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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LEESA and MICHAEL
JUERGENS.

LEESA JUERGENS,

Appellant,

v.

MICHAEL JUERGENS,

Respondent.

G043884, G044523, G044735

(Super. Ct. No. 05D009340)

O P I N I O N

Appeals from judgments and orders of the Superior Court of Orange County, Daniel T. Brice (retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and James L. Waltz, Judges. Appeal Nos. G043884 and G044523 dismissed. Judgments and orders addressed in appeal No. G044735 affirmed.

Law Offices of Steven R. Young and Jim P. Mahacek for Appellant.

Minyard Morris, Michael Morris, Rachel Hass; Snell & Wilmer and Richard A. Derevan for Respondent.

* * *

In marital dissolution proceedings, Leesa L. Juergens appeals from three judgments and related orders. The first two appeals (Nos. G043884 and G044523) are taken from nonappealable interlocutory judgments and must be dismissed. However, we construe all of the issues Leesa¹ has briefed as being challenges to the third and final judgment of January 13, 2011 and related intermediate rulings (appeal No. G044735), and thus consider each point she raises.

Leesa has addressed a plethora of issues. She says that each of Judge Daniel T. Brice and Judge James L. Waltz made a series of errors. She has failed to meet her burden to show error. We affirm the January 13, 2011 judgment and related intermediate rulings (No. G044735).

I

FACTS

A. INTRODUCTION:

Leesa married Michael E. Juergens on March 26, 1994. Leesa and Michael had three children, born in 1994, 1998 and 1999, respectively.

Michael was a principal in Deloitte & Touche USA LLP (Deloitte & Touche) and had a substantial income. He was not a “partner” in the firm, because he was not a certified public accountant. Leesa had an AA degree. She had been employed at various times over the years. She had sold pagers for Pagenet, from 1989 to 1996, earning about \$35,000 in her final year. She had also worked as a sales representative for Verizon Wireless, ending her employment in 2000. She made \$90,000 in her last year with that company. In addition, Leesa worked as a loan officer in 2002, making about \$7,000 or \$10,000 in 60 days. Leesa also acquired a real estate license in 2002. She received a number of commissions from 2002 through 2005.

¹ “Hereafter, we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. [Citation.]” (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

Michael and Leesa separated on October 1, 2005. Leesa commenced dissolution proceedings six days later.

B. PROCEDURAL HISTORY:

Unfortunately, this case has a tortured and drawn-out procedural history. Because Leesa makes much of the court's failure to get judgments and orders entered, we slog through that history from start to finish.

A trial took place over various dates in May 2008, before Judge Brice. Judge Brice issued a tentative statement of decision that was filed on June 9, 2008. It addressed child custody, support and counseling, title to certain real properties, and tax liability. A month later, the court held a hearing on the tentative decision. The court addressed certain additional matters, including a management company, costs of health insurance, attorney fees, DissoMaster calculations, and a wage assignment. Leesa thereafter filed a request for a further statement of decision or clarification of the statement of decision. She also filed objections to a proposed statement of decision prepared by Michael.

At a hearing on October 14, 2008, the court made additional orders concerning certain properties located in Arizona, certain lines of credit, and spousal support. Judge Brice ordered counsel to prepare formal orders. In a minute order dated November 6, 2008, the court corrected the October 14, 2008 minute order nunc pro tunc to reflect that the court had reviewed two proposed statements of decision and declined to sign either one.

On December 3, 2008, Leesa filed an order to show cause re modification of child custody and support, and for attorney fees.

On January 12, 2009, Judge Brice issued a formal statement of decision with respect to the matters heard at trial. That formal statement of decision, prepared by Michael's counsel, addressed child and spousal support, a deferred tax liability arising

out of Michael's earnings, title to 11 real properties, and attorney fees and costs. However, many issues between the parties remained for resolution.

A trial was set for January 14, 2009, before Judge Waltz. The parties framed issues pertaining to life insurance, Hawaii property mortgage and maintenance issues, the value of the Mission Viejo residence, a home equity line of credit, a division of certain Palms Las Vegas property and a related loss, a division of loss carry forwards pertaining to certain Arizona properties, retirement accounts and IRA's, employment benefits, airline miles, a timeshare, furniture and furnishings, and attorney fees.

On May 13, 2009, the parties entered into a stipulation for partial judgment on reserved issues and Judge Waltz so ordered. The parties agreed as to the characterization of a number of assets as either community property or separate property, as designated on an attached schedule. The parties further agreed that the characterization of certain disputed assets would be determined by a special master, pursuant to Code of Civil Procedure section 638. In addition, they agreed that the special master would make recommendations to the court on eight issues, including child custody, support and counseling, spousal support, life insurance, income for DissoMaster purposes, and attorney fees.

The court appointed Attorney Philip Seastrom as the special master, and directed that he hold a hearing on July 8, 2009. The court hearing on the special master's report was set for July 28, 2009. The hearing before the special master was continued to July 23, 2009. However, on July 16, 2009, Leesa changed counsel and substituted in her fifth attorney, Elizabeth Nigro. Attorney Nigro, on behalf of Leesa, filed an ex parte application to take the hearing before the special master off calendar because Leesa expected to file for bankruptcy. In addition, Leesa claimed the division of community property set forth in the May 13, 2009 stipulation and order was unequal, so she sought to renegotiate the stipulation and order.

Michael, upon learning that Leesa contemplated filing for bankruptcy, filed

an ex parte application on July 29, 2009, asking the court to enter judgment. He requested that the court enter a judgment incorporating the decisions of Judge Brice plus the provisions of the May 13, 2009 stipulation and order.

Counsel for each party appeared for the ex parte proceedings. Attorney Nigro, on behalf of Leesa, opposed Michael's application and argued there was no urgency regarding entry of judgment. Michael's counsel asserted the matter was urgent because of Leesa's announced intention to file for bankruptcy. In response, Attorney Nigro represented to the court no bankruptcy filing was planned that week because Leesa's bankruptcy counsel was on vacation. Based on that representation, the court postponed ruling and set an expedited briefing schedule. It announced that it would "rule late Friday afternoon between 4:00 and 4:30 after review of the briefs" In its July 31, 2009 minute order, the court stated that inasmuch as there was "no legal reason not to enter the judgment, the court was poised to do so until served at 4:15 p.m. with a Notice of [Leesa's] Chapter 7 bankruptcy filing and Notice of stay of proceedings." Consequently, Judge Waltz ordered the family law proceedings stayed.

A judgment of dissolution as to status only was entered on July 29, 2009.

About a week later, on August 6, 2009, Leesa filed an order to show cause re modification of child custody and visitation, for a move-away order, and for entry of judgment on certain issues not precluded by the bankruptcy stay. She represented that she could not afford to make the mortgage payments on the family residence, so she sought to relocate the children to Arizona. The court denied the move-away order.

At a hearing in September, the parties argued the effect of the bankruptcy stay. Michael requested that judgment be entered notwithstanding the bankruptcy proceedings, and Leesa opposed his request. The court continued the matter.

In October 2009, a second trial took place, over a period of several days, before Judge Waltz. The matters at issue included those raised in Leesa's orders to show cause re modification filed in December 2008 and August 2009. The parties stipulated

that there was a change of circumstances bearing upon custody and visitation. They further stipulated to the bifurcation of those issues. At the conclusion of the trial, the court ordered the parties to prepare proposed findings and orders and closing arguments, and to submit briefs.

On October 13, 2009, Leesa filed a memorandum of points and authorities in opposition to Michael's pending motion for entry of judgment on the decisions of Judge Brice and the provisions of the May 13, 2009 stipulation and order. She argued, *inter alia*: "[T]he intent of the parties was to meet before Special Master Philip Seastrom to resolve the remaining issues of the case. It was clearly anticipated the judgment would be prepared and entered after the hearing before Mr. Seastrom. [My] financial collapse and bankruptcy occurred before that could happen. The failure of this condition precedent should bar any argument by [Michael] that he is merely requesting the Court to perform a 'ministerial function.'" She further argued that entry of judgment would violate the bankruptcy stay and that there had been substantial changes in circumstances since May 13, 2009.

