subsequent prospects included the income and expense declaration Appellant signed and filed on April 7, 2014. In the declaration, Appellant stated (1) he worked about 40 to 50 hours per week, (2) his professional corporation paid him a salary of \$4,000 in the last month, but that salary would soon exceed the corporation's ability to pay, and (3) averaging his income for the last 12 months to get average monthly income would be misleading. Appellant also stated that his financial situation had changed significantly over the last 12 months because, as of about March 2013, his law practice business was dramatically reduced and expenses exceeded income. Appellant attached a profit and loss statement for his professional corporation that covered the first three months of 2014. It showed revenues of \$17,604, total expenses (including payroll) of \$37,112, and a net operating loss of \$19,508.

As to his posttrial prospects for earning income, Appellant painted a dismal picture. He testified that he was no longer getting work from bankruptcy trustees, stating that work had dried up and "because I would say have been black listed." He also

testified about a drop in his immigration practice, the loss of a major church client, fewer referrals from various sources, and the difficulty of establishing a new practice in southern California at the age of 60.

Appellant testified that over the past 15 years, he had always had a large case in the works that he expected to pay off someday. When the Mariani case paid off in September 2013, he no longer had any big case generating a long term account receivable. He also testified he had no current expectation of being retained in that type of case.

3. *Trial Court's Findings*

The trial court addressed Appellant's contention that his downward change of income was significant by stating: "Although that [contention] *may* be true at the time of the [May 2014] contested hearing looking at an impermissibly small window of three months in 2014[footnote], it was certainly untrue at the time of the filing of the [June 2013] motion [to modify]. [Appellant's] income held steady in 2011 and 2012 and nearly tripled in 2013." The footnote stated: "A court cannot base a spousal support determination on a small unrepresentative current sampling of earnings. (*Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1081-1085.)"

The written ruling did not explicitly address Appellant's future prospects for generating income, but we presume the trial court impliedly found Appellant's characterization of those prospects was not believable: "It is abundantly clear to the court that Petitioner was on the verge of reaping extraordinary income (in excess of \$300,000 in a settlement on a contingent fee case) before the ink dried on his motion. Petitioner failed to mention the imminent windfall in his [June 2013] motion, or at any other time thereafter voluntarily, and refused to withdraw his motion on receipt of the extraordinary income."

4. *Analysis of Appellant's Contentions*

The rules of appellate review require this court to infer the trial court found Appellant's testimony and other evidence about his future prospects were not credible. When reviewing a finding that evidence lacks credibility, appellate courts recognize that a trial court is not required to believe everything that a witness says even if those statements are not contradicted. (*Guerra v. Balestrieri, supra*, 127 Cal.App.2d at p. 515.) Appellant has not overcome this deferential legal standard and established the trial court committed error by impliedly finding his evidence about his future prospects was not credible. It follows that Appellant has not established the trial court was compelled as a matter of law to find a material change of his prospects for earning income.

In summary, we conclude the trial court did not err in its factual and legal analysis of the alleged change of circumstances related to the reduction of Appellant's income.

5. *Debt Load and Ability to Pay*

Although Appellant's primary focus was on his reduced income, his appellate brief also suggests the trial court erred in analyzing how his ability to pay spousal support was negatively affected by his "overwhelming debt problems." Appellant argued in the trial court that the income from the Mariani case did not mitigate his financial crisis, "principally because he became so indebted out of necessity while accruing the receivables that led to that income."

We conclude the trial court rejected Appellant's view of necessity and impliedly found that a significant portion of the borrowed funds went to support a lifestyle that could not be maintained by Appellant's earnings and his prospects. This point was raised by Respondent's counsel during closing argument when she argued that Appellant's motion was an attempt to use money owed as spousal support to pay down the debt he incurred by overspending on standard of living higher than justified by his earnings. Appellant has not shown the evidence compelled the trial court to disagree with Respondent's view of the facts relating to debt and lifestyle.

E. Reduced Needs—Paid Off Mortgage

A decrease in the supported spouse's needs is a type of change of circumstances that can justify a downward modification of spousal support. (*McCann, supra*, 41 Cal.App.4th at p. 982; see § 4320, subd. (d) [needs of each party].) Appellant contends that Respondent had fewer obligations after paying off the mortgage on her residence and the trial court erred in discounting this fact.

