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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of LESLEY KRAUT
and ROBERT BODEN.

LESLEY KRAUT,

Appellant,

v.

ROBERT BODEN,

Respondent;

NATE G. KRAUT,

Objector and Appellant.

B162065 & B164780

(Los Angeles County
Super. Ct. No. BD152863)

APPEALS from orders of the Superior Court of Los Angeles County,
John W. Ouderkirk, Judge. Dismissed in part and affirmed.

Esner & Chang and Stuart B. Esner for Appellant and Objector and
Appellant.

Kolodny & Anteau, William J. Glucksman, Jody M. Leibman, and James L.
Keane for Respondent.

INTRODUCTION

Lesley Kraut appeals from two orders involving issues of child custody, child support, attorney fees and costs, and the imposition of discovery sanctions,¹ which followed a 1996 judgment of dissolution of her marriage from Robert Boden. As to one order, we find the notice of appeal was untimely and therefore dismiss the appeal to the extent it purports to challenge that order. As to the second order, we find no merit to the various contentions of error and therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Boden and Kraut were divorced on February 14, 1996. They have one child, Michelle, born in May 1991. Prior to the events at issue in the present appeal, Kraut had been twice tried on charges of attempting to murder Boden; both trials ended in a hung jury. Kraut claimed she attacked Boden when he entered her home and she believed him to be an intruder. In addition, Kraut had accused Boden and his wife, Marla, of molesting Michelle. Apparently after Michelle told her teacher she had been molested, the teacher reported the matter to the Department of Children and Family Services (DCFS), which investigated and found the allegations were unsubstantiated.

Boden filed an order to show cause on November 17, 2000, by which he sought to modify the parties' custody and visitation arrangements (so that he had sole physical custody of Michelle), to obtain an Evidence Code section 730 psychiatric evaluation, and an order that Michelle see a therapist. He also sought

¹ As to the imposition of sanctions, Nate Kraut, Kraut's brother and prior attorney, is a party to this appeal as objector and appellant.

sanctions against Kraut for allegedly making false accusations of child molestation, and an award of attorney fees and costs.

On January 9, 2001, Kraut filed an application for pendente lite attorney fees. She requested \$78,000 in fees in order for her to be prepared to defend against Boden's OSC, scheduled for hearing on January 22, 2001. Part of the \$78,000 request was "to bring her current on her past legal fees just to bring her up to par." Her counsel, Nate Kraut, estimated that she would need \$30,000 to retain a family law practitioner to defend her in the upcoming OSC.

On January 16, 2001, a hearing was held on the application for pendente lite fees, as well as on Boden's motion to continue the hearing on his OSC. After some discussion of the financial condition and dealings of the parties, the court stated: "I am going to deny the request without prejudice and what I am going to do is continue the OSC hearing from the 22nd, but I will set a hearing on the subject of attorneys fees when each side has more opportunity to conduct discovery regarding these money issues because I can't take any of this at face value." The court ordered both parties to produce tax returns and all other evidence of their income for the past three years.

Counsel for Kraut asked, "You have continued the matter?" The court replied, "Regarding discovery regarding finances." The court asked each party to specify if there were any specific requests for financial information they wanted. As part of that discussion, Boden's counsel asked for "an accounting as to the attorneys fees that he is alleging." The trial court said, "All right," then gave Kraut's counsel an opportunity to speak.

The court appointed counsel for the minor child, and reserved jurisdiction to determine who would pay for minor's counsel. The court also set February 1, 2001, as the deadline for exchange of documents.

Kraut's counsel then stated, "I take it because you are continuing this motion that I don't have to file new paperwork regarding it; is that correct? We are going based on the moving papers that you currently have other than the financial information?" The court said, "There is going to be new information, perhaps, coming in. Either side may wish to supplement what they have submitted to the court." Kraut's counsel replied, "Right, but I don't have to set a whole new motion to start the ball rolling?" The court said, "No."

The notice of ruling for the January 16, 2001 hearing stated that the court ordered, among other things, that Kraut's "motion for pendente lite attorney's fees was denied without prejudice to being granted at the hearing to be held on February 28, 2001"; and that "the date for a hearing on [Boden's] OSC to terminate [Kraut's] parental and custodial rights will be set at the February 28, 2001 hearing on [Kraut's] motion for an award of pendente lite attorney's fees."

On January 22, 2001, Boden served notice for Kraut's deposition to be held on February 6, 2001, a date preceding the hearing on the application for pendente lite fees. Kraut objected to the notice as being defective for lack of service on Susan Weiss (appointed as child's counsel), and as preceding the hearing scheduled for February 28, 2001. Kraut filed a motion seeking a protective order to prohibit Boden from taking her deposition prior to decision on the motion for an award of pendente lite attorney fees. Kraut also sought an award of sanctions pursuant to Code of Civil Procedure section 128.5. This motion was also calendared for February 28, 2001.