On October 30, 2009, the court denied Michael's motion to enter judgment. It stated that the act of entering judgment in the matter would not be a ministerial act and that, therefore, the bankruptcy stay precluded entry of judgment. With regard to the date Leesa contemplated filing for bankruptcy, the court, in its October 30, 2009 minute order, "agree[d] it was mis-led but [concluded] the stay was no less effective."

A minute order encapsulating Judge Waltz's 26-page tentative statement of decision was filed on January 19, 2010. It addressed child custody and visitation, child and spousal support, and attorney fees and costs. Leesa filed lengthy objections to the tentative statement of decision. The court's final statement of decision, by Judge Waltz, was filed February 10, 2010.

Michael thereafter filed a proposed judgment, to which Leesa objected. On March 11, 2010, the court ordered Michael to re-submit a proposed judgment. After he

did so, Leesa again filed objections.

A judgment on reserved issues, prepared by Michael's counsel, was ultimately entered on April 9, 2010. It addressed child custody, support and visitation, spousal support, and attorney fees and costs.

Leesa filed a notice of intention to move for a new trial. At a June 4, 2010 hearing on the matter, the court denied the motion and ordered Michael to pay \$18,263 plus interest in arrears, payable \$1,000 per month beginning July 1, 2010. The court ordered the judgment to be amended nunc pro tunc to include the new payment schedule on arrears and also ordered Michael to prepare a formal order. Because the parties disagreed on the language and the matter was not going to be resolved by July 1, 2010, Michael filed an application to have the language of the judgment settled nunc pro tunc.

On July 2, 2010, Leesa filed a notice of appeal from the April 9, 2010 judgment. By minute order of July 13, 2010, the court ordered that the language proposed by Michael be used for the amended judgment except as otherwise modified by the minute order.

Leesa filed a motion for entry of judgment based on the June 2008 and January 2009 statements of decision, complaining that the court had left Judge Brice's statements of decisions in limbo. She offered one proposed judgment based on each statement of decision. Michael opposed her motion, given the bankruptcy stay, the fact that the court had subsequently made orders in modification of those contained in the statements of decision, and for a variety of other reasons. He offered a competing proposed judgment, to be entered if not in violation of the bankruptcy stay.

On November 3, 2010, the court, Judge Waltz, approved a proposed amended judgment submitted by Michael in September 2010, and the amended judgment was entered that date. The amended judgment addressed the matters raised in the April 9, 2010 judgment, as amended per court order. On November 10, 2010, Leesa filed her second notice of appeal, from the amended judgment entered November 3, 2010 nunc pro

tunc to April 9, 2010.

Leesa filed a response to Michael's opposition to her motion for entry of judgment with respect to the matters decided by Judge Brice. In that response, she represented that she had received her bankruptcy discharge in June 2010.

The court granted Leesa's motion in part and denied it in part. A judgment on reserved issues, addressing property division, was entered on January 13, 2011, nunc pro tunc to "June 10, 200i."² Leesa filed her third notice of appeal.

Leesa moved to consolidate the three appeals. We granted her requests.

II

DISCUSSION

A. JUDGE BRICE'S DECISIONS:

(1) Imputed Income—

With regard to child support calculations, the June 2008 tentative statement of decision stated in part: "For purposes of the Dissomaster, [Leesa] shall be entered as head of household with four (4), wages of \$2,900.00 monthly, and itemized deductions of \$6,421.00." The wording of the January 2009 final statement of decision was essentially the same.

Leesa argues Judge Brice erred in imputing income of \$2,900 per month to her, for various reasons. For one thing, she claims there was no evidence to show that she could earn that amount of money given the state of the economy. She says Michael had the burden to produce evidence showing that she had a measurable earning capacity and available employment opportunities, and that he did not do so.

However, Leesa admits that at the trial in May 2008, the parties stipulated that she had an earning capacity of \$2,900 per month. Nonetheless, she argues "Michael cannot rely on the doctrine of imputed income to validate Judge Brice's order based

² In her appellant's reply brief, Leesa represents that, on September 28, 2011, Judge Waltz corrected the typographical error to read, "June 12, 2008."

solely on [her] stipulation” Leesa overlooks the fact that when she stipulated to an earning capacity of \$2,900 per month, that obviated the need for Michael to put on evidence as to the point.

In addition to complaining about Michael’s failure to put on evidence, Leesa complains about the court’s failure to make findings. She contends a court cannot impute income without making findings on both earning capacity and available employment, but that Judge Brice failed to make any specific findings on those points, or for that matter, on her ability to work, income, education, imputed income, or the best interests of the children.

Leesa contends she timely filed a request for a statement of decision, so the appellate court cannot infer that the trial court made findings necessary to support the imputation of income. Consequently, she says, the trial court must recalculate spousal support nunc pro tunc to May 8, 2008.³

We disagree. The tentative decision was mailed on either June 9 or June 10, 2008. (There is a discrepancy in the record regarding that detail.) Leesa thereafter had 10 days in which to request a statement of decision and “specify those controverted issues as to which [she was] requesting a statement of decision.” (Code Civ. Proc., § 632.) In other words, Leesa could have requested that the court address any factors she thought may have been overlooked and make any necessary findings. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134, 1136; *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.) However, she did not make a timely request. Consequently, we apply the standard rule: “A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]” (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at p. 1133; *Tusher v.*

³ Although Judge Brice’s tentative statement of decision and final statement of decision each use the \$2,900 figure in connection with child support, Leesa says in her opening brief that it is spousal support that must be recalculated.

Gabrielsen (1998) 68 Cal.App.4th 131, 140; *In re Marriage of Ditto, supra*, 206 Cal.App.3d at p. 649.) Put another way, we presume “““that the court performed its duties in a regular and correct manner absent a clear showing to the contrary. [Citation.]””” (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 494.) So, in presuming the findings and order after hearing to be correct, we presume the court considered every factor it was required to consider and we infer that the court made all findings necessary to support its decision.

Leesa ultimately filed a request for further statement of decision or clarification on August 1, 2008. However, she cites no authority for the proposition that the court was then required to address the points she so tardily raised.

(2) *Attorney Fees*—

At trial in May 2008, each party requested attorney fees. The trial was continued to July 11, 2008. On that date, Leesa filed declarations and points and authorities in support of an attorney fees request. Leesa declared that she had spent \$392,947 in fees. She listed 12 persons to whom she had paid fees, including at least five lawyers, three forensic accountants and a child custody evaluator. Leesa supported her fee request with the declaration of only one attorney, her then current attorney, Patrick McCall. He declared that he had incurred \$90,764.25 in fees and costs on Leesa’s behalf.

Also on July 11, 2008, Michael filed the declaration of his attorney, Michael Morris, in support of a request for attorney fees and costs pursuant to Family Code sections 271 and 1101. Attorney Morris declared that his firm had incurred fees and costs in the amount of \$304,262 through June 2008. He declared that Leesa’s unreasonable conduct during the case was largely responsible for the high fees incurred. He stated, for example, that she had hired four separate attorneys in the span of about two and a half years, sought ex parte continuances of trial dates four times, changed her position on the characterization of the parties’ 13 Arizona rental properties—first having declared under penalty of perjury that they were community property and later having

asserted that they were her separate property, and had gone through three different forensic accountants, two appraisers of the family residence and two appraisers of furniture and furnishings.

At the end of the proceedings on July 11, 2008, the court announced an award of \$25,000 in attorney fees, payable by Michael directly to Attorney McCall, at the rate of \$2,000 per month until paid. The court further ordered that each party submit proposed findings to the court. A minute order reiterating the ruling from the bench was filed July 11, 2008.

The record does not contain a copy of any proposed findings prepared by counsel for Leesa. However, it does contain a copy of her request for “further” statement of decision or for clarification, filed August 1, 2008. In that document, she raised 10 questions regarding attorney fees. However, the document was filed more than 10 days after the court announced its decision on the attorney fees matter and requested that the parties prepare proposed statements of decision. Consequently, it was untimely filed. (Code Civ. Proc., § 632.) We presume the findings and order after hearing to be correct, and we infer that the court made all findings necessary to support its decision. (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at p. 1133; *In re Marriage of Ditto, supra*, 206 Cal.App.3d at p. 649.)

