

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of FRITZ and JEANNE  
AKERLUND.

H036686  
(Santa Clara County  
Super. Ct. No. FL117215)

FRITZ AKERLUND,

Appellant,

v.

JEANNE AKERLUND,

Respondent.

In this dissolution proceeding involving a lengthy marriage between Fritz and Jeanne Akerlund, a trial ensued and judgment was thereafter entered.<sup>1</sup> Fritz appeals from the judgment, asserting three claims. First, he argues that the judgment must be reversed because the court failed to file a statement of decision after Fritz made a timely request for one. Fritz contends further that the court erred in denying his request that Jeanne reimburse the community for the value of her exclusive use of the family home for a period of several years, otherwise known as *Watts* (*Marriage of Watts* (1985) 171

---

<sup>1</sup> For the sake of clarity, we refer to the parties by their first names. We mean no disrespect in doing so. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

Cal.App.3d 366 (*Watts*) credits. Third, he asserts that the court erred in awarding attorney fees to Jeanne without giving consideration to Fritz's ability to pay those fees.

We conclude that the court committed reversible error by failing to file a statement of decision in response to Fritz's timely request. Accordingly, we will reverse the judgment with instructions that the trial judge who heard the matter prepare and file a statement of decision.

### PROCEDURAL HISTORY

Fritz filed a petition for dissolution of his marriage with Jeanne in December 2003. He alleged that the parties were married in July 1982, had two children, and had separated in November 2003. In February 2004, the court ordered, among other things, that Jeanne would be granted temporary exclusive use of the couple's family home in Los Altos. The court ordered further that Fritz pay child support and spousal support.

A trial on the remaining issues occurred on December 16, 17, and 21, 2009, before a licensed attorney, James F. Cox, Temporary Judge.<sup>2</sup> After submission of the matter following post-trial briefing, Temporary Judge Cox issued a tentative decision, identified as his "Intended Decision," on November 22, 2010. The Intended Decision disposed of various matters including Fritz's request for *Watts* credits; Jeanne's request for permanent spousal support; spousal support arrearages; and attorney fees and costs. Judgment was entered on January 12, 2011. Fritz filed a timely notice of appeal.

### DISCUSSION

#### I. *Issues on Appeal*

Fritz asserts three claims of error on appeal. They concern the court's (1) failure to provide a statement of decision, (2) failure to award *Watts* credits in favor of Fritz as

---

<sup>2</sup> Pursuant to stipulation and order entered in October 2005, Cox, an attorney in Scotts Valley, was appointed temporary judge for all purposes in the case. The first two days of trial were reported; the third day, by stipulation of the parties, was not reported.

requested, and (3) award of \$15,000 attorney fees in favor of Jeanne.<sup>3</sup> Because we conclude that the first contention has merit and necessitates reversal, we do not address the second and third claims of error.

## II. *Statement of Decision*

### A. *Background and Contentions*

At the end of the second day of trial (on December 17, 2009), there was a discussion between the court and counsel in which Temporary Judge Cox indicated that there had been a request for statement of decision by counsel.<sup>4</sup> Fritz contends that he made a timely request for a statement of decision at that time. Fritz's alleged request notwithstanding, Temporary Judge Cox noted in his November 2010 Intended Decision that "[n]either party requested a Statement of Decision." Fritz's counsel thereafter in response to the Intended Decision, advised Temporary Judge Cox that she had, in fact, made a request for a statement of decision during the trial; she renewed that request in her response. The judgment entered in January 2011 similarly stated that "[n]either party requested a Statement of Decision."

Fritz argues that the failure of Temporary Judge Cox to render a statement of decision in response to his request constituted error. He contends that this omission was "reversible error per se. [Citation.]"

---

<sup>3</sup> In his notice of appeal, Fritz indicated that he would also challenge (1) the permanent spousal support award; (2) the "[p]rocedural effect on validity of Judgment of setting of new trial/settlement conference by Petitioner after trial, but before intended decision received by the parties and before Judgment filed"; and (3) the award of "[c]osts." Fritz indicated in his opening brief that he had elected not to pursue the first two of these remaining issues. And he makes no argument concerning any claim that the court erred concerning any award of costs. Accordingly, any appellate challenges concerning these three issues are forfeited.

<sup>4</sup> Because the parties dispute that Fritz actually requested a statement of decision, we detail the discussion between Temporary Judge Cox and counsel on this subject, *post*.

