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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JOSEPH L. and
JENNIFER R. BECKER.

JOSEPH L. BECKER,

Appellant,

v.

JENNIFER R. BECKER,

Respondent.

G048497

(Super. Ct. No. 09D003901)

O P I N I O N

Appeal from a judgment and orders of the Superior Court of Orange County, Mark Millard, Judge. Reversed in part, affirmed in part, and remanded.

Merritt L. McKeon for Appellant.

Law Offices of Saylin & Swisher, Brian G. Saylin and Lindsay L. Swisher for Respondent.

* * *

Appellant Joseph L. Becker appeals from the trial court's judgment and orders (1) denying his request for half of the income tax refund respondent Jennifer R. Becker received based on how she reported the couple's sale of their \$10 million home on her tax return;¹ (2) denying Joseph's request for an order requiring Jennifer to submit to drug and alcohol testing to maintain joint custody of the couple's children; (3) awarding Jennifer \$25,000 in attorney fees under Family Code sections 2030 and 2032 for time her attorney spent opposing Joseph's request for drug and alcohol testing;² and (4) awarding Jennifer \$20,000 in attorney fees as a sanction under section 271 based on Joseph's request for half of Jennifer's tax refund and various other omitted assets.

We agree with Joseph the trial court erred in denying his request for half of Jennifer's tax refund because the "Post Nuptial Agreement" Joseph and Jennifer executed required the couple to share the net sale proceeds equally after paying the capital gains taxes and other specified items. Contrary to the trial court's ruling, Jennifer's refund constituted net sale proceeds subject to the Post Nuptial Agreement because she claimed on her tax return the amount of capital gains taxes paid on her behalf from the sale proceeds significantly exceeded the amount of taxes she owed on the sale. But we agree with the trial court that whether an equalization payment is required may only be decided after the tax authorities make their final determination on the amount of taxes Jennifer owes. Accordingly, we remand for the trial court to reconsider Joseph's request based on the tax authorities' final determination.

The trial court did not err in denying Joseph's request for an order requiring Jennifer to submit to drug and alcohol testing under section 3041.5. As explained below,

¹ For clarity, "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 (*Balcof*).

² All statutory references are to the Family Code unless otherwise stated.

Joseph forfeited his constitutional challenge to section 3041.5 by failing to cite any authority to support it or even identify the constitutional provision allegedly violated. Moreover, the record supports the trial court's decision Joseph failed to make the required factual showing Jennifer habitually or continually used illegal drugs or abused alcohol.

Finally, the trial court did not abuse its discretion in awarding Jennifer attorney fees under sections 2030 and 2032 because the record supports the court's finding Jennifer suffered a significant disparity in her ability to pay for legal representation. But we reverse the award under section 271 because the trial court relied in part on its finding Joseph had no basis for seeking half of Jennifer's tax refund. Accordingly, we remand for the trial court to determine whether the other conduct on which it relied supports an attorney fee award under section 271, and if so, the amount.

I

FACTS AND PROCEDURAL HISTORY

Joseph and Jennifer married in 1997, and they have two daughters born in 1998 and 2001. They originally separated in 2006, when Joseph filed an earlier action to dissolve their marriage. In December 2008, Joseph dismissed that action after the parties signed a "Post Nuptial Agreement" defining their rights in the Laguna Beach family home Joseph purchased before their marriage.

In the Post Nuptial Agreement, Joseph and Jennifer agreed the home was community property, but Joseph had a \$2.5 million separate property right of reimbursement under section 2640. The couple further agreed to list the home for sale within seven days after they executed the Post Nuptial Agreement, and any sale proceeds "will be shared pursuant to the terms herein." The agreement included an exhibit that served as a "Pro Forma example of distribution of sale proceeds . . . for purposes of illustration." Finally, the Post Nuptial Agreement stated, "In the event of a dissolution of

marriage between the parties, the property shall be sold, and the net sale proceeds shall be divided equally between the parties after payment of all existing encumbrances, normal transaction costs, Joe's Family Code §2640 separate property interest and any state and federal capital gains taxes." (Capitalization and underscoring omitted.)