Ultimately, a statement of decision, prepared by Michael’s counsel, was filed on January 12, 2009. The statement of decision stated in part, “The Court . . . makes the following order: The \$25,000 previously given to [Leesa] towards attorney fees will not be reimbursed to [Michael]. The Court awards an additional \$25,000 in attorney fees to [Leesa] . . . to be paid directly to Mr. McCall at the rate of \$2,000 per month beginning on September 1, 2008 until the balance is zero.”

Leesa makes several assertions of error. She contends Judge Brice “made no true findings,” did not consider the appropriate factors in making his decision and, to the extent he did consider such factors he abused his discretion. We disagree.

First off, the January 2009 statement of decision contained five paragraphs explaining the court's decision on attorney fees. The court stated, inter alia, that it "considered the overall financial circumstances of each party pursuant to [*In re Marriage of Keech* (1999) 75 Cal.App.4th 860]," "the amount of support being paid, the available cash and assets to each party, the liabilities and obligations of each party and the source of money [Michael] used to pay his fees." "The Court also considered testimony that [Michael] borrowed from his 401(k) to pay fees and that [he] had no ability to contribute to [Leesa's] fees." "The Court [found] that the substantial fees incurred by both parties were absolutely appropriate for [the] case and the high quality of professional performance by each counsel. But recognizing that it would be too much of a burden to be awarding it as a sole burden of one party or the other, equitably the Court found that, based upon the obligations and resources of the respective parties the award from [Michael] to [Leesa] was the correct amount of award." Plainly, it is not the case that the court failed to make any findings. We turn now to Leesa's assertion that Judge Brice abused his discretion in making the award he did.

In the January 2009 statement of decision, Judge Brice found that Michael had transmuted his community property interest in 11 properties to the separate property of Leesa. Consequently, the court confirmed those 11 properties as Leesa's separate property. In addition, it allocated one property in Surprise, Arizona to Michael and another property in Surprise, Arizona to Leesa.

In addition, the court found that Michael's monthly earnings were \$18,025 and used that figure as a starting point for the calculation of child support. As noted previously, it used \$2,900 as Leesa's monthly income. The court ordered Michael to pay Leesa \$2,871 per month in child support, plus 13.24 percent of Michael's periodic distributions. It also credited him with a \$1,020 monthly health insurance obligation and ordered him to pay \$2,150 per month in spousal support. As further noted previously, the court observed that Michael had needed to borrow from his 401(k) to pay attorney fees

and that he had no ability to pay Leesa's attorney fees. The court nonetheless ordered Michael to pay an additional \$25,000 in attorney fees on Leesa's behalf, \$25,000 already having been paid to her.

In her opening brief, Leesa devotes six pages to the discussion of Judge Brice's errors in his attorney fees award. In her reply brief, she offers another seven pages on the topic. Alluding only to the June 2008 tentative statement of decision and the January 2009 statement of decision, Leesa compares the relative financial strength of the parties, including their incomes and their assets. However, nowhere in her 13 pages of discussion does she cite any portion of the record containing evidence of the parties' income or assets. For example, Leesa states that she had no liquid assets and was awarded only the family residence plus certain rental properties in Arizona. However, she cites no portion of the record to show the values of the dozen or so properties she received or their respective income streams.

Leesa concedes that Judge Brice considered the factors set forth in *In re Marriage of Keech, supra*, 75 Cal.App.4th 860. The court in that case addressed factors to be considered in awarding attorney fees under Family Code sections 2030 and 2032. (*In re Marriage of Keech, supra*, 75 Cal.App.4th at pp. 866-867.) However, Leesa nonetheless asserts that Judge Brice erred in failing to consider the disparity in income between the parties, the ability of Leesa to pay her own attorney fees, and the need to level the playing field between the parties. However, inasmuch as we do not know the amount of income Leesa was receiving from the many rental properties, we have no basis for concluding that Judge Brice erred in making his determination.

“[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] “[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. . . .”

[Citation.]” (*In re Marriage of O’Connor* (1997) 59 Cal.App.4th 877, 881.) Leesa has not made a clear showing of abuse.

Finally, Leesa complains that Judge Brice never reduced his fees award to judgment, the court clerk never entered judgment on the statement of decision, and Judge Waltz refused to enter judgment on the fees award when asked to do so. However, she does not say what prejudice she suffered or what should be done about it at this date. The April 2010 judgment contains the attorney fees award as determined by Judge Brice, and Attorney Morris had filed a declaration stating that Michael has paid the \$25,000 as ordered. Leesa’s complaints lead nowhere.

(3) Child Support—

The January 2009 statement of decision states: “Pursuant to Exhibit 209 and thereafter, CPA Hunt’s finding of [Michael’s] earnings being \$18,025 monthly is our starting point and is the figure to be used in this order for calculating child support.” Leesa claims Judge Brice made a “crucial error” in finding that Michael’s income was \$18,025 per month. She says that Hunt had opined Michael’s base monthly income was \$18,750 and that he had deducted therefrom \$1,999 per month as Michael’s “buy-in” with respect to Deloitte & Touche. She says the \$1,999 should not have been deducted. Also, she observes that the court should have used \$18,751 as a base figure, not \$18,206, so there was another error of \$545. Thus, she claims there are total errors of \$1,999 plus \$545 per month, so the figure the court should have used was \$20,749.⁴

Michael, on the other hand, says that \$18,025 per month was exactly the figure Hunt used, just as the statement of decision states. In support of her contrary position, Leesa cites trial exhibit 209. However, the copy of trial exhibit 209 as contained in her appellant’s appendix is nothing but a one-page face sheet of a report of

⁴ These are indeed the figures Leesa uses in her opening brief. We agree with Michael that her “arithmetic is hard to follow.”

gross available cash flow as prepared by White, Zuckerman, Warsawsky, Luna, Wolf & Hunt LLP. The entire body of the report is missing. Consequently, exhibit 209 provides no support for Leesa's assertions of error.

In her reply brief, Leesa says the report is contained elsewhere in the appellant's appendix and she was following court policy in not including the same exhibit in the record more than once. Yet she still does not cite to any particular pages of the record or the report in support of her claims. Michael directs us to a copy of a 20-page report that would appear to be the one Leesa is addressing. However, it is not our obligation to search 20 pages of mathematical figures to find support for Leesa's assertions of error. Having failed to provide an adequate record for review or to cite to the record in support of her point, as the case may be, her argument regarding child support is deemed waived. (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 402; *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.)

(4) *Tax Liability*—

At trial before Judge Brice, certified public accountant Andrew L. Hunt testified as to income tax liabilities arising out of Michael's earnings at Deloitte & Touche. He testified that while Deloitte & Touche paid its principals based on the accrual basis, it reported income to its principals on a cash basis. "In other words," he said, "the difference between accrual basis and cash basis is typically the bill[ed], but uncollected client receivables and billings" Hunt explained that the tax will become due when the taxable income catches up with the distributions that have already been made.

Hunt further stated, "the deferred tax calculation is made by Deloitte & Touche on behalf of its partners and principals on an annual basis so that they can plan accordingly for their tax situations." In this case, Deloitte & Touche had determined that the deferred tax liability was \$78,708. Since a portion of the income generating the deferred tax liability was paid after separation, Hunt apportioned the tax liability

accordingly. He determined that the community portion of the deferred tax liability was \$58,343. Hunt “then reduced [that figure] by 33 percent down to [\$]39,090 to give consideration to the present value of the timing of the tax payment.”

In the January 2009 statement of decision, the court ordered that Michael be charged \$19,545, which is half of \$39,090, as his pro rata share of the deferred tax liability. It also directed that Leesa be liable for her pro rata share.

The court aptly found: “Deloitte & Touche LLP USA pays distributions based upon the accrual method of accounting. In essence, distributions are based upon the value of Deloitte & Touche LLP USA’s accounts receivables in a given year. As taxes are paid by Deloitte & Touche LLP USA on the cash basis method of accounting, the community is not required to pay the full extent of the tax liability for these distributions until the accounts receivables are collected. [¶] . . . The distributions at issue were those earned during the marriage Therefore, a tax liability was incurred during the marriage by the community. [¶] . . . It would be inequitable for [Michael] to have to [bear] the entire tax burden for distributions the community received. [Leesa] equally derived a benefit in that she got the use of these funds on a tax deferred basis and therefore, should share in the burden.” These findings are supported by the evidence.