The trial court's written ruling addressed the factual basis for this alleged change of circumstances by stating it was undisputed that Respondent recently paid off the mortgage on the marital home and thereby lowered her expenses by about \$800 per month. The court determined this decrease of her expenses "was contemplated when the parties reached their spousal support agreement."

On appeal, Appellant argues that there is nothing in the 2010 stipulation and order declaring that Respondent would be free of mortgage obligations in 2013 or any other time. He contends "the Court had no basis for assuming that [Appellant] knew in 2010 that in 2013 [Respondent] would remain in the family residence after the mortgage was paid off, rather than upgrade her accommodations some time before 2013 and take on a new mortgage." These arguments do not demonstrate the trial court erred.

1. *Proper Interpretation of Trial Court's Ruling*

Initially, we address the proper characterization of the trial court's analysis of the alleged change of circumstance. Under applicable rules of appellate practice, the trial court did not *assume* Appellant knew in 2010 that in 2013 Respondent would remain in the residence after the mortgage had been paid off. Instead, the trial court *made a finding of fact* about what the parties "contemplated" when they entered into their stipulation in 2010. Our conclusion that the trial court made a finding of fact rather than an assumption is required by law because that conclusion adopts an intent that supports the judgment. (See *Bowen, supra*, 91 Cal.App.4th at p. 1301 [court of review indulges all intendments to support the judgment].) In other words, the law does not authorize this

court to interpret a trial court's ruling in a light favorable to the appellant and thereby lighten the appellant's burden of demonstrating error. (See *Denham, supra*, 2 Cal.3d at p. 564 [appellant has burden of affirmatively demonstrating prejudicial error because lower court's order is presumed correct].)

Our interpretation of the written ruling as making a finding of fact (not an assumption) about what the parties contemplated is significant for purposes of appellate review because a finding of fact on an issue where the appellant has the burden of proof will be overturned on appeal only if a contrary finding is compelled as a matter of law. (See pt. I.B.3, *ante*.)

2. *Meaning of the Court's Express Finding*

We interpret the trial court's finding of fact that "this scenario was contemplated when the parties reached their spousal support agreement" to mean that, when the parties entered into the stipulation addressing spousal support, their mutual *expectation* was that the mortgage would be paid off in November 2013. We adopt this interpretation of the finding because it also is an intendment that supports the judgment. (*Bowen, supra*, 91 Cal.App.4th 1301; see *Denham, supra*, 2 Cal.3d at p. 564.)

When this finding about the parties' expectations is coupled with the undisputed fact that the mortgage was paid off on time, it follows that the parties' expectations about the mortgage were realized. Ordinarily, there is no material change of circumstances when the parties' expectations are realized. (See pt. I.A, *ante*.)

3. *A Contrary Finding is Not Compelled by the Evidence*

Having identified the content of the trial court's express finding, the next step to address is whether a contrary finding was compelled as a matter of law. (See pt. I.B.3, *ante*.) This standard applies because Appellant, the party challenging the finding, had the burden in the lower court. (*Ibid.*) We conclude a contrary finding was not compelled.

First, the terms of the stipulation support the finding that the parties expected Respondent to pay off the mortgage in November 2013 and, consequently, do not compel a contrary finding. The warranty of full disclosure set forth in section 5.06 of the parties' stipulation stated that each party warranted that he or she "made a full and accurate disclosure to the other pursuant to Fam. Code §2100 of all assets, liabilities, and encumbrances, and their values, in which one or both Parties have or may have an interest" Based on this warranty, it was reasonable for the trial court to infer Appellant and Respondent were informed about the mortgage's outstanding balance and its maturity date.

In addition, section 3.02 of the stipulation expressly allocated liability on the mortgage to Respondent and stated she would hold Appellant harmless from that liability. Based on this provision, the trial court reasonably could infer the parties expected Respondent to continue making the payments on the mortgage until it was paid off.