In March 2009, Joseph and Jennifer sold the family home for \$10 million. From the sale proceeds, they instructed the escrow company to pay \$425,000 to the Internal Revenue Service and \$265,000 to the California Franchise Tax Board on each spouse's behalf as estimated capital gains taxes, for a total payment of \$850,000 in federal taxes and \$530,000 in state taxes. After paying Joseph \$2.5 million for his separate property interest and all fees, commissions, and costs relating to the sale, the couple evenly divided the remaining \$3.52 million in sale proceeds.

Shortly after completing the sale, the couple separated again when Joseph filed this dissolution action. Joseph and Jennifer therefore filed separate 2009 tax returns with each reporting \$5 million in income from the sale of the family home. Based on his return, Joseph paid an additional \$65,000 in capital gains taxes over the amount paid through escrow. Based on her return, Jennifer received a \$475,000 tax refund because she claimed the \$2.5 million separate property payment to Joseph as part of her nontaxable basis for the property.

In January 2011, the trial court entered a judgment dissolving the couple's marriage and reserving jurisdiction over all other issues. A few months later, the court conducted a trial on some of the reserved issues, including child and spousal support. Based on its findings regarding each spouse's income and assets, the court denied Jennifer's request for an order requiring Joseph to pay some of her attorney fees.

In November 2011, Joseph filed an order to show cause asking the trial court to divide certain omitted assets the parties did not address at the previous trial, including the tax refund Jennifer received based on her 2009 income tax return. Joseph argued he was entitled to receive half of the refund under the Post Nuptial Agreement

because the couple agreed they would divide equally the net proceeds from the sale of the home that remained after paying capital gains taxes, transaction costs, and Joseph's separate property interest. Jennifer opposed Joseph's order to show cause and asked the court to award her attorney fees.

In July 2012, the court conducted an evidentiary hearing on Joseph's request for half of Jennifer's income tax refund, but continued the hearing on the other omitted assets Joseph identified in his order to show cause. The trial court ruled Jennifer's tax refund was not part of the net proceeds from the sale of the home, and therefore the Post Nuptial Agreement did not require her to share the refund with Joseph. The court explained the couple agreed to have the escrow company make equal tax payments on behalf of each spouse from the sale proceeds, and it was then up to each of them to determine how to address the capital gains from the transaction on their separate tax returns. The court acknowledged Jennifer filed an aggressive tax return that resulted in her refund, but only the Internal Revenue Service and the California Franchise Tax Board had jurisdiction to decide whether she paid the proper tax amount. The court explained Jennifer was entitled to any benefit her return provided, but also bore responsibility for any liability. The court nonetheless retained jurisdiction to require an equalization payment if Jennifer's return resulted in an audit and additional tax liability for Joseph.

A few weeks after the court's ruling, Joseph filed an ex parte application for an order requiring Jennifer to submit to drug and alcohol testing, temporarily granting him sole physical and legal custody of the couple's children, and temporarily limiting Jennifer to supervised visitation. Joseph alleged Jennifer's adult daughter from a prior marriage and others told him Jennifer was using cocaine and abusing alcohol when she had the children, and also drove while under the influence of alcohol with the children in the car. Jennifer opposed the application and again asked the trial court to award her

attorney fees and costs. The trial refused to issue an ex parte order on Joseph's application, and instead set it and the remaining issue for an evidentiary hearing.

At the beginning of the evidentiary hearing, Joseph took the remainder of his order to show cause on omitted assets off calendar. After hearing testimony from Joseph, Jennifer, Jennifer's adult daughter, several of the couple's friends and acquaintances, and the couple's 14-year-old daughter, the trial court denied Joseph's application in its entirety because it found Joseph failed to establish by a preponderance of the evidence that Jennifer was using illegal drugs and abusing alcohol. The court explained it found questionable the testimony accusing Jennifer of abusing drugs and alcohol and that the couple's daughters appeared to be doing well under the "50-50 custody arrangement" to which the couple had agreed at the beginning of the dissolution action.