Leesa claims Hunt’s figures were based on “*voodoo economics*” and that his theory of liability had been rejected by the Supreme Court in *In re Marriage of Fonstein* (1976) 17 Cal.3d 738. We disagree.

The issue in *In re Marriage of Fonstein, supra*, 17 Cal.3d 738 was the valuation of the husband’s interest in his law partnership. (*Id.* at p. 743.) The court started with the total amount of payments that would be made to the husband if he withdrew from the partnership, discounted that income stream by seven percent to reach a present value, and then discounted the present value based upon an estimate of potential income taxes. The wife challenged the final step—the discount based upon an estimate of taxes. (*Id.* at p. 744.)

The Supreme Court agreed that the trial court had erred in applying the final step. It stated: “While the parties assumed that the partnership would be valued on the basis of a withdrawal value, the fact remains that [the husband] was *not* withdrawing and no tax liability was incurred during the marriage. There is therefore no liability to be charged to [the wife] or against her share of the community property. [Citation.]” (*In re Marriage of Fonstein, supra*, 17 Cal.3d at p. 750.)

In the matter before us, however, we are not addressing the valuation of an asset, the transfer of which could generate a future tax liability. We are concerned with a deferred tax liability generated with respect to income already distributed during the marriage. This case falls under “the general rule that upon a division of community property under a divorce decree the former husband and wife each take the part awarded subject to prior liens; and . . . that the part awarded either wife or husband is subject to community debts not reduced to liens.” [Citations.]” (*In re Marriage of Fonstein, supra*, 17 Cal.3d at pp. 749-750.) “In dividing the property equally . . . , the court must distribute both the assets and the obligations of the community so that the residual assets awarded to each party after the deduction of the obligations are equal. [Citations.]” (*Id.* at p. 748.)

Leesa argues that the court should not have accepted Hunt’s tax estimate because it was too speculative. First of all, it was based on Deloitte & Touche’s \$78,708 tax liability estimate, which was only an estimate with inherent flaws not a quantified tax liability. Second of all, Hunt reduced the community portion of that estimated tax liability by 33 percent—another estimate. Estimate upon estimate is, she contends, just too uncertain. However, Leesa did not offer a competing estimate of tax liability.

Income was paid to the community and, as Hunt opined, a taxable event has already occurred. While the exact amount of the tax that will be due has not yet been quantified, Hunt provided a reasoned estimate. It constitutes substantial evidence in support of Judge Brice’s determination. Leesa has not demonstrated error.

B. COURT ERROR:

Seeming to ignore the tortured procedural history of the case, Leesa complains that no judgment was entered either after Judge Brice issued his tentative statement of decision in June 2008 or after he issued his final statement of decision in January 2009. This gripe notwithstanding, in her opening brief, she states: “Leesa assumes that Judge Brice could have modified his first Statement of Decision before entry of judgment . . . so the result should be a judgment exactly as set forth in Judge Brice’s original statement [of] decision except as Judge Brice specifically modified it by his second. [¶] Although Leesa cannot appeal from the Statement of Decisions, she can and does appeal from Judge Waltz’ three (3) judgments that sometimes do and sometimes do not comport with Judge Brice’s findings.”

Given this concession, we need not rehash the procedural history and determine whether at any given point in time a partial judgment should have been entered on the issues passed upon by Judge Brice. We simply turn to the many arguments Leesa makes based upon Judge Waltz’s rulings.

C. JUDGE WALTZ’S RULINGS:

(1) Confusion—

Leesa complains at length that Judge Waltz exhibited confusion and inconsistency in applying standards of law at an evidentiary hearing. Under the topic heading regarding Judge Waltz’s purported confusion, Leesa provides 11 pages of discussion on procedural background. Ultimately, she asserts that “every decision that Judge Waltz made, with the exception of custody for [C.], and an increase (not decrease) in child support for [C.] totally lacked both the pleading of, and evidence as to, a ‘change of circumstance.’” To the extent Leesa may be inviting this court to research the record and compare all rulings of Judge Waltz to all decisions of Judge Brice, ascertain the differences, and determine whether Judge Waltz erred in making changes, we decline to

do so. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) However, we will address the points that Leesa has raised under separate sub-topic headings.

(2) *Changes in Timeshare and Child Support—*

(a) *Orders*

In his January 2009 final statement of decision, Judge Brice ordered that Michael pay \$2,871 per month in fixed child support, allocated \$559 for C., \$849 for D.e and \$1,464 for M., plus an *Ostler & Smith*⁵ percentage of Michael's periodic distributions. The child support was based upon a timeshare of 66 percent to Leesa and 34 percent to Michael.

Judge Waltz's April 2010 judgment directed that C. reside with Leesa until further order. It also ordered that Leesa and Michael have joint physical custody of the two other children, using a week-on, week-off schedule. The court ordered child support based on a 100 percent timeshare to Leesa with respect to C., and a 50 percent timeshare to each parent with respect to the other two children. The judgment required Michael to pay Leesa child support in the amount of \$2,147 per month, allocated \$325 for C., \$605 for D., and \$1,218 for M., in addition to an *Ostler & Smith* percentage of Michael's periodic distributions.

(b) *Notice and opportunity to be heard; change of circumstances*

Leesa argues that she had no notice or opportunity to be heard in connection with the above-referenced changes and she insists the record contains no stipulation regarding a change of circumstances. Considering the issues raised in the parties' pleadings and the dialogue on the record at the beginning of the trial before Judge Waltz on October 7, 2009, we find her arguments disingenuous.

⁵ See *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33 (*Ostler & Smith*).

(i) pleadings

At the beginning of the proceedings on October 7, 2009, Leesa, as the moving party, stated the matters pending before the court included her December 3, 2008 and August 6, 2009 orders to show cause. In her December 3, 2008 order to show cause, Leesa sought, inter alia, a modification of child support. In her August 6, 2009 order to show cause, Leesa sought a move-away order permitting her to relocate the children to Arizona and awarding her sole legal and physical custody of each child. In addition, she lamented that she had been unable to obtain an increase in child and spousal support despite having filed her December 3, 2008 order to show cause and she requested an order on child support and spousal support arrearages.

With these two orders to show cause pending, Leesa argues Judge Waltz could not consider increasing Michael's timeshare with respect to children D. and M. because Michael had not requested an increase. In her opening brief, she states: "When we come to Judge Waltz' hearing we again find that Michael did not ask for an increase in parenting time nor a decrease in child support payments unless Judge Waltz authorized Leesa to take the children to Arizona (which he did not.) We have Judge Waltz denying Leesa Due Process by making decisions absent requests from Michael"

We must chastise Leesa for her failure to cite to the record and, indeed, for her misrepresentation of the record. We located on our own Michael's responsive declaration in opposition to Leesa's August 6, 2009 order to show cause. On the first page thereof, Michael states that he opposes Leesa's requested order, but does "consent to the following order: Current custodial orders to continue. In the alternative legal and physical custody be awarded [to Michael]. In the event [Leesa] remains in Orange County, California, physical custody be alternated on a week-to-week basis."

In paragraph 14 of Michael's supporting declaration, he stated: "In the event [Leesa] relocates I ask that I be awarded their sole legal and physical custody with

reasonable visitation being awarded [Leesa;] if [Leesa] remains in Orange County, California, I request we share our children's custody on an alternating week-to-week basis." Clearly, the issue of changing child custody to a 50/50 basis was raised by the pleadings.

As this court has stated in another case: "Here, the responsive declaration showed that father opposed the move and requested custody of the minor[s]. The pending move clearly constituted a change of circumstances sufficient to allow the court to consider a change in custody. Father's responsive petition demonstrated his desire to take primary physical custody of [the children, in the event of mother's move away]. We therefore hold that the change in circumstances, together with father's response placed the issue of custody before the court. [¶] As a practical matter, a hearing on a request for a so-called move-away order necessarily involves issues of custody and visitation." (*Brody v. Kroll* (1996) 45 Cal.App.4th 1732, 1736.)

(ii) stipulations on record

At the proceedings on October 7, 2009, Judge Waltz asked Michael's counsel: "Do you believe that there is a change of circumstance at hand with regard to modifying child support?" His counsel replied: "I think there is a change in circumstances as pled." Seeking clarification, the court asked: "Do you contest the representation by [Leesa's counsel] that as regards to child support, . . . that there is a change of circumstance?" Michael's counsel replied: "No, I don't contest that." Finally, the court asked: "So you believe, then, . . . I should go forward and modify the order based on findings to be made?" Michael's counsel responded: "Yes."