On February 14, 2001, Boden brought an ex parte application to shorten time on a motion to compel Kraut's deposition, and requesting sanctions for Kraut's failure to attend her scheduled deposition. At the hearing, the trial court stated: "What I am inclined to do is to continue the February 28th hearing, and I am inclined to do this, and I will hear from you, and allow any of these motions to

be brought within the normal time for bringing a motion as opposed to one on shortened time.” After further discussion, the court ordered that no depositions would be taken prior to the February 28th hearing. The court placed off calendar the hearing on Kraut’s request for pendente lite fees and all other financial issues, including child support; those issues were to be decided at a later date. The court noted that at the hearing on Kraut’s motion for a protective order (still scheduled for February 28, 2001) it would decide what depositions, if any, would be ordered. Boden asked that his ex parte motion to compel Kraut’s deposition be considered the opposition to the motion for a protective order, and the court granted the request. “Your Honor, my feeling is that between now and the 28th, if, in fact, the court is going to hear . . . his request for the protective order on the 28th, *then our motion that we filed today*, we would ask that that be our response to his notice for protective order. I believe it’s one in the same, quite honestly, Your Honor. [¶] We are asking that . . . Ms. Kraut be compelled to sit for her deposition which was duly noticed that Mr. Kraut keeps talking about that I have never notified him of.” (Emphasis added.) Kraut’s counsel prepared and filed notice of ruling; it did not state that the motion to shorten time was denied.

Hearing on the application for protective order and motion for sanctions took place on February 28, 2001. Boden’s counsel represented that the court had granted his application for an order shortening time to compel Kraut’s deposition. He said: “My recollection of the hearing, Your Honor, was that the court did, in fact, grant our motion, our ex parte motion to shorten time, and I asked that in conjunction with that, Your Honor, that our motion be allowed to also be our response to the protective order since it basically covers the same issues, Your Honor. And my understanding was the court granted that.” The court concurred. It then denied the motion for protective order, and granted Boden’s request to compel Kraut’s deposition (to be held within 30 days, only regarding financial

issues), and imposed sanctions of \$1,536 on Kraut and her counsel, Nate Kraut. The court found Kraut had failed to show that justice required a protective order prohibiting the taking of her deposition prior to hearing her OSC regarding pendente lite fees, and that Boden had the right to defend himself. It further found that Kraut had not submitted any evidence regarding her financial condition.

As to the imposition of sanctions, over Kraut's protest that the request for sanctions failed to comply with notice requirements, the court found that the award of sanctions was mandatory as Kraut was not substantially justified in failing to attend the deposition and in bringing the motion for a protective order. The court found good cause to continue Kraut's OSC for fees until after her deposition to permit Boden to conduct discovery.

Finally, at the suggestion of Michelle's counsel, the court ordered the appointment of Dr. Kay Bathurst to perform a psychological evaluation pursuant to Evidence Code section 730. Hearing on the issue of attorney fees and a status conference were set for May 2, 2001.

On April 12, 2001, Kraut filed an order to show cause seeking modification of child support, contending Boden's annual income was \$1.3 million, while Kraut's income was negligible. She also checked the box on the notice form indicating she was seeking attorney fees and costs.

On April 20, 2001, Kraut filed a motion for reconsideration of the order imposing sanctions, contending the court erred on February 28, 2001, in believing it had previously granted Boden's application to shorten time on motion to compel Kraut's deposition, and then granting the motion to compel and awarding sanctions. Kraut attached the reporter's transcript of the February 14, 2001 hearing, showing the application to shorten time was not granted. She also argued that even if the motion to compel remained an active issue at the February 28 hearing, the award of sanctions was in error for failure of proper notice.

On May 4, 2001, Boden filed an order to show cause and affidavit for contempt based on Kraut and her counsel's failure to pay the sanctions awarded in his favor.

Thereafter, Boden filed opposition to Kraut's motion for reconsideration on May 21, 2001. He contended that even if he misspoke regarding the court's ruling of February 14, 2001, the court nonetheless granted his request for affirmative relief in response to Kraut's motion for a protective order, i.e., it ordered Kraut to attend her deposition, and both she and her counsel pay sanctions for their previous failure to attend. Kraut filed a reply to the opposition.