Further evidence of the payoff date and Appellant's expectation that the mortgage would be paid off by Respondent is provided by the personal financial statement Appellant prepared for Premier Valley Bank in November 2009 (about six months before signing the stipulation). Schedule 3 of that financial statement (1) listed the balance of the mortgage against the Fresno residence at about \$15,000, (2) identified November 2013 as the maturity date, (3) showed Appellant was making no payments on the mortgage, and (4) included the handwritten note that "ex-wife pays per ct order." Thus, Appellant's financial statement shows he knew when the mortgage was scheduled to be paid off and knew that Respondent was making the monthly payments.

The terms of the stipulation and other evidence support a finding that the parties expected Respondent to pay off the mortgage by November 2013. In contrast, Appellant has cited no evidence supporting, much less compelling, a contrary finding of fact.

4. *Implied Finding Regarding New Debt*

Appellant’s contention sets forth the *possibility* that Respondent might “upgrade her accommodations some time before 2013 and take on a new mortgage.”

Consequently, we address whether the parties agreed to spousal support of \$2,600 per month based on the *expectation* that Respondent’s future needs would include the funds necessary to pay a new mortgage on upgraded accommodations.

Under the applicable rules of appellate review, we (1) infer that the trial court impliedly found that the parties did not reasonably expect Respondent to take on a new mortgage and (2) address whether Appellant has demonstrated that a contrary finding was compelled as a matter of law.

Appellant’s argument that Respondent might have taken on a new mortgage was presented as a hypothetical scenario, not as an expectation the parties reasonably held. Appellant did not support the scenario with citations to evidence and, as a result, has not shown the trial court was compelled to find that the parties reasonably expected Respondent to take on a new mortgage. Therefore, the trial court’s implied finding that the parties did not expect Respondent to take on a new mortgage must be upheld.

In summary, we conclude the trial court’s analysis of the issues related to the mortgage on the Fresno residence contains no legal or factual error.

F. Change of Circumstances—Disinclination to Become Self-Supporting

1. *Trial Court’s Decision*

The trial court explicitly found that Respondent had not made serious attempts to find employment and concluded this fact did not support a reduction in spousal support. The court cited *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705 (*Gavron*) and stated there was no evidence that Respondent had been warned that her spousal support might be terminated or reduced if she did not undertake reasonable efforts to become self-supporting. The court also stated: “This is a case involving a very long term

marriage. The Court decides that a *Gavron* warning is inadvisable in this case. (Fam. Code sec. 4330, subd. (b).)”

Implicit in the trial court’s decision is a finding that, when the parties signed the stipulation, they did not expect Respondent to seek employment and become wholly or partially self-supporting.

2. *Appellant’s Contentions*

Appellant contends that “the Court was wrong to entirely discount the undisputed evidence that [Respondent] had taken essentially no steps on her own to find employment in order to become self-supporting in the years since the initial separation of the parties in 2004”

He also contends it was legal error for the court to rely on the absence of a *Gavron* warning⁹ because the duty of a supported spouse to become self-supporting exists independently of a warning. Appellant cites *In re Marriage of Rosan* (1972) 24 Cal.App.3d 885 for the proposition that an unreasonable delay or refusal by the supported spouse to seek employment consistent with his or her ability may be taken into consideration by the trial court in modification proceedings. (*Id.* at p. 896.) He contends no case has overturned this principle and it was not mooted by *Gavron*.

3. *Background on Gavron Warnings*

In *Gavron*, the parties had been married approximately 25 years and the former wife was 57 years old when the trial court granted the former husband’s request to terminate spousal support. (*Gavron, supra*, 203 Cal.App.3d at p. 707.) The trial court stated the former wife’s failure to become employable or to seek training after so many years shifted the burden to her to demonstrate her continued need for support. (*Id.* at pp.

⁹ The term “*Gavron* warning” is used to describe a fair warning to the supported spouse that he or she is expected to become self-supporting. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 55; see § 4330, subd. (b) [codified version of warning].)

709-710.) The appellate court reversed, stating the trial court abused its discretion. (*Id.* at p. 707.)