In February 2013, the trial court conducted a hearing on Jennifer's pending attorney fee requests. The court awarded her \$20,000 in fees as a sanction under section 271 based on Joseph's vague order to show cause regarding omitted assets. The court explained Joseph's order to show cause required Jennifer to conduct extensive discovery, and then Joseph took all matters off calendar except the tax refund issue. On the tax refund issue, the court found it also warranted sanctions because there was no basis for Joseph to seek half of the tax refund Jennifer received. In addition, the court awarded Jennifer \$25,000 in attorney fees under sections 2030 and 2032 based on Joseph's application to change custody and require Jennifer to submit to drug and alcohol testing. Although both sides were capable of paying their own attorney fees, the court found the disparity in assets between Joseph and Jennifer justified a fee award to Jennifer.

Five days after the trial court's hearing and ruling on Jennifer's attorney fee requests, Joseph filed a request seeking a statement of decision on both the trial court's ruling regarding the custody and drug testing issues and also its attorney fee ruling. The trial court denied Joseph's request for a statement of decision on the ground the request

was untimely. In April and May 2013, the trial court entered a judgment on the custody and drug issues and a separate order on the attorney fee awards. Joseph appealed from both the judgment and the order.

II

DISCUSSION

A. *The Trial Court Was Not Required to Provide a Statement of Decision*

Joseph contends the trial court erred by denying his request for a statement of decision on his order to show cause regarding child custody and drug testing and Jennifer's attorney fee requests. Joseph contends the court's refusal to issue a statement of decision is per se reversible error. We disagree because Joseph's request failed to identify the issues to be addressed, a necessary prerequisite to trigger the court's duty to prepare a statement of decision.

Upon any party's timely and proper request in a nonjury trial, the court must "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) "The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision." (*Ibid.*; Cal. Rules of Court, rule 3.1590(d) ["The principal controverted issues must be specified in the request"].) The controverted issues in a case are those placed at issue by the parties' pleadings and on which they offered evidence at trial. (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 525, disapproved on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184-185.)

The trial court has a mandatory duty to provide a statement of decision when properly requested, and the failure to do so is per se reversible error. (*Wallis v. PHL Associates, Inc.* (2013) 220 Cal.App.4th 814, 825; *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397.) But a court's statement of decision need only address the

principal controverted issues specified in the party's request; it need not address any other issues. (*Harvard Investment Co. v. Gap Stores, Inc.* (1984) 156 Cal.App.3d 704, 710, fn. 3 (*Harvard Investment*); see *Balcof, supra*, 141 Cal.App.4th at p. 1531 [“all that is required is an explanation of the factual and legal basis of the court's decision regarding the principal controverted issues at trial *as listed in the request*” (italics added)].) “[A] general, nonspecific request for a statement of decision does not operate to compel a statement of decision as to all material, controverted issues.” (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292-1293 (*City of Coachella*); see *Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1394 (*Hume*).)

In *Hume*, we relied on these principles to affirm the trial court's refusal to prepare a statement of decision when the party's request merely sought a statement without specifying the issues to be addressed. We explained, “[a] party is not entitled to a statement of decision based on a ‘general inquisition’ that ‘unfairly burdens the trial judge in that he must not only speculate which questions embrace ultimate as distinguished from evidentiary facts, but also search his recollection of the record without the assistance of a suggestion from counsel.’ [Citations.]”³ (*Hume, supra*, 140 Cal.App.4th at p. 1394.)

Here, Joseph merely requested “a Statement of Decision for the Court's ruling [on] the [order to show cause] filed by [Joseph on] July 28, 2012, in response to which, [Jennifer] requested [a]ttorney fees.” Joseph's request failed to identify specific controverted issues for the court to address, and therefore the trial court was not required

³ In its entirety, the party's request in *Hume* stated, “Respondent William Snow Hume requests a statement of decision upon each of the principal controverted issues at trial on the above-captioned proceeding. Such issues whose decisions are asked to be stated include any propositions of fact or law set forth in any of the pleadings or trial briefs in this proceeding, as well as any issues that are raised by any other means at any time through trial.” (*Hume, supra*, 140 Cal.App.4th at p. 1394, fn. 15.)

to provide a statement of decision. (*Hume, supra*, 140 Cal.App.4th at p. 1394; see *City of Coachella, supra*, 210 Cal.App.3d at pp. 1292-1293; *Harvard Investment, supra*, 156 Cal.App.3d at p. 710, fn. 3.) Because we conclude the trial court did not err in refusing to provide a statement of decision, we need not address the parties' contentions on whether Joseph's request was timely.