Jeanne responds that “[t]here is no request for a Statement of Decision in the record in this matter.” She contends further that even assuming a proper request had been made, Temporary Judge Cox’s Intended Decision and the judgment thereafter entered satisfied the requirements of a statement of decision in that they provided specific findings on the issues in controversy.

B. *Applicable Law*

Under Code of Civil Procedure section 632, a court is obligated after a trial, upon a timely request by a party, to provide a statement of decision “explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial.”<sup>5</sup> As one court explained: “In a nonjury trial the appellant preserves the record by requesting and obtaining from the trial court a statement of decision pursuant to California Code of Civil Procedure section 632 [and rule 3.1590 of the California Rules of Court]. The statement of decision provides the trial court’s reasoning on disputed issues and is our touchstone to determine whether or not the trial court’s decision is supported by the facts and the law.” (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.) The court in its statement of decision need not address all legal and factual issues that the parties have

---

<sup>5</sup> “In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision. [¶] The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties.” (Code Civ. Proc., § 632.) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

raised; rather, it must “ ‘state only ultimate rather than evidentiary facts because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them. [Citation.]’ [Citations.] In other words, a trial court rendering a statement of decision is required only to set out ultimate findings rather than evidentiary ones.” (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125.)

Section 632 specifies the procedure by which a party may request a statement of decision. If the trial is more than one day, the request must be made within 10 days of the announcement by the court of its tentative decision. (§ 632.) If the trial is less than one day (or less than an aggregate of eight hours if conducted over multiple days), a party must make the request “prior to the submission of the matter for decision.” (§ 632.) If no party makes a timely request for a statement of decision, because of the presumption that the judgment is correct, an appellate court “must infer the trial court . . . made every factual finding necessary to support its decision.” (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 61; see also *In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1159, superseded by statute as stated in *In re Marriage of Fellows* (2006) 39 Cal.4th 179, 185 and fn. 6.) Therefore, because of the application of this doctrine of implied findings, “a trial court’s failure to issue a statement of decision can have a significant adverse effect on that party’s ability both to assess whether an appeal is justified and, if an appeal is filed, to present an effective challenge to the trial court’s decision.” (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 661.)

A court’s failure to file a statement of decision following a timely request therefore constitutes “per se reversible error.” (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126 (*Miramar Hotel*)). There, after trial and submission of the case, the court issued its tentative decision (labeled as “ ‘Memorandum of Decision and Statement of Decision . . . ’ ”), and the cross-complainants made a timely request for statement of decision. (*Id.* at p. 1127.) There was no indication in the record that the court took notice of the request, and a judgment was entered without a statement of

decision having been filed. (*Id.* at p. 1128.) The appellate court rejected the court’s attempt to circumvent the statement of decision process by terming its decision as such, holding that the tentative decision did not explain the legal and factual bases for the court’s decision and “the trial court deprived appellants of an opportunity to make proposals and objections concerning the court’s statement of decision. [Citation.]” (*Id.* at p. 1129.) Holding that the filing of a statement of decision under such circumstances was mandatory under section 632 (*Miramar Hotel*, at p. 1129), the court explained: “The Legislature, by its enactment of section 632, and the Judicial Council, by its adoption of California Rules of Court, rule 232 [now rule 3.1590] . . . , have created a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court’s decision. [¶] A statement of decision prepared in conformity to the established procedure may be vitally important to the litigants in framing the issues, if any, that need to be considered or reviewed on appeal. Parenthetically, such a statement may render obvious the futility of an appeal. Eventually, a careful issue identification and delineation may also be of considerable assistance to the appellate court.” (*Id.* at pp. 1128-1129, fn. omitted.)

Numerous cases are in accord with *Miramar Hotel*, *supra*, that the failure to file a statement of decision following a party’s timely request for one is reversible error. (See, e.g., *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397-1398; *In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010-1011; *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 282-284; *Social Service Union, Local 535 SEIU, AFL-CIO v. County of Monterey* (1989) 208 Cal.App.3d 676, 678-681; *In re Marriage of McDole* (1985) 176 Cal.App.3d 214, 219-220, disapproved on another ground in *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451, fn. 13; *In re Marriage of S.* (1985) 171 Cal.App.3d 738, 746-750.) The proper procedure where such error has occurred is for the appellate court to remand the case to the trial judge who heard the matter with

instructions that he or she complete the process of preparing and entering a statement of decision. (*Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1531.)