In *Gavron*, the appellate court recognized the general principle that it is in the best interests of both spouses and society that a supported spouse becomes self-sufficient. (*Gavron, supra*, 203 Cal.App.3d at p. 711.) This principle, coupled with other factors, can create an *expectation* at the time a support order is entered that the supported spouse will become self-supporting in the future. As set forth in part I.A, *ante*, unrealized expectations can constitute a change of circumstances justifying a modification of spousal support. Thus, when there is an expectation that a supported spouse will work toward becoming self-supporting, “the supported spouse’s failure to at least make good-faith efforts to become self-sufficient can constitute a change in circumstances which could warrant a modification in spousal support.” (*Id.* at p. 712.)

A supported spouse’s reasonable expectations necessarily are based on the information available to him or her. Thus, the court in *Gavron* concluded that the supported spouse should be made aware of the obligation to become self-supporting and the consequences of not satisfying the obligation. (*Gavron, supra*, 203 Cal.App.3d at p. 712.) The court identified different ways in which a supported spouse’s awareness of the expectation of self-sufficiency could be established, such as an explicit statement from the court when it issued the original support order (which became known as a *Gavron* warning) or a stipulated agreement addressing the wife’s ability to obtain future employment. (*Ibid.*) The court also stated the awareness could be inferred where the order contains a reasonable termination date for the support and the supported spouse was employed during the separation and continuing through the time of the original support order. (*Ibid.*)

In 1996, the *Gavron* warning was codified by the Legislature. Subdivision (b) of section 4330 provides in full:

“When making an order for spousal support, the court may advise the recipient of support that he or she should make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances considered by the court pursuant to Section 4320, unless, in the case of a marriage of long duration as provided for in section 4336, the court decides this warning is inadvisable.”

Section 4336, subdivision (b) provides that “there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of the marriage to the date of the separation, is a marriage of long duration.” In the present case, over 24 years passed between the date of the parties’ marriage and the date of their separation.

4. *Analysis of Asserted Errors*

We conclude the trial court did not commit legal error by relying on the absence of a *Gavron* warning. The absence of a *Gavron* warning is a fact relevant to the determination whether the supported spouse was aware of both an expectation to become self-supporting and the consequences of not fulfilling that expectation. (*Gavron, supra*, 203 Cal.App.3d at p. 712.) The principles set forth in *Gavron* and enacted in sections 4330 and 4336 were well established when the parties separated in 2005 and when they entered the stipulation in 2010.¹⁰ In that context, the parties chose to settle the spousal support and other disputed issues without including a provision that Respondent was expected to seek employment and become self-supporting. The absence of such a provision, the lack of a *Gavron* warning from the court, and the provision stating the parties’ intention that “there shall be, as between them, only those rights and obligations as are specifically provided in this Agreement” supports the implied finding that the parties did not expect Respondent to seek employment and become wholly or partially

¹⁰ The fact these principles were part of established California law when the stipulation was signed has relevance because the stipulation states “it shall be interpreted according to California law.”

self-supporting. Therefore, Appellant has failed to show a contrary finding was compelled as a matter of law.

Furthermore, the principles established in *Gavron* limit a trial court's discretion to find a change of circumstances based on a supported spouse's failure to seek employment. If the trial court had reduced Respondent's spousal support based on her failure to seek employment without finding that she received a *Gavron* warning or otherwise was made aware that she was expected to become self-supporting, it would have abused its discretion in the same manner that the trial court in *Gavron* abused its discretion.

Therefore, we conclude the trial court correctly referred to the absence of a *Gavron* warning and relied upon that fact in finding Respondent's failure to seek employment was not a material change of circumstances.

Appellant also contends the trial court erred by stating "that a *Gavron* warning is inadvisable in this case" because the parties were not notified it would be an issue and were not able to present briefing on the subject. We conclude the trial court did not abuse its discretion in treating Appellant's request for a modification of spousal support as including an implicit request for a *Gavron* warning in the event the modification was denied. Also, the trial court's decision not to give the warning was appropriate in light of the record before it, particularly because the marriage was one of long duration. (See §§ 4330, 4336, subd. (b).)