Joseph's reliance on *In re Marriage of Keech* (1999) 75 Cal.App.4th 860 (*Keech*), is unavailing. *Keech* did not address a trial court's obligation to provide a statement of decision, but instead discussed the factors a court must consider when making an attorney fee award under sections 2030 and 2032. (*Keech*, at pp. 866-867.) Nothing in *Keech* required the trial court to provide a written explanation of its rulings equivalent to a statement of decision under Code of Civil Procedure section 632. (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2014) ¶ 15:170, p. 15-37, citing *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 188, and *In re Marriage of Carlsen* (1996) 50 Cal.App.4th 212, 217-218.) Indeed, *Keech* does not require a written decision in any form; it merely requires the record to show the trial court considered the factors identified in sections 2030 and 2032. (*Keech*, at pp. 866-867.)

B. *The Trial Court Erred in Ruling the Post Nuptial Agreement Did Not Apply to Jennifer's Tax Refund*

Joseph contends the trial court erred in denying his request for half of Jennifer's tax refund because the refund constituted proceeds from the sale of the Laguna Beach home and the Post Nuptial Agreement required the couple to share the sale proceeds equally. According to Joseph, the sale proceeds included the refund because Jennifer claimed on her tax return the capital gains taxes she owed on the sale were significantly less than the amount the escrow company paid on her behalf. Although we agree the trial court erred in ruling the refund did not constitute sale proceeds subject to the Post Nuptial Agreement, we conclude the trial court acted within its discretion by declining to order an equalization payment until the tax authorities finally determine the

amount of Jennifer’s taxes. Accordingly, we remand for the trial court to determine what, if any, equalization payment is required based on the taxing authorities’ final tax determination.

The Post Nuptial Agreement is a contract that must be interpreted based on the ordinary canons of contract interpretation. (Civ. Code, § 1635 [“All contracts, whether public or private, are to be interpreted by the same rules”]; *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 13 [premarital agreement]; *In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518 [marital settlement agreement].) “The basic goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting.” (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955; see *In re Marriage of Facter* (2013) 212 Cal.App.4th 967, 978.) “The terms of a contract are determined by objective rather than by subjective criteria. The question is what the parties’ objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe. [Citations.]’ [Citation.]” (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 184-185; see also *In re Marriage of Facter*, at p. 978.)

“The parties’ intent is ascertained from the language of the contract alone, ‘if the language is clear and explicit, and does not involve an absurdity.’ [Citation.] Extrinsic evidence is admissible to explain the meaning of a contract if ‘the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.’ [Citation.]” (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 712.) When, as here, the parties offer no extrinsic evidence of their intent, we review the trial court’s interpretation of a contract de novo. (*Id.* at p. 713; *In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.)

In the trial court, Joseph and Jennifer relied on separate provisions of the Post Nuptial Agreement. Joseph cited the provision stating, “In the event of a dissolution of marriage between the parties, the property shall be sold, and the net sale proceeds shall

be divided equally between the parties after payment of all existing encumbrances, normal transaction costs, [Joseph's] Family Code §2640 separate property interest and any state and federal capital gains taxes.” (Underscoring omitted.)

Jennifer argued that provision did not apply because escrow on the home's sale closed *before* Joseph filed this action to dissolve the couple's marriage, and therefore there was no marriage dissolution to trigger that provision's operation. Jennifer instead points to the provision stating, “The house will be listed for sale in the Orange County California MLS within 7 days of execution of this agreement. In the event both parties agree to accept an offer for sale, the proceeds will be shared pursuant to the terms herein. A Pro Forma example of distribution of sale proceeds is attached hereto as Exhibit ‘A’ for purposes of illustration and is incorporated herein by this reference.”

Jennifer, however, fails to recognize the result is the same under both provisions, namely, Joseph and Jennifer must divide equally the net sale proceeds *after* all capital gains taxes are paid.⁴ The provision on which Joseph relies expressly requires that result, and the pro forma example referred to in the provision Jennifer cites requires the same result because it shows the parties must pay all capital gains taxes and other agreed upon items from the sale proceeds before the remaining net proceeds are divided equally between Joseph and Jennifer.