Judge Waltz specifically asked whether this was a trial or a pretrial proceeding. Michael's counsel responded: "I'm happy for this court to make it a judgment order, a final order on custody and visitation." Judge Waltz asked: "So is there any reason I shouldn't deem this a bifurcated trial on the issue of custody and visitation?" Michael's counsel replied: "I don't see any reason why you shouldn't." Judge Waltz

said: “So at the end of the day, . . . the court can make . . . a permanent and final order?”

Counsel for each party answered: “Yes.”

Judge Waltz then summed up: “Then our record will show that this is deemed trial on the issue and it will be my goal to make a permanent custody and visitation order following the close of evidence if I think that the circumstances warrant that.” Leesa’s counsel did not object.

Indeed, in her opening statement, Leesa’s counsel said: “So child support was not calculated correctly factoring in the fact that there was a hundred-percent timeshare with mom.” Judge Waltz replied: “Well, let me just add. There is also an agreement that there is a change of circumstance, so I’m going to recalculate support.” Leesa’s counsel replied: “Okay.”

As the foregoing exchange shows, contrary to Leesa’s characterization of the record, the parties stipulated to a change of circumstances and Leesa clearly had notice that the court was going to make permanent orders on custody and visitation and to recalculate child support. A trial on the matter ensued, and Leesa had an opportunity to be heard on these matters.

(c) Abuse of discretion

Leesa claims the court abused its discretion in (1) reducing the amount of fixed child support allocated with respect to C. while increasing the amount of Leesa’s timeshare with that child, (2) reducing the total amount of fixed child support with respect to each child, and (3) increasing Michael’s timeshare with D. and M. However, in her discussion of these issues, Leesa fails to cite any portion of the record addressing the parties’ respective financial situations at the time of Judge Waltz’s orders.

Furthermore, she fails to cite any legal authority in support of her argument that Judge Waltz’s orders constituted an abuse of discretion. Having failed to cite to the record or cite legal authority, Leesa’s arguments based on abuse of discretion are waived.

(Schubert v. Reynolds (2002) 95 Cal.App.4th 100, 109 [failure to cite record or legal

authority constitutes waiver].)

Even were we to reach the issue she raises, we would conclude that the record does not support her position. We located on our own a portion of Judge Waltz's 26-page statement of decision dated February 10, 2010, that discloses the information he relied upon in changing child support. The statement of decision said: "Both sides stipulated there is a material change of financial circumstances and both sides asked the court to re-calculate guideline child support under the child support formula."

With respect to Michael's income, the statement of decision provided: "The court finds that the father's current gross monthly income is [\$]16,645 based on his testimony, the testimony of CPA Andrew Hunt and Mr. Hunt's cash flow analysis report received into evidence without objection" With respect to Leesa's income, the statement of decision said, inter alia: "The court finds that the mother's income is from two sources. First, the mother receives an average of 2,750 dollars [per month] (passive income from rental properties) See the trial testimony of CPA Hal Brand. Second, the mother testified she quit her job at '800 REFI' in or about December 2008 while earning 3,467 dollars [per month]. This finding is based on the testimony of CPA Hunt, the mother's Income and Expense Declaration dated December 3, 2008 and her own testimony. Since then, the court finds the mother has not made any sincere, meaningful and full time attempt to find re-placement employment. Therefore, the court imputes to the mother her former wage of 3,467 dollars [per month]." We note these figures are sufficient for an adjustment in the amount of child support when compared to the figures utilized by Judge Brice based on the evidence before him.

(d) Improper imputation of income

Leesa states: "Out of an abundance of caution that this Court might reach the issue of Judge Waltz' order regarding spousal support (although it should not) Leesa notes that even in this arena he erred." We are tempted to stop here, because Leesa seems to say we should not read her argument.

Leesa's brief gets even more confusing as we do read her argument. She says: "Even if Judge Waltz could reach the issue of spousal support, (he could not) he improperly imputed income to Leesa." We observe that Judge Waltz did not change Judge Brice's spousal support order, so we are uncertain why Leesa attempts to frame an argument on this topic.

Although she does not articulate it this way, it appears Leesa's real gripe is that Judge Waltz imputed income to her in the amount of \$3,467 per month, for the purposes of calculating *child* support. Leesa insists that the issue of imputed income was never put before the court and that her due process rights were violated when Judge Waltz addressed the issue. However, we have already discussed at length the fact that the record demonstrates the issue of child support was properly put before the court. Furthermore, the income of each parent must be considered in fixing child support (Fam. Code, § 4053) and the court is at liberty to consider a parent's earning capacity in lieu of actual income, if consistent with the best interests of the children (Fam. Code, § 4058). Leesa's assertion that her earning capacity, for the purposes of imputation of income, was not before the court is contrary to the record.

Leesa also argues Michael did not meet his burden to show that income should be imputed to her and the evidence did not support the court's imputation of \$3,467 in income to her. In making this argument, Leesa again fails to cite to the record or to discuss any of the evidence whatsoever pertaining to her earning capacity. Evidently, there was some. We have already discussed Judge Waltz's February 2010 statement of decision wherein he addressed the evidence concerning Leesa's earning capacity. We need not reiterate that here.

(3) Reduction of Ostler & Smith Percentage—

In his January 2009 statement of decision, Judge Brice directed Michael to pay Leesa, as child support over and above the fixed child support discussed above, 13.42 percent of his periodic distributions of unit earnings. Judge Brice found that percentage

“to be an equitable percentage, though at the high end.” In the April 2010 judgment, Judge Waltz ordered Michael to pay Leesa 13 percent of his net periodic distributions without deduction of taxes.

Leesa claims that Judge Waltz erred in reducing the *Ostler & Smith* percentage from 13.42 percent to 13 percent. In support of her argument, she just baldly asserts that there was “nothing” before Judge Waltz that justified the reduction. But the only portion of the record she cites addressing the financial information presented to Judge Waltz is an uninformative snippet from Hunt’s testimony.

Hunt was being questioned concerning a report he prepared showing what he described as “the net monthly spendable income available to each party after considering the various and sundry support payments and some selected living expenses.” In responding to initial questions concerning that “net spendable report,” Hunt acknowledged that the figures included a deduction for the 13.42 percent *Ostler & Smith* allocation. Hunt neither opined as to how Judge Brice arrived at the 13.42 percent figure in the first place nor expressed a view as to whether or not the percentage was appropriate based on the parties’ finances.

This one meager citation to the record is insufficient to meet Leesa’s burden to address the financial information provided to Judge Waltz in setting the *Ostler & Smith* percentage. Furthermore, her argument is unsupported by any legal authority. Inasmuch as Leesa neither met her burden to cite the portion of the record showing the financial information before Judge Waltz nor cited legal authority in support of her assertion of error, she has waived her argument on the *Ostler & Smith* percentage. (*Schubert v. Reynolds, supra*, 95 Cal.App.4th at p. 109.)

In any event, we observe that Judge Brice stated 13.42 percent was on “the high end.” Leesa has not shown that Judge Waltz abused his discretion when he took a figure that was a little high and merely rounded it down to the nearest whole number.

(4) Treatment of Child C.—

Prior to Judge Brice's involvement in the case, Leesa and Michael entered into a stipulation and order on order to show cause, filed December 12, 2005. It stated, inter alia: "Stephen Adam, Ph.D. shall be the Court's expert (pursuant to Evidence Code Section 730) regarding custody and visitation." Judge Salvador Sarmiento so ordered.

Judge Brice, in his June 2008 tentative statement of decision, stated: "The Court, with regret, rejects the proposal by Dr. Adams that Dr. Yglesias be the therapist for [C.] and her two (2) siblings. Since it appears that Mrs. Juergens and Dr. Yglesias are unable to properly communicate, and the testimony indicates [C.] is not comfortable with that therapist, the order is for [C.] to continue with the counselor she is presently seeing until discharged or terminated treatment by agreement of her parents." This language was omitted from Judge Brice's January 2009 final statement of decision, which did not contain any order regarding counseling for C.