On or about June 8, 2001, Boden filed a responsive declaration to Kraut's order to show cause, requesting that the court deny Kraut any award of child support, or at least reduce the amount of the child support award, and that the court grant Kraut no attorney fees based on alleged financial fraud by Kraut and her counsel. He claimed he had overpaid child support since October 9, 1998, in the amount of \$15,874.50.

Boden's income and expense declaration dated May 29, 2001, stated his net monthly disposable income was \$6,284, an amount 85 percent less than in the year 2000.

On July 31, 2001, a hearing was held to select a date for hearing regarding the Evidence Code section 730 evaluation pertaining to custody issues, and to arraign Kraut and Nate Kraut on the contempt motions. Kraut, now represented by Attorney Richard Bloom, again raised the issue of the pendente lite attorney fees. Also before the court was Kraut's motion for reconsideration of the sanction order. The court set August 14, 2001, as the hearing date regarding the psychological evaluation, the motion for reconsideration, and for a trial setting conference on the contempt motions. Kraut's attorney pointed out that Kraut's psychological expert witness, Dr. Arden, wanted to review Dr. Bathurst's documentation in preparation

for the hearing on August 14, and would need to receive the documents in timely fashion. Counsel also noted he would be requesting Dr. Arden's costs as part of the pending motion for pendente lite attorney fees and costs. The court stated: "We will hear the child support certainly after the custody evaluation. And at some point I'll hear the fees and costs at the end."

On August 8, 2001, Kraut filed a responsive declaration to Boden's order to show cause regarding custody and visitation. Boden filed opposition to Kraut's response on August 10, 2001.

Hearing commenced on August 14, 2001, on Kraut's motion for reconsideration of the sanction order. The court found that the motion failed to present new facts or new law, stating that Nate Kraut had the opportunity to argue on February 28, 2001, that the motion to compel was not on calendar, and the court rejected that argument. In any event, the court stated that it had denied the motion for protective order, and granted sanctions against Nate Kraut and Kraut for bringing the motion. Counsel for Boden acknowledged that he had misspoken in saying that the motion to compel was on calendar. Kraut's counsel argued that the motion to compel was permitted to be used as Boden's response to the motion for a protective order, but that notice of the sanctions request was lacking for the February 28, 2001 hearing. Boden's counsel pointed out that the motion to compel did indeed include a request for sanctions. The court denied the motion for reconsideration.

September 14, 2001, was scheduled as the hearing date on the motions for contempt.

The court then directed the parties' attention to the issues of custody and visitation. Kraut's counsel noted that a telephone conference had been held the previous Thursday (August 9th), during which he had expressed concern that records subpoenaed from Dr. Bathurst had not been delivered to Kraut's expert.

The court indicated the parties should try to make sure the documents were delivered as soon as possible before the August 14th hearing. Testing results were faxed to Kraut's counsel shortly thereafter, but "a significant amount of other information we were told at that time would not be available until sometime later." The majority of the documents were received by Kraut's counsel at 6:00 p.m. on August 13, who then sent them by messenger to Dr. Arden, who received them at 11:00 p.m. after he finished seeing patients at 10:00 p.m. Dr. Arden was able to review the documents (about a three-inch stack) in cursory fashion, and counsel not at all, prior to the hearing. Dr. Arden indicated his ability to give meaningful testimony to the court would be severely limited without his having reviewed the documents.

Kraut's counsel requested a continuance. He stated that Kraut had made a proposal that "in many respects mirrors what Dr. Bathurst has recommended," and counsel suggested that the granting of a continuance be made conditional upon the imposition of the proposed custody terms. Boden's counsel had not yet reviewed Kraut's proposal. Michelle's counsel disagreed that the proposal mirrored Dr. Bathurst's recommendations, and further expressed concern that if the matter were continued, it would be put off until September or October because Boden and Kraut's counsel had vacations scheduled during August. The hearing was recessed until later in the day to permit counsel to confer. The court noted, "If we have a long continuance on this matter because vacations and things get delayed, I may be inclined to make modifications based on the information that I do have on an interim basis. [¶] So keep that in mind --."

When the matter reconvened, counsel informed the court that more time was needed to confer and come to agreement on the custody terms.

The hearing continued on August 15, 2001. Kraut's counsel informed the court that the parties had agreed on a large number of issues regarding custody,

with relatively few issues remaining to be decided. With the understanding that the parties were agreeing to terms that would become part of an enforceable judgment, Michelle's counsel read into the record matters which had been agreed upon, and both parties' counsel stated any disagreements with those terms and also stated what remained to be decided. The court then asked the parties if they were in agreement with what had been stated, and each replied in the affirmative. The court set a date of September 6, 2001, for the parties to meet and confer to resolve the remaining custody and visitation issues.