Jennifer also contends the Post Nuptial Agreement is ambiguous because it does not specify how any refund or additional taxes arising from the sale must be handled. We agree the Post Nuptial Agreement does not expressly address tax refunds or additional taxes, but it clearly states the couple's intent was to share equally in the net sale proceeds that remained after they paid the capital gains taxes. Although the Post

⁴ As explained above, the Post Nuptial Agreement also requires Joseph's \$2.5 million separate property interest, all transaction costs and fees, and certain other items to be paid before the net sale proceeds are distributed, but we do not address these other items because the parties dispute only the requirement to pay capital gains taxes.

Nuptial Agreement does not refer to an equalization payment based on a later capital gains determination by the tax authorities, the couple's clear intent to equally divide the net sale proceeds *after* paying the taxes requires an equalization payment if the taxes differed from the amount the couple contemplated at the time escrow closed.

The trial court concluded Jennifer's tax refund did not derive from the sale under the Post Nuptial Agreement because the court found the parties reached a separate agreement for the distribution of the sale proceeds during escrow. According to the trial court, by instructing the escrow company to make equal estimated capital gains tax payments on behalf of each party and then to distribute the remaining proceeds equally between them, Joseph and Jennifer agreed the estimated tax payments were part of each spouse's distribution of the sale proceeds. Accordingly, the court concluded each spouse was left to file their own tax return as he or she saw fit, and then keep any refund or pay any additional tax that resulted. The only limitation the court imposed was that Joseph could seek an equalization payment if the aggressive position Jennifer took in her tax return lead the tax authorities to audit Joseph and impose additional taxes on him. We find no evidence in the record to support this conclusion.

The Post Nuptial Agreement does not specify how or when the capital gains taxes were to be paid, nor does it require each spouse to pay an equal amount as capital gains. Rather, the Agreement simply required each party to pay capital gains taxes from the sale proceeds and then equally share the remaining net proceeds. Thus, Joseph and Jennifer could pay the capital gains taxes in any manner they saw fit provided they equally shared the remaining net sale proceeds after paying the taxes. Neither Joseph nor Jennifer testified they reached an agreement during escrow that modified the terms of the Post Nuptial Agreement. Similarly, the record contains no escrow instructions or other documents establishing a modification. The instruction directing the escrow company to make equal estimated capital gain tax payments on behalf of each spouse does not establish an intent to modify the Post Nuptial Agreement. Without an express

modification, the instruction must be construed as an attempt to carry out the couple's intent to pay the taxes before the net sale proceeds are equally divided. Nothing in the instruction waives Joseph's right to later seek an equalization payment if the tax authorities determine the payment on Jennifer's behalf exceeded her tax liability.

Finally, Jennifer contends any issue relating to the amount of taxes she owed is moot because the tax authorities concluded she underreported her income from the sale of the Laguna Beach home and have ordered her to pay additional taxes, penalties, and interest. Although subsequent action by the tax authorities ultimately may render Joseph's request for half of Jennifer's refund moot, we cannot make that determination because the record lacks admissible evidence showing the tax authorities have ordered Jennifer to pay additional taxes, and we agree with the trial court's conclusion the federal and state governments must make the final determination on the amount of taxes Jennifer owes.

To support her mootness contention, Jennifer submits a letter from her counsel stating he is "now informed and believe[s] that action has been taken which did result in taxes, penalties and interest being further assessed against [Jennifer]." This letter, however, is not part of the record and is not admissible evidence. (See *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236 ["An averment on information and belief is inadmissible"]; Code Civ. Proc., § 2015.5 [to be admissible as declaration, document must be executed under penalty of perjury].) Moreover, the letter only attaches documents from the California Franchise Tax Board; it does not include any information on whether the Internal Revenue Service has made a final determination on Jennifer's taxes. The letter also does not include any calculations showing the principal amount of additional taxes that purportedly have been assessed against Jennifer equal the amount of the refund she received. Even if Jennifer has been assessed additional taxes, Joseph's request is not moot unless the additional taxes assessed equal the amount of Jennifer's refund.