C. *Analysis of Claim of Error*

1. *Whether request was made*

We address initially Jeanne’s claim that the record does not reflect that Fritz made a request for statement of decision. We reject that contention.

At the conclusion of the second day of trial, the following exchange occurred between Temporary Judge Cox, counsel for Fritz (Heidi Hudson), and counsel for Jeanne (Constance Carpenter): “[The Court:] I would note counsel has requested a statement of decision on [permanent spousal support]. [¶ Ms. Carpenter:] The Watts and the attorney’s fees. [¶ Ms. Hudson:] On the Watts and the attorney’s fees. [¶The Court:] Also— [¶ Ms. Hudson:] And on the permanent spousal support. [¶The Court:] Okay. [¶ Ms. Carpenter:] Permanent spousal support. If there is going to be a statement of decision, it is not a settlement conference, that’s a trial. [¶The Court:] They can always be waived. It is being requested right now presuming a trial[. W]e are in trial, and if we compromise and settle then [there is] not going to be a statement of decision. It will be settled.” After brief further discussion unrelated to a request for statement of decision, the trial was adjourned for the day with an indication that it would resume with further proceedings on three issues: Fritz’s claim for *Watts* credits, permanent spousal support, and attorney fees and costs.

The foregoing demonstrates that a proper oral request for statement of decision was made in compliance with section 632 before the matter was submitted. (*Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 126 [request for statement of decision may be made orally]; *In re Marriage of Ananeh-Firempong, supra*, 219 Cal.App.3d at p. 284

[same].) What is less clear is whether the request was being made on behalf of Fritz, Jeanne, or both parties. But within 10 days after the court issued its Intended Decision, Fritz’s attorney thereafter indicated in writing that she had requested a statement of decision “at the outset of trial” and renewed that request. Although Jeanne’s counsel submitted proposed corrections to the Intended Decision, there is nothing in the record indicating that she disputed the claim that Fritz had requested a statement of decision during trial. We therefore conclude that Fritz made a timely request for statement of decision.

## 2. *Failure to issue statement of decision*

It is plain that once we have determined that Fritz in fact requested a statement of decision and none was forthcoming, the principle of per se reversal enunciated in *Miramar Hotel, supra*, 163 Cal.App.3d 1126 applies. Jeanne, however—citing no authority in support of the proposition—urges that the Intended Decision and judgment satisfy the requirements of a statement of decision and thus should be deemed such a statement under section 632. Jeanne’s argument lacks merit.

Section 632 and California Rules of Court, rule 3.1590, provide a specific procedure that the court must follow in the event a timely request for statement of decision is made by any party. In the tentative decision, the court may either indicate that it will prepare, or will order a party to prepare, a statement of decision. (Cal. Rules of Court, rule 3.1590(c)(2), (3).) Alternatively, a court may specifically indicate that its tentative decision will be its proposed statement of decision, subject to a party thereafter asserting formal objections thereto. (Cal. Rules of Court, rule 3.1590(c)(1).) As a fourth approach, it may “[d]irect that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision.” (Cal. Rules of Court, rule 3.1590(c)(4).) But because a tentative decision is not binding on the

court (Cal. Rules of Court, rule 3.1590(b)), unless the court expressly orders otherwise as provided in rule 3.1590 of the California Rules of Court, the tentative decision may not be considered the statement of decision. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647; see also Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2011) ¶ 16:164, p. 16-37.)

The court here did not designate that its tentative decision (identified as its Intended Decision) would serve as its statement of decision in accordance with either subdivision (1) or (4) of rule 3.1590(c) of the California Rules of Court. There is no authority for Jeanne's suggestion that either the Intended Decision or the judgment thereafter entered may be deemed a surrogate statement of decision under these circumstances, or that the procedural requirements of section 632 and California Rules of Court, rule 3.1590 may be otherwise ignored. We therefore conclude that the court's failure to file a statement of decision constituted per se reversible error. (*Miramar Hotel, supra*, 163 Cal.App.3d 1126.)

#### DISPOSITION

The judgment is reversed and the matter is remanded with instructions that the trial judge file a statement of decision. The court exercises its discretion in ordering that each party shall bear his/her respective costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

---

Duffy, J.\*

WE CONCUR:

---

Rushing, P.J.

---

Premo, J.

---

\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.