The April 2010 judgment ordered C. to resume psychological counseling with Ms. Sheila Heddon, LCSW, and to resume conjoint psychological counseling with Dr. Patricia Yglesias. Leesa was ordered to cooperate and to facilitate the counseling.

Leesa contends Judge Waltz erred in "overruling" Judge Brice's order that C. not be treated by Dr. Yglesias. She maintains that Judge Waltz was required to enter judgment based on Judge Brice's tentative statement of decision and that he was not at liberty to make a different order absent changed circumstances. However, Leesa cites no authority for the proposition that when a final statement of decision omits an order that had previously been contained in a tentative statement of decision, that omitted order must nonetheless be resurrected and included in a later judgment. Furthermore, she cites no authority for the proposition that when an issue is not addressed in a final statement of decision, it cannot later be addressed absent changed circumstances.

Leesa also contends that neither party requested that Judge Waltz revisit the question of whether C. should be treated by Dr. Yglesias, neither party presented

evidence on the matter, and the order was made without notice or opportunity to be heard. The record does not support her contentions.

In her December 3, 2008 order to show cause, Leesa addressed C.'s emotional and counseling issues at length. She stated, *inter alia*, that C. had been diagnosed with anxiety and depression and had been prescribed antidepressants. She also said that Michael had refused to consent to C. taking the prescribed medication. Leesa requested an order permitting her to provide prescription drugs to the children.

In addition, Leesa reported that C. was reluctant to discuss important issues with her counselor out of a fear that her confidential disclosures could be made known to her parents. Leesa requested an order that both parents be enjoined from requesting information from C.'s counselor concerning C.'s disclosures.

In her August 6, 2009 order to show cause Leesa stated: "The children have been caught in the middle of these dissolution proceedings, through the child custody evaluation with Dr. Adam Our daughter [C.] has refused to see her father for months, is in counseling and taking antidepressant medication."

In court on October 7, 2009, counsel for Michael stated: "These parties have taken part in an original 730 evaluation with Dr. Stephen Adam and they have taken [part] in an updated custody evaluation with Stephen Adam. In fact, the most recent report of April 24th, 2008, I'm going to ask be considered by this court." Leesa's counsel added that it was "important for the court to read Dr. Adam's report of April 24th 2008" Judge Waltz stated that he would read and consider the report. The October 7, 2009 minute order reflects the parties' stipulation that the report be received into evidence. In court on that date, Leesa's counsel further stated: "[C.]'s problems are unique and we are going to present evidence to further expand on what Dr. Adam concluded about what is going on with [C]."

On appeal, in her discussion of Judge Waltz's order on C.'s treatment Leesa makes no mention of Dr. Adam's report. However, we located a copy of the report in the

record. We find it to be quite enlightening.

In his April 24, 2008 report, Dr. Adam stated that Dr. Patricia Yglesias was the court appointed treating psychologist. She provided treatment for the children until mid-December 2007, when Leesa decided that Dr. Yglesias did not have the right knowledge and experience to handle the matter.

Dr. Adam opined: “It is the children who are truly the victims in this dysfunctional, post-divorce situation. When I conducted the original evaluation, I stated that the children were in need of psychotherapy. Dr. Yglesias was appointed by the Court to conduct treatment. Apparently, neither of the parties has made a sincere effort to support their children’s treatment. Yet, the mother has consulted with other psychotherapists, educators, reaching out for help and guidance while Dr. Yglesias, who is an entirely competent psychologist is not being utilized. Dr. Yglesias articulated clearly to me what she believed to be the issues affecting the children. She also provided to me a strategy and treatment plan for the children. In my opinion, Dr. Yglesias is unequivocally capable of providing the children with the care and guidance that they need. It is the parents, for their separate reasons, who are not committed to their children’s therapy, which is absolutely necessary in order for them [to] develop appropriately without being continuously affected by their parent’s unresolved divorce related and personal unrelated issues.”

Dr. Adam further stated: “During this most recent supplemental assessment process, I have directly observed the children, particularly [C.], emotionally deteriorating and eventually decompensating. I expect that her sister and brother may do the same unless there is strong and effective intervention.” Dr. Adam “recommended that the three children immediately commence psychotherapy with Dr. Yglesias on a regular basis.”

In addition to having Dr. Adam’s report for consideration, Judge Waltz heard the testimony of C. herself. However, the transcript of that testimony was sealed.

As we can see, Leesa herself, in her two orders to show cause, raised issues concerning C.'s mental state and need for counseling. She also emphasized the importance of Dr. Adam's report. Just because she did not request that the court order counseling to resume with Dr. Yglesias, did not mean that she had no notice or opportunity to be heard in connection with issues pertaining to either C.'s counseling or the recommendations contained in Dr. Adam's report.

In her reply brief, Leesa concedes that the court had the authority to order counseling under Family Code section 3190, subdivision (a). That subdivision states that a "court may require parents or any other party involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional" Here, Leesa's orders to show cause clearly framed custody and visitation disputes, making the statute applicable.

Leesa simply claims that the court could not order counseling under Family Code section 3190, subdivision (a) without notice and opportunity to be heard. But as we have said, Leesa's own orders to show cause and oral statements to the court were sufficient to put C.'s counseling needs at issue.

(5) Adoption of Parenting Plan—

In his January 2009 statement of decision, Judge Brice affixed child support and the parental timeshare. He did not, however, include a parenting plan. Judge Waltz, in contrast, included a nine-page parenting plan in his April 2010 judgment. Leesa claims this was error. She says neither she nor Michael put the issue of a parenting plan before Judge Waltz, who gave no notice of his intention to adopt one.

Once again, we disagree with Leesa's characterization of the record. We have already addressed the portions of the reporter's transcript where Judge Waltz confirmed the understanding of the parties that he was going to hold "a bifurcated trial on the issue of custody and visitation" and that "at the end of the day," he would make "a permanent and final order." He further stated: "Then our record will show that this is

deemed trial on the issue and it will be my goal to make a permanent custody and visitation order following the close of evidence if I think that the circumstances warrant that.”

Furthermore, during Leesa’s testimony, an exchange took place between her counsel and Judge Waltz. Judge Waltz stated to the attorney: “Let’s develop the record, deepen the record, broaden the record insofar as best interest of the children and where they ought to live and the best parenting plan to put in place here.” Given this, Leesa can hardly claim that Judge Waltz gave no notice of his intention to adopt a parenting plan. Leesa had an opportunity to object to the suggestion or to ask questions regarding the scope of the intended parenting plan and thus the extent of the evidence that she should put on.

Moreover, Judge Waltz’s parenting plan is in furtherance of statutory objectives concerning custody and visitation orders as set forth in the Family Code. Family Code section 3022 provides: “The court may, during the pendency of a proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper.” Section 3048, subdivision (a) provides that “in any proceeding to determine child custody or visitation with a child, every custody or visitation order shall contain . . . : [¶] . . . [¶] (3) A clear description of the custody and visitation rights of each party.” (Fam. Code, § 3048, subd. (a)(3); see also Fam. Code, § 3084.) Leesa has not met her burden to show that Judge Waltz erred in establishing a parenting plan when deciding the custody and visitation issues put before him.

(6) Vacation of Special Master Appointment—

As we recall, on May 13, 2009, Michael and Leesa entered into a stipulation for a partial judgment on reserved issues and Judge Waltz so ordered. Michael and Leesa agreed that the characterization of certain disputed assets would “be adjudicated by a special master/referee pursuant to [Code of Civil Procedure section] 638.” They further stipulated that “the special master/referee [would] determine [certain

additional] issues and make recommendations to the court” Those additional issues included child custody, child support modification, child counseling, spousal support modification, life insurance, income for DissoMaster purposes, and attorney fees.

In her August 6, 2009 order to show cause, Leesa stated that she had “been unable to obtain an increase in child and spousal support despite [her] filing of an order to show cause on December 3, 2008. It was anticipated these issues would have been resolved at the hearing before the Special Master, Philip Seastrom. We were unable to go forward with that proceeding based on my bankruptcy filing . . . , and my inability to pay another \$2,500 to Mr. Seastrom”

At the outset of the October 7, 2009 proceedings before Judge Waltz, Leesa’s counsel reiterated that the December 3, 2008 order to show cause had “never been heard.” She said that “it was going to be heard before Phillip Seastrom, but that matter was stayed, because there were property issues. And as the court knows . . . , [Leesa] is in bankruptcy.” Leesa’s counsel further stated that there were also issues of child and spousal support arrearages. She expressed her belief that issues of child custody, child support, spousal support, and attorney fees were not stayed by the bankruptcy.