Accordingly, we reverse the trial court's ruling denying Joseph's order to show cause regarding the tax refund and remand for the court to determine whether the tax authorities' final determination on Jennifer's taxes requires an equalization payment consistent with our interpretation of the Post Nuptial Agreement.⁵

C. *The Trial Court Did Not Err in Denying Joseph's Request for Drug and Alcohol Testing*

Joseph contends the trial court erred in denying his section 3041.5 request for an order requiring Jennifer to submit to drug and alcohol testing. That section authorizes a court to order a parent seeking custody of a child to submit to drug and alcohol testing "if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent." (§ 3041.5.) Joseph challenges both the statute and the trial court's ruling, but we conclude each of his challenges lacks merit.

First, Joseph contends section 3041.5 is unconstitutional because it sets an impossibly high standard for any parent to meet. Absent a criminal conviction, Joseph contends a parent would never be able to show by a preponderance of the evidence that the other parent is using illegal drugs or abusing alcohol. Instead, to protect the child, Joseph argues a parent should be able to obtain an order requiring drug testing of the

⁵ We note Jennifer would have a right to receive an equalization payment from Joseph if the tax authorities assessed additional taxes against her that exceeded the amount of her refund because the Post Nuptial Agreement required the net sales proceeds to be divided equally between Joseph and Jennifer after all capital gains taxes are paid. (Of course, Jennifer also would have to make a proper request for an equalization payment.) In calculating whether an equalization payment should be ordered, the parties and the trial court must exclude any penalties, interest, or other amounts assessed against Jennifer other than the principal amount of the taxes because the Post Nuptial Agreement merely requires capital gains taxes to be paid from the sale proceeds, not any interest, penalties, or other assessments.

other parent “on demand.” We conclude Joseph forfeited this challenge because he failed to cite any authority to support it or even to identify the constitutional provision section 3041.5 purportedly violates. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*) [““When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived””]; *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1472 [“due process argument is forfeited for failure to provide an adequate legal and factual analysis”].) Furthermore, Joseph’s argument on what he thinks the governing standard should be is more appropriately directed to the Legislature. We may only apply the statute as it is written, we may not rewrite it. (See *Brandon S. v. State of California ex rel. Foster Family Home etc. Ins. Fund* (2009) 174 Cal.App.4th 815, 830.)

Second, Joseph contends the trial court erred in failing to apply Evidence Code section 412’s inference when it ruled on Joseph’s request. That section provides, “If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.” (Evid. Code, § 412.) According to Joseph, this statute essentially required the trial court to reject all evidence Jennifer offered in opposition to Joseph’s request because she could have produced stronger and more satisfactory evidence by voluntarily submitting to drug and alcohol testing to conclusively show she was not using illegal drugs or abusing alcohol.

Joseph, however, waived this argument because he never asked the trial court to apply this statutory inference and he cites no authority establishing the trial court had a sua sponte duty to do so. (See *People v. Moore* (2011) 51 Cal.4th 1104, 1144 [defendant’s failure to request instruction forfeits right to have jury instructed life without possibility of parole is presumed to be appropriate sentence in capital cases].) More importantly, applying this statutory inference in the manner Joseph suggests would require a parent to submit to drug and alcohol testing virtually any time the other parent

made an application to compel testing. Indeed, once the request was made, the opposing parent would have to voluntarily submit to drug and alcohol testing to defeat the request, or the trial court would be required to apply Evidence Code section 412 and distrust all evidence offered to oppose the request. Joseph cites no authority that requires the court to apply Evidence Code section 412 in a manner that would effectively shift the burden of proof.

Finally, Joseph contends the trial court erred because the weight of the evidence showed Jennifer used alcohol regularly in the presence of the children and at least once drove the children while she was intoxicated. According to Joseph, every witness testified Jennifer drank nearly every time they saw her. This contention, however, ignores the governing standard and the trial court's factual findings.