Thereafter, Boden's counsel said: "[B]ecause of my change in my employment status, Your Honor, I would just ask that the court order me back for the September 14th hearing." The court did so.

Kraut's counsel then asked that a date be set for hearing the financial issues, noting that he had not received a complete response to his request for production of documents from Boden. Boden's counsel stated that he had received all the documentation he needed to proceed with the financial issues. The parties were ordered to meet and confer regarding further document production from Boden, and October 9, 2001 was set as the hearing date for the financial issues, including attorney fees and child support.

On September 14, 2001, Michelle's counsel informed the court that the parties had not reached agreement on some terms of the custody arrangement, and asked that the court hear and decide the remaining issues on October 9, 2001, and set a different date for hearing the financial issues. Kraut's counsel stated a "strong preference" that the financial issues not be heard on October 9th, since he still had not received a complete document production, and Boden's deposition had not yet been scheduled. Boden's counsel again stated that, although Nate Kraut had resisted all efforts to get him to produce documents, Boden had all the documents he needed, adding: "[W]e feel that we can make a strong case that, in

fact, there is a -- let's put it this way -- that there is a conspiracy between Mr. Kraut and Mrs. Kraut to hide assets.”

The court indicated that at the hearing on October 9, 2001, it would decide the remaining custody issues, and at that time set a date for hearing the financial issues. Finally, Boden's counsel informed the court that he was dismissing the contempt proceedings against Kraut and Nate Kraut, since they paid the sanctions after denial of the motion for reconsideration. Boden's counsel again asked that he be ordered back for the next hearing, and the court complied.

Boden filed a supplemental declaration regarding the custody and visitation issues on October 5, 2001.

Hearing was held on January 17, 2002, on the custody issues raised in Boden's OSC. The parties had reached agreement on the vast majority of issues regarding custody, and presented the remaining issues to the court for resolution. Those issues were discussed at length, and resolved by the court where necessary. In addition, the parties indicated to the court that they wished to vacate January 28, 2002, as the date to hear financial issues, as there remained a document request by Kraut with which Boden had not yet complied.

On April 5, 2002, a detailed order was filed regarding the custody and visitation issues. By that order, the parties would continue to share joint legal custody of Michelle. Where the parties could not agree, Boden would be entitled to make the final decision on issues concerning Michelle's education and medical care. Boden was awarded primary physical custody of Michelle. Kraut would have custody of her on alternate weekends from Friday after school until Monday morning, every Thursday after school until the following morning, and for two consecutive weeks during the summer. The order also specified how the parties would split holiday time with Michelle, among other miscellaneous issues. Kraut filed notice of appeal from the order of April 5, 2002, including the interim orders

awarding discovery sanctions and denying the motion for reconsideration, on October 3, 2002.

Previously on March 4, 2002, Richard Bloom, Kraut's counsel, filed a motion to be relieved as her counsel, stating that he and Kraut disagreed on how to litigate the financial issues in the case and were no longer able to effectively communicate. He also stated that her unpaid balance for his attorney fees was almost \$13,000, and she indicated she was unable to pay any of that amount or for future fees.

Bloom also filed a *Borson*² motion, seeking an award of fees of \$27,300 and costs of \$1,044 from Boden.

On April 29, 2002, Kraut filed a declaration in opposition to Bloom's motion to be relieved as her counsel. She stated that Bloom knew when he undertook her representation that she had no money, that she borrowed money from friends to pay his retainer, and that she expected him to depose Boden immediately so that the issue of pendente lite attorney fees could be resolved right away. Instead, the custodial issues went forward first. She stated that at the hearing of August 14, 2001: "This Court indicated that, unless the parties reached an agreement on the custodial issues, it would proceed to hear Boden's expert's testimony, unchallenged by effective cross-examination, and make an interim ruling based solely on that testimony. Under these circumstances, despite wanting a trial on the merits of the custodial issues (something I still want), I was forced into making many concessions to Boden's demands."

She stated that Bloom's failure to take Boden's deposition was due to her inability to pay Bloom to do so. She further stated that Boden still had not complied with requests for production of documents, and Bloom had failed to

² *In re Marriage of Borson* (1974) 37 Cal.App.3d 632.

bring a motion to compel production due to Kraut's inability to pay him to do so. She contended that "the delay in the resolution of my motion for an award of pendente lite attorney's fees has caused continuous friction between me and my attorney concerning payment. If the motion had been resolved before the other issues were decided, my attorney could have been focused on the merits of the issues instead of being concerned about how he would ultimately be paid."

The court granted Bloom's motion to be relieved as Kraut's counsel on May 10, 2002, reserving jurisdiction over the *