As already discussed, the parties agreed to a bifurcated trial on the issues of child custody and visitation and a minute order stating Judge Waltz’s tentative statement of decision was filed on January 19, 2010. It addressed child custody and visitation, child and spousal support, and attorney fees and costs. In addition, the minute order stated: “On the Court’s own motion, the stipulation/order dated May 13, 2009 is dissolved. Reason: the filing of [Leesa’s] bankruptcy preempts the execution of the party’s agreement to resolve the remaining contested issues using a special master appointed [under Code of Civil Procedure section] 638. Once the bankruptcy proceedings are resolved, any remaining family law/dissolution property issues shall be resolved by this court at an evidentiary hearing. The court will await a party filing a motion.”

Leesa filed 10 pages of objections to the tentative statement of decision. However, she did not object to the dissolution of any portion of the May 13, 2009 stipulation and order.

The court's final statement of decision, by Judge Waltz, was filed February 10, 2010. It stated: "Comes now the court and on its own motion, vacates that portion of the May 13, 2009 order appointing the special master under [Code of Civil Procedure section] 638 – in all other respects the May 13, 2009 stipulation/order negotiated between the parties is undisturbed and extant, subject to the federal bankruptcy proceedings and stay."

On appeal, Leesa argues that Judge Waltz erred in vacating the special master appointment without notice or legal ground. However, Leesa overlooks the fact that she herself requested that the court, not the special master, address the issues raised in her December 3, 2008 and August 6, 2009 orders to show cause and that she complained about the inability to get matters before the special master because of her bankruptcy filing and her lack of funds for the special master's fee. Furthermore, she stipulated to a bifurcated trial on child custody and visitation issues. Consequently, she has waived any objection to the order vacating the reference to the extent the reference would apply to those issues.

Leesa has also waived any objection to the order to the extent the reference would affect the remaining issues, because she failed to object to the portion of the court's tentative statement of decision with respect to the order vacating the reference. "An appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not, presented to the lower court by some appropriate method. [Citations.]' [Citation.] Failure to object to the ruling or proceeding is the most obvious type of implied waiver. [Citation.]" (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002; see also *Akins v. State of California* (1998) 61 Cal.App.4th 1, 41, fn. 36 [failure to object to statement of decision].)

Leesa also complains that the order in question was neither in the best interests of the children nor based on a change in circumstances. However, she does not explain how laws pertaining to changed circumstances and the best interests of the children enter into the equation, inasmuch as she fails to identify any issues of child custody, visitation, or support that remained in need of resolution, either by a special master or by the court, after Judge Waltz rendered his 26-page decision on those matters.

(7) Errors in Entering Judgment—

Although it is unclear from the record exactly when, sometime after Judge Waltz entered judgment, Leesa filed a motion to enter judgment based on Judge Brice's June 2008 tentative statement of decision and his January 2009 final statement of decision. Apparently ruling on that motion, Judge Waltz, in a December 17, 2010 minute order, stated: "The Court will not issue a nunc pro tunc judgment on custody and notes a statement of decision and judgment has already been entered. [¶] The Court will sign a judgment on property based on Judge Brice's ruling only." The January 13, 2011 judgment on reserved issues, pertaining only to property issues, was entered thereafter.

Leesa complains that Judge Waltz "gave credence to Judge Brice's decisions as to property issues but nothing else." She claims Judge Waltz erred in failing to enter judgment pursuant to Judge Brice's statements of decision with respect to "support, custody and the like." Had this been done, she says, Judge Brice's orders could not have been altered absent a change in circumstances.

To the extent that, somewhere along the line, either the court clerk or Judge Waltz should have entered judgment based on Judge Brice's statement of decision, Leesa has not demonstrated prejudicial error. We have already discussed at length that the parties, in appearing before Judge Waltz, stipulated to changed circumstances. Given this, Judge Waltz had the authority to make changes in Judge Brice's orders pertaining to "support, custody and the like." To the extent there is any particular order of that nature that Judge Brice made to which the changed circumstances stipulation did not

apply, it was Leesa's burden as the appellant to point out that particular order and state the basis for the error. We have already addressed her individual assertions of error. If there were any others, she should have said so.

(8) *Stay of Proceedings*—

On July 2, 2010, Leesa filed her first notice of appeal, taken from the April 9, 2010 judgment. On November 10, 2010, she filed her second notice of appeal, taken from the amended judgment entered November 3, 2010. In her opening brief on appeal, Leesa contends Judge Waltz had no jurisdiction to enter amended judgments after she had filed her notices of appeal.

Leesa is correct that, generally speaking, “[a] timely notice of appeal suspends the trial court’s jurisdiction over the cause and vests jurisdiction in the appellate court. [Citations.]” (*In re Marriage of Varner* (1998) 68 Cal.App.4th 932, 936.) That general rule is not dispositive in this case, however.

Family Code section 2025, applicable in the event of a bifurcation, provides as follows: “Notwithstanding any other provision of law, if the court has ordered an issue or issues bifurcated for separate trial or hearing in advance of the disposition of the entire case, a court of appeal may order an issue or issues transferred to it for hearing and decision when the court that heard the issue or issues certifies that the appeal is appropriate. Certification by the court shall be in accordance with rules promulgated by the Judicial Council.” The applicable rule is California Rules of Court, rule 5.180.

As explained in *In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429: “A family law court may bifurcate trial on one or more issues, including division of property or child custody, if resolution of the bifurcated issue is likely to simplify the determination of the other issues. (Cal. Rules of Court, rules 5.175(a), 5.175(c).) Although an order on a bifurcated issue is not separately appealable, the family law court may certify in its order that there is probable cause for immediate appellate review of the issue, or it may do so in response to a party’s motion made 10 days after mailing of the

decision. (Rule 5.180(b); see [Fam. Code,] § 2025.) ‘If the certificate is granted, a party may . . . file in the Court of Appeal a motion to appeal the decision on the bifurcated issue.’ (Rule 5.180(d)(1).) Failure to seek or obtain appellate review of the decision on the bifurcated issue does not preclude review of the decision upon appeal of the final judgment. (Rule 5.180(h).)” (*In re Marriage of Lafkas, supra*, 153 Cal.App.4th at p. 1433, fns. omitted.)

In the matter before us, issues of custody, visitation and support were bifurcated for trial in May 2008. Judgment on those issues was entered on April 9, 2010. The judgment specifically stated that jurisdiction was reserved “to calendar a trial date for reserved issues once the bankruptcy proceedings are resolved.” The judgment on reserved issues addressing property division was not entered until January 13, 2011.

Thus, as in *In re Marriage of Lafkas, supra*, 153 Cal.App.4th 1429, in order for Leesa to appeal from the April 2010 partial judgment alone, “[a] certificate of probable cause was required . . . to invoke the appellate jurisdiction of this court.” (*Id.* at p. 1433.) None was obtained.

As in *Lafkas*, “[a]lthough the order on the bifurcated trial resolved some of the issues . . . , it did not resolve all of them, and issues concerning . . . property were still pending. . . . Thus, the order appealed from [was] merely preliminary to a final order characterizing, . . . and dividing all the marital assets. [Leesa] did not follow the procedure in [Family Code] section 2025 allowing an interlocutory appeal on a bifurcated issue. No certificate of probable cause was obtained from the family law court. Accordingly, we have no jurisdiction to hear the appeal.” (*In re Marriage of Lafkas, supra*, 153 Cal.App.4th at pp. 1433-1434, fn. omitted.)

The reason why an appeal from a judgment generally divests the trial court of authority to rule on the judgment is to protect the jurisdiction of the appellate court to decide the appeal. (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 666.) However, when the appellate court has no jurisdiction over a matter described

in a notice of appeal, there is no reason to divest the trial court of authority. (*Id.* at pp. 663, 666; *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1409, fn. 4.)

So, in the matter before us, when Leesa filed her first notice of appeal, from the April 2010 judgment, the trial court did not lose jurisdiction to make a minor amendment with respect to the schedule for payment of support arrearages. And, when Leesa filed her second notice of appeal, challenging the November 3, 2010 amended judgment, the trial court did not lose jurisdiction to enter judgment as to reserved issues on January 13, 2011.