Moreover, the court's decision not to give the warning is not sufficiently different from what would have occurred if the trial court had not addressed the issue at all because no warning would be have been given in that scenario. The court's finding the warning was inadvisable (which was based on the record then before the court) does not preclude Appellant from seeking to have a warning given at a subsequent date and presenting evidence to support that request. In other words, we interpret the trial court's finding that a warning was inadvisable to mean inadvisable *at that time based on the*

*evidence before the court.*¹¹ Thus, Appellant has not been prejudiced by the trial court's determination as he may raise the issue in the future and attempt to overcome section 4336's presumption that the marriage was of long duration.

II. AWARDS OF ATTORNEY FEES UNDER SECTION 271

A. Trial Court's Award

The trial court's written ruling addressed Respondent's request for attorney fees and cost as follows:

“The Court finds that [Appellant's] filing of the motion on the eve of receiving, and soon thereafter knowing that he would be receiving, in excess of \$300,000 in contingent attorney fees is conduct that increased the cost of litigation. [Appellant's] determined prosecution of the motion with burdensome discovery and hiding the fact of the large contingent fee recovery until his deposition further increased the cost of litigation. [Appellant's] conduct was sanctionable and the Court awards attorney fees and costs against [Appellant] and in favor of Respondent in the amount of \$32,000. The Court determines that the monetary sanction is scaled to [Appellant's] ability to pay. [Citation.] Said sanctions are to be paid to [Respondent's] attorney of record ... at the rate of \$1,500 per month, the 10th of every month beginning July 10, 2014. If any payment is more than ten days late, the entire unpaid balance shall become immediately due and payable with accrued and accruing interest at the legal rate.”

Appellant challenges the award of attorney fees and costs on procedural grounds and on the sufficiency of the evidence.

B. Basic Principles for Awards under Section 271

A court in a family law proceeding may award attorney fees and costs based on the conduct of a party that “frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties” (§ 271, subd. (a).) Such awards are in the nature of a sanction, but the sanctioned conduct need not be frivolous or taken solely for the purpose of delay.

¹¹ That evidence included Respondent's testimony about her health problems, which need not be described here.

(*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1318 (*Tharp*)). “Litigants who flout that policy by engaging in conduct that increases litigation costs are subject to imposition of attorney fees and costs as a section 271 sanction.” (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225 (*Corona*)).

Section 271 states that a court “may” award attorney fees and costs. (§ 271, subd. (a).) The use of “may” means that awards under section 271 are discretionary. (§ 12 [“may” is permissive, not mandatory]; see *Tharp, supra*, 188 Cal.App.4th at p. 1316.)

A trial court must observe certain statutory requirements when awarding sanctions under section 271. Procedurally, the court may award sanctions “only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.” (§ 271, subd. (b).) In addition, “the court shall take into consideration all evidence concerning the parties’ incomes, assets, and liabilities.” (§ 271, subd. (a).) As to the amount of the award, the court shall not impose “an unreasonable financial burden on the party against whom the sanction is imposed.” (*Ibid.*; see *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 828 [sanction must be scaled to payer’s ability to pay and made in light of both parties’ financial circumstances].)

Notwithstanding these requirements, an award need not be (1) limited to the actual cost to the opposing party resulting from the sanctioned party’s conduct or (2) correlated to specific attorney’s fees. (*Corona, supra*, 172 Cal.App.4th at p. 1226.)

C. Standard of Review

Appellate courts review an award of attorney fees and costs under section 271, subdivision (a) for abuse of discretion and will overturn it only if, viewing the evidence in the light most favorable to the award and drawing all reasonable inferences in its favor, no reasonable judge could have made the award. (*Corona, supra*, 172 Cal.App.4th at pp. 1225-1226.) The findings of fact on which the award rests are reviewed for substantial evidence. (*Id.* at p. 1226.)

D. Notice and Due Process

Appellant contends the order imposing \$32,000 in attorney fees and costs was procedurally erroneous because he had no notice that he could be sanctioned for concealing anything and thus had no ability to defend himself at trial.