Under section 3041.5, the mere use of alcohol will not support an order for alcohol testing. Rather section 3041.5 requires evidence the parent habitually and continually abused alcohol before the court may impose drug and alcohol testing. Here, the trial court found the evidence failed to establish this essential fact. To the contrary, the court found the evidence showed Jennifer was a good parent and that the witnesses Joseph offered to show Jennifer abused drugs and alcohol lacked credibility. The court also expressly found Jennifer did not drive the children while intoxicated. We must defer to the trial court's evaluation of the witnesses' credibility. (*Colombo v. BRP US Inc.* (2014) 230 Cal.App.4th 1442, 1451.) The sole question for us to consider is whether substantial evidence supports the trial court's findings, not whether the evidence would have supported different findings. (*Ibid.*) We conclude the record supports the court's findings, and therefore we reject Joseph's challenge.

D. *The Trial Court Did Not Abuse Its Discretion in Awarding Jennifer Attorney Fees Under Sections 2030 and 2032*

1. Governing Legal Standards

Sections 2030 and 2032 authorize the trial court “to award fees and costs between the parties based on their relative circumstances in order to ensure parity of legal representation in the action.” (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 974 (*Falcone & Fyke*)). The court has broad discretion in making an attorney fee award under these statutes and “we will not reverse absent a showing that no judge could reasonably have made the order, considering all of the evidence viewed most favorably in support of the order. [Citation.] However, ‘although the trial court has considerable discretion in fashioning a need-based fee award [citation], the record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion.’ [Citation.]” (*Id.* at p. 975.)

Section 2030 requires the court to “make findings on whether an award of attorney’s fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties.” (§ 2030, subd. (a)(2).) “In determining what is just and reasonable under the relative circumstances,” section 2032 requires “the court [to] take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320[, which establishes the factors to be considered in making a spousal support award].” (§ 2032, subd. (b).)

“In assessing one party’s relative need and the other party’s ability to pay, the family court may consider all evidence concerning the parties’ current incomes, assets, and abilities, including investments and income-producing properties.”

(*In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 662 (*Sorge*); *In re Marriage of*

Tharp (2010) 188 Cal.App.4th 1295, 1313 (*Tharp*.) “That a party who is requesting fees and costs has the resources is not, by itself, a bar to an award of part or all of such party’s fees. Financial resources are only one factor to consider.” (*Falcone & Fyke, supra*, 203 Cal.App.4th at p. 975.) “‘A *disparity* in the parties’ respective circumstances may itself demonstrate relative “need” even though the applicant spouse admittedly has the funds to pay his or her fees.’ [Citations.]” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 315, original italics.) Indeed, in 2010, the Legislature amended section 2030 to provide, “If the findings demonstrate disparity in access and ability to pay, the court *shall* make an order awarding attorney’s fees and costs.” (§ 2030, subd. (a)(2), italics added.) “In summary, the proper legal standard for determining an attorney fees award requires the trial court to determine how to apportion the cost of the proceedings equitably between the parties under their relative circumstances.” (*Falcone & Fyke*, at p. 975.)

2. The Record Supports the Trial Court’s Attorney Fee Award

The trial court awarded Jennifer \$25,000 under sections 2030 and 2032 for her attorney’s efforts in opposing Joseph’s request to temporarily change child custody until Jennifer submitted to drug and alcohol testing. Although it found both Joseph and Jennifer were capable of paying their own attorney fees, the court concluded the disparity in Joseph’s and Jennifer’s access to funds to pay their legal bills justified an award to Jennifer. The court explained Joseph’s \$4.3 million in assets was at least double the value of the assets Jennifer held, even though the home in which he lived with the children represented a significant percentage of his assets, and Joseph’s approximately \$7,500 in monthly income was nearly three times Jennifer’s monthly income.

Joseph contends the trial court erred in two ways. First, he contends the trial court awarded Jennifer attorney fees without finding the surrounding circumstances had changed since the court denied Jennifer’s earlier request for the attorney fees she

incurred during the July 2011 trial on child and spousal support. At that time, the court denied Jennifer's request because it found the value of each spouse's liquid assets were about the same, their monthly income was about the same after imposition of spousal support, and Joseph previously had paid Jennifer \$5,000 in attorney fees. According to Joseph, these findings from 18 months earlier required the trial court to find a change in circumstances before it could award Jennifer attorney fees under sections 2030 and 2032.