As a technical point, we dismiss Leesa’s first and second appeals, for we have no jurisdiction to hear them.⁶ (*In re Marriage of Lafkas, supra*, 153 Cal.App.4th at pp. 1432, 1435.) That does not mean, however, that we cannot consider Leesa’s arguments pertaining to the first two judgments. We have addressed each of the issues Leesa has raised in her briefing on appeal, as matters appropriate for review on appeal from a final judgment—in this case the judgment entered January 13, 2011. (Code Civ. Proc., § 906; *In re Marriage of Lafkas, supra*, 153 Cal.App.4th at p. 1433.)

(9) *Attorney Fees Incurred after January 2009*—

The April 2010 judgment did not award to either party attorney fees incurred in the period from January 2009 (when Judge Brice entered his final statement of decision including an attorney fees award in favor of Leesa) to the date of the judgment. However, the “ruling [was made] without prejudice to any party filing a prospective motion seeking attorney fees and costs based on need and ability to pay.”

⁶ By order of February 22, 2012, we requested that the parties be prepared to address, at oral argument, whether the first two appeals should be dismissed and, if so, whether we should nonetheless consider all of the issues Leesa has raised on appeal. On a related point, in this opinion, we have addressed Michael’s point that the April 2010 judgment was not appealable, and have concluded that the appeal from that judgment must be dismissed as taken from a nonappealable judgment. That being the case, we need not address another issue we observed on our own—whether the appeal from the April 2010 judgment should be dismissed as untimely filed.

Leesa contends Judge Waltz abused his discretion in failing to award her attorney fees incurred after January 2009.

In his February 2010 statement of decision, Judge Waltz explained his reasoning as follows: “The court took note of each party’s expenses and income. For instance, the court noted that [Michael] is paying child support and spousal support, paying attorney fees and costs ordered by Judge Brice, and apportioning any bonus income under this order and his reasonable living expenses. The court then considered [Leesa’s] living expenses, and her income from all sources, including her receipt of support under this order. The court noted that the parties are in a similar financial circumstance. The court also noted that [Leesa] has been the moving party on the issues presented during the second trial and that she has not prevailed from her point of view. In the end, the parties have relative parity and both appear financially able to fund their own legal team; the court is otherwise [unaware] of any community resources to draw upon.”

Leesa contends Judge Waltz abused his discretion in several respects. For one, Leesa maintains that Judge Waltz erred in considering the factors he did, and she says he was not at liberty to consider the support she was receiving. However, the legal authorities she cites, Family Code section § 2032 and *In re Marriage of Harrison* (1986) 179 Cal.App.3d 1216, do not state that it is improper to consider support payments.

Family Code section 2032, subdivision (a) permits the award of attorney fees and costs where the making of an award is “just and reasonable under the relative circumstances of the respective parties.” In weighing the relative circumstances of the parties, the court may consider their respective incomes (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 406), and the statute gives no indication that support payments are to be excluded in consideration of income.

Furthermore, Family Code section 2032, subdivision (b) requires the court to consider the factors set forth in Family Code section 4320. Section 4320, in turn,

requires consideration of the “ability of the supported party to engage in gainful employment . . . ,” the “goal that the supported party shall be self-supporting within a reasonable period of time,” and any “other factors the court determines are just and equitable.” (Fam. Code, § 4320, subs. (g), (l) & (n).) Leesa has not shown that the court erred in considering support payments.

On another point, Leesa attacks the portion of Judge Waltz’s statement of decision wherein he affixed child support. The statement of decision shows that Judge Waltz viewed Leesa’s \$2,750 per month in income from her Arizona rental properties as being “passive” income. Although she lived in California and apparently could not have provided any day-to-day management of the properties, in her opening brief Leesa represents that she did not employ a property management company and “would occasionally travel to Arizona to manage” the properties. In her opening brief, she also represents that “[s]he spent 10-15 hours in active management.” However, she neither specifies the time period over which she would spend those hours nor provides a record reference to back up these representations. Anyway, she says this information shows that the income was not passive, but was active, so Judge Waltz should not have imputed any income to her. If he had not imputed \$3,467 in monthly income to her, she argues, it would have been all the more obvious that she was in a negative cash flow situation and should have been awarded attorney fees to level the playing field.

Nothing Leesa has said convinces us that she engaged in the active management of the properties such that it was an abuse of discretion to impute income to her. In any event, in evaluating the need of the parties for attorney fees, the court may consider both investment and income-producing properties (*In re Marriage of Dietz*, *supra*, 176 Cal.App.4th at p. 406) and a spouse’s earning capacity (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 253).

Leesa also contends Judge Waltz erred in considering the fact that Judge Brice had ordered Michael to pay attorney fees previously and that Michael’s bonus

income was being apportioned. Contrary to Leesa's assertions, these were not "improper factors" to consider. The court is required to consider each party's obligations (Fam. Code, § 4320, subd. (e)), and Judge Brice's attorney fees award constituted a substantial obligation on Michael's part. So too, the court must consider "the supporting party's earning capacity, earned and unearned income" (Fam. Code, § 4320, subd. (c).) Consequently, it was only appropriate for the court to consider Michael's bonus income and the apportionment of the same.

In addition, Leesa asserts it was inappropriate for Judge Waltz to consider which party was the "prevailing party." Neither Family Code section 2032 nor Family Code section 4320 precludes the court from giving consideration to this factor. Rather, section 2032, subdivision (b), provides that "[f]inancial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." And, section 4320, subdivision (n), permits the court to consider "[a]ny other factors the court determines are just and equitable." Contrary to Leesa's assertion, *In re Marriage of Hublou* (1991) 231 Cal.App.3d 956 does not bar a court from considering prevailing party issues. Rather, that case merely stated, "there is no requirement that attorney fees be awarded only to prevailing parties, as they may be awarded *against* a prevailing party in family law proceedings. [Citation.]" (*Id.* at p. 966.)

Finally, Leesa charges that Judge Waltz erred in concluding that she had the ability to pay her own attorney fees and made a fundamental error in failing to level the playing field between the parties. She maintains that, even when taking imputed income, rental income, child support and spousal support into consideration, she had negative cash flow of \$1,979 per month. In her calculations, she omits to include any amount for the *Ostler & Smith* payments with respect to Michael's bonus income and the fact that Judge Brice ordered Michael to pay \$2,000 per month in attorney fees.

Perhaps more fundamentally, as Michael points out, Leesa omits to cite any

portion of the record wherein she submitted any proof of the amount of attorney fees she claimed to have incurred during the time period in question. In her December 3, 2008 order to show cause, Leesa requested attorney fees according to proof. In her August 6, 2009 order to show cause, she requested \$20,000 in attorney fees. In her August 5, 2009 declaration attached to that order to show cause, she listed 13 persons to whom she had paid fees (or who had incurred fees on her behalf). The list was largely duplicative of the list she had submitted in her July 11, 2008 declaration in support of attorney fees request. In her August 5, 2009 declaration, Leesa stated: “My bankruptcy filing includes a portion of the above-referenced attorney’s fees and costs.”

In her briefing on appeal, Leesa does not address the amount of attorney fees she seeks. She only claims that it is not fair to fail to award them. We believe we have located on our own the basis of her complaint. In her August 5, 2009 declaration, Leesa says: “I respectfully request an order that [Michael] pay my attorney, Elizabeth Nigro, the sum of \$20,000 from his September 2009 bonus to secure payment of future attorney’s fees and costs which she estimates will be incurred in the event he opposes my move away request and/or requests an updated child custody evaluation.” As best we can tell then, Leesa’s only articulated request pending before Judge Waltz was for an award of prospective attorney fees. To the extent that is correct, we observe that Judge Waltz did not preclude a request for prospective fees. To the extent that is not correct, Leesa has only herself to blame for lack of specificity and failure to cite to the record.

D. CONCLUSION:

We dismiss Leesa’s first two appeals (Nos. G043884 and G044523) as taken from nonappealable interlocutory judgments. However, under the umbrella of her third appeal (No. G044735), we have addressed all issues she has raised in her opening brief and conclude she has not met her burden to show error.

DISPOSITION

The judgments and orders are affirmed. Michael shall recover his costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.