1. *Facts Relevant to Notice*

The first document mentioning attorney fees under section 271 was the responsive declaration Respondent filed on August 21, 2013, over eight months before the court awarded attorney fees and costs in May 2014. Item 5 of that response addresses attorney fees and costs and includes a box followed by the preprinted words: “I consent to the following order:” Respondent had checked the box and, immediately following the preprinted words, typed: “Husband to pay Wife’s attorney fees and costs pursuant to Family Code section 271.”

In addition, Respondent’s responsive declaration included a three-page attachment of supporting information. The second sentence of the supporting information reiterated Respondent’s position that “[Appellant] should be ordered to pay [her] attorney’s fees pursuant to Family Code section 271.” Furthermore, the last three sentence of the supporting information stated:

“I request the court award attorney’s fees pursuant to Family Code section 271 in that this motion and action frustrated the policy of the law. [Appellant] is a graduate of Boalt Hall and a well-experienced lawyer. Although he is acting *in pro per* he is to be charged with the knowledge that it is mandatory to address Family Code section 4320 factors as part of a motion to reduce permanent spousal support.”

The second document mentioning attorney fees was the income and expense declaration Respondent submitted with her responsive declaration. Item 15 of the income and expense declaration supported Respondent’s request for attorney fees by stating she had paid her attorney \$6,500 in fees and costs from her savings and specified \$300 as her attorney’s hourly rate. This information notified Appellant of the economic consequences that his motion was having on Respondent and of his potential exposure.

The foregoing documents that Respondent filed in August 2013 were deemed adequate by the trial court to raise the issue of attorney fees and costs. The court's September 3, 2013, minute order continued the contested hearing regarding spousal support to December 5, 2013, and explicitly stated the matter of attorney fees would be addressed at the end of the contested hearing. This order provided Appellant with clear notice that the question of her attorney fees would be addressed at the same hearing that addressed modification of the spousal support.

Before the December hearing, Respondent filed additional papers that repeated her request for attorney fees and costs and provided Appellant with more information about that request. Specifically, on November 22, 2013, Respondent filed a trial brief and documents that addressed (1) the factors listed in section 4320 and (2) attorney fees. Those documents included a "REQUEST FOR ATTORNEY'S FEES AND COSTS ATTACHMENT" on Judicial Council form FL-319 and a "SUPPORTING DECLARATION FOR ATTORNEY'S FEES AND COSTS ATTACHMENT" on Judicial Council form FL-158. The later form requested the court to consider the following facts: "This year [Appellant] has earned over \$300,000. He is requesting that spousal support be reduced because he cannot afford to pay me \$2,600 per month."

Respondent's trial brief restated her position that "[Appellant] should be ordered to pay [her] attorney's fees and costs." The brief asserted that (1) at the time of the September 3, 2013, hearing, Appellant was aware that his case with a large receivable was about to settle, yet he continued with this litigation and (2) Appellant "initially withheld information regarding the large receivable." Under the trial brief heading "ATTORNEY'S FEES," Respondent requested attorney fees based on the needs based provisions of the Family Code as well as section 271. Respondent supported her by asserting (1) Appellant's papers had failed to include the mandatory analysis of the factors in section 4320; (2) the income from his law practice had increased, not decreased, since the entry of judgment based on their 2010 stipulation; (3) Appellant had

maintained the litigation after receiving income over \$300,000; and (4) Appellant unnecessarily subjected Respondent to a deposition and large request for production of documents when he knew the only assets she had were those received in the dissolution.

Appellant's trial brief, filed on the same day as Respondent's, devoted a page and a half to the issue of attorney fees. Appellant asserted his motion to modify spousal support was filed in good faith and out of necessity. He stated that he "had no idea as of June 25, 2013, if he or his professional corporation would receive [income from the Mariani settlement], and even that income does not mitigate the crisis he faces, principally because he became so indebted out of necessity while accruing the receivables that lead to that income."¹² In making these assertions, Appellant partially addressed the argument that he had not made a complete and timely disclosure of information relating to the Mariani settlement and the fees he would collect.

The December 2013 hearing date was continued and the parties subsequently filed updated papers in early April 2014. The updated papers anticipated the contested hearing beginning on April 29, 2014 (which it did). Appellant's papers included an updated trial brief, but that brief did not address Respondent's request for attorney fees and, thus, did not address the additional grounds set forth in Respondent's November 2013 trial brief.

Respondent did not file an updated trial brief, but her April 2014 income and expense declaration stated she had paid \$11,161 in attorney fees and costs and still owed \$9,470 to her attorney.

2. *Analysis of Notice and Due Process Claim*

First, we reject the legal argument that an award under section 271 is allowed only after a noticed motion at the end of the litigation. The text of subdivision (b) of section

¹² In part I.D.5, *ante*, we concluded the trial court rejected Appellant's view of necessity and accepted Respondent's view that Appellant's debt is attributable to overspending in an attempt to maintain a standard of living higher than justified by his earnings.

271 requires only notice and an opportunity to be heard. (See *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1529 [§ 271 does not specify the form of notice to be provided].) If the Legislature had intended to require a noticed motion, it would have said so.

Furthermore, *Niko v. Foreman* (2006) 144 Cal.App.4th 344 (*Niko*), the case cited by Appellant, does not establish a noticed motion is required. In *Niko*, the court quoted a practice guide for the proposition that section 271 requests *generally* should be made by noticed motion and, *ordinarily*, at the end of litigation when the extent and severity of the party's bad conduct can be judged. (*Niko, supra*, at p. 369.) This proposition is not an absolute rule and does not purport to interpret the "notice" requirement in section 271, subdivision (b).

Second, we conclude the trial court did not abuse its discretion by considering the request without a noticed motion. The statutory requirement for notice was satisfied because (1) Appellant had actual notice that Respondent was seeking attorney fees under section 271 over seven months before the contested hearing; (2) in November 2013 Respondent requested attorney fees using Judicial Council forms FL-319 and FL-158;¹³ and (3) Respondent's November 2013 trial brief stated (a) the grounds that Appellant had acted contrary to the law's policy by continuing to pursue modification after receiving the fees related to the Mariani settlement and (b) her assertion of fact that Appellant had "initially withheld information regarding the large receivable." We note that this latter assertion is not that Appellant concealed the *existence* of the receivable, but that he concealed information (i.e., details) about the receivable. In addition, the fact that Respondent's trial brief did not repeat her allegation about withheld information in the paragraph under the heading "ATTORNEY'S FEES" did not render that allegation

¹³ Use of these Judicial Council forms is not mandatory. (*In re Marriage of Sharples* (2014) 223 Cal.App.4th 160, 163 [trial court's conclusion that forms were mandatory was reversible error].)

obsolete or deprive Appellant of notice that (1) the withholding of information about the receivable would be an issue pursued at the contested hearing and (2) his withholding information could be regarded as a lack of “cooperation” for purposes of section 271. Thus, Appellant’s argument that he was never placed on notice that he should come to trial prepared to show his disclosure of the receivable relating the Mariani settlement was proper and accurate is contrary to the record.

The foregoing documents were available to Appellant over five months before the contested hearing began on April 29, 2014. They provided Appellant with the notice required by section 271, subdivision (b). Also, Appellant’s opportunity to respond to these documents, both in the papers he filed in April 2014 and at the contested hearing, provided him with the opportunity to be heard required by section 271, subdivision (b). Therefore, we conclude Appellant received adequate notice and his due process rights were not violated.

E. Other Alleged Inadequacies Relating to Notice

Appellant’s opening brief addresses the possibility that the award under section 271 was based “not just on concealment of a large A/R but on other grounds.” Appellant contends the other grounds were not set forth in the opposition papers that Respondent filed in August 2013 or in her subsequent trial brief. Appellant also contends that the court and opposing counsel did not advise him “at trial that a failure to withdraw his motion upon receipt of his A/R recovery or failure to disclose it before his deposition or the mere act of noticing a deposition and document production for [Respondent] were sufficient grounds for imposition of sanctions, ... so that he would have been able to specifically argue these points there.”

This argument overlooks material facts set forth in part II.D.1, *ante*, regarding the contents of Respondent’s trial brief and other papers. We need not repeat those facts here as it is sufficient to note that those documents identified other factual bases that

contributed to Respondent's position that she should be awarded attorney fees and costs under section 271. To the extent that Appellant's arguments imply a high degree of specificity is required to provide him with adequate notice, we conclude the notice requirement of subdivision (b) of section 271 does not require the requesting party to explain in explicit detail how each fact alleged relates to the statutory grounds. Furthermore, California law does not require a higher degree of specificity because Appellant was representing himself in the litigation. (See *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284-1285 [self-representing litigants are subject to the standards generally applied by California courts in civil litigation].)

F. Evidentiary Support for Concealment Finding

The trial court's finding that Appellant hid information about a large contingent fee recovery both when he filed his motion to modify spousal support and thereafter is supported by Appellant's exhibit No. 11, the personal financial statement Appellant prepared for a bank in March 2013, over three months before he filed the motion.

In that document, Appellant "estimated his annual income for the 2013-2014 'loan year' at \$550,000, on the hope that he would get paid based on a distribution to the _____ discussed in last year's [personal financial statement] and in conversations with Bank officers. If the _____ A/R is not collected during the next year, [Appellant] expects to gross approximately \$150,000 to \$175,000 from his law practice; and to have proportionately less tax liability."

Appellant's declaration in support of his motion to modify spousal support stated, "I had hoped to collect a large law practice A/R by this time, but I have not. Because of attorney-client confidence I am not able to disclose the case or amount or circumstances, but would do so in camera if ordered to do so. That case continues in litigation, and the recovery has not happened and cannot yet happen for an unknown number of months." His declaration also stated that "at present I am netting only about \$1,000/month from my

law practice, with prospects for the future uncertain at best, and all my receivables are already claimed—by outstanding debt.”

On May 15, 2013, about 40 days before Appellant’s motion to modify, the Second Circuit filed its decision in *Ransmeier v. Mariani* (2d Cir. 2013) 718 F.3d 64. This decision and the two early published decisions unequivocally demonstrate that a significant amount of information about the case that Appellant claimed was protected by the attorney-client relationship was in the public domain and, thus, not confidential. Even if Appellant’s expressed view of necessity to withhold specific details about the identity and amount of anticipated income from the litigation were correct, there was no restriction on divulging general information about the likelihood of a substantial recovery that would better inform the court regarding Appellant’s claim of changed circumstances. Thus, the record shows Appellant failed to disclose information about the contingent attorney fee recovery—information that would have (1) undercut his contention that his income had decreased since the May 2010 stipulation and (2) probably focused the litigation on the dispute about the alleged necessity of the debt that he had incurred since the stipulation was signed.

Besides Appellant’s inadequate disclosure of information about the Mariani litigation, the trial court also based the award under section 271 on other conduct. The court explicitly found that Appellant’s determined prosecution of the motion with burdensome discovery increased the cost of litigation. Appellant has not challenged this finding on appeal.

Therefore, we conclude that the challenged findings of fact related to the award under section 271 had adequate evidentiary support.

G. Evidentiary Support for Finding Relating to Financial Burden

Appellant also contends that there is insufficient evidence to support the trial court's finding that the sanction of \$32,000 (payable at the rate of \$1,500 per month) was scaled to Appellant's ability to pay.

Appellant's April 7, 2014, income and expense declaration stated that he had inherited approximately \$265,000, which he "devoted to relocation, debt repayment and 2013 tax reduction." An attachment to the declaration stated \$100,000 of the inherited funds were used as a down payment and approximately \$8,000 were used for closing costs. Appellant's trial brief stated about \$30,000 of the \$250,000 received from the inheritance remained and was in an IRA and he estimated receiving another \$15,000. The down payment referenced in the attachment related to the purchase of a house in Temecula. The acquisition of that house cut Appellant's housing expenses by approximately \$2,000 per month.

We conclude the evidence relating to the \$45,000 of inheritance that had not been applied for other purposes and the reduction in his housing expense is sufficient to establish that the payment of Respondent's attorney fees and costs would not impose an "unreasonable financial burden" on Appellant for purposes of section 271, subdivision (a).

DISPOSITION

The order is affirmed. Respondent shall recover her costs on appeal.

FRANSON, J.

WE CONCUR:

KANE, Acting P.J.

POOCHIGIAN, J.