This contention fails as a matter of law because an attorney fee award under these statutes must be based on each spouse's *current* circumstances. (*Falcone & Fyke*, *supra*, 203 Cal.App.4th at p. 975; *Sorge*, *supra*, 202 Cal.App.4th at p. 662; *Tharp*, *supra*, 188 Cal.App.4th at pp. 1313-1314.) Sections 2030 and 2032 do not require a finding of changed circumstances when there was a previous fee request. (See *In re Marriage of Wolfe* (1985) 173 Cal.App.3d 889, 893; Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶¶ 14:161 to 14:162, p. 14-55; ¶¶ 17:335, pp. 17-86 to 17-87.)

Joseph's second claim of error is the attorney fee award was not warranted because the "actual available assets or 'cash monies'" he and Jennifer had to pay for legal representation was "roughly equal" when his spousal and child support payments to Jennifer and the illiquid nature of his primary asset—his home—are considered. Joseph fails to provide any evidence or authority to support his contention. For example, Joseph does not cite any evidence establishing the value of his home, nor does he cite any legal authority requiring the court to deduct the value of an illiquid asset when comparing the spouses' financial resources. Similarly, although he claims only a \$2,500 difference between his monthly income and Jennifer's when adjusted to account for his child and spousal support payments, Joseph fails to cite any evidence to support his calculations or any authority that requires the court to make that adjustment.

As explained above, the trial court has broad discretion in determining how to equitably apportion the cost of litigation based on each spouse's relative circumstances. (*Falcone & Fyke*, *supra*, 203 Cal.App.4th at p. 975.) In exercising that

discretion, the court may consider the evidence regarding each spouse's current income, assets, and abilities, but their financial resources are only one factor to be considered. (*Ibid.*; *Sorge, supra*, 202 Cal.App.4th at pp. 662-663.) Here, the trial court based the attorney fee award on the significant disparity in Joseph's and Jennifer's relative access to funds and their ability to pay for legal representation. The record supports those findings and Joseph cites no evidence or authority to support his contention to the contrary. (See *Cahill, supra*, 194 Cal.App.4th at p. 956 [appellant forfeits argument by failing to support it with reasoned argument and citations to authority].)

E. *The Trial Court Erred in Awarding Attorney Fees Under Section 271*

The trial court also awarded Jennifer \$20,000 in attorney fees as a sanction under section 271. That section allows a trial court to make an attorney fee award "in the nature of a sanction" if the court finds a party's conduct frustrates the family law policy of promoting settlement and reducing the cost of litigation by encouraging cooperation between the parties. (§ 271, subd. (a).)

Here, the trial court found Joseph's order to show cause on omitted assets justified an attorney fee award under section 271 because the order to show cause made broad and vague allegations that required Jennifer to conduct extensive discovery, and after she completed that discovery Joseph withdrew his order to show cause on all allegedly omitted assets except Jennifer's tax refund. The court also found Joseph's request for half of Jennifer's tax refund warranted an attorney fee award under this section because Joseph was not entitled to any portion of her refund and the request "doesn't make any sense . . . at all."

We must reverse this attorney fee award because it relies, at least in part, on Joseph's request for half of Jennifer's tax refund. As explained above, we conclude the Post Nuptial Agreement entitles Joseph to a portion of any tax refund to which the tax authorities determine Jennifer is entitled based on the amount of estimated capital gains

taxes the escrow company paid on her behalf. Joseph's request for half of Jennifer's tax refund therefore may not serve as a basis for an attorney fee award under section 271 given our determination the trial court erred in denying that request. (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1083 [party's order to show cause does not provide basis for attorney fee award under section 271 when appellate court reverses trial court's decision denying order to show cause].) We therefore remand the matter for the trial court to reconsider whether to award Jennifer attorney fees under section 271, and if so the amount of fees, based on the other conduct the court relied upon in making its award.

III

DISPOSITION

The judgment and orders are reversed in part and affirmed in part. We reverse the trial court's order denying Joseph's request for half of Jennifer's tax refund and also the trial court's order granting Jennifer's request for attorney fees under section 271. We remand those matters for the trial court to reconsider each of those requests consistent with the views expressed herein. We affirm the trial court's judgment and orders in all other respects. In the interest of justice, the parties shall bear their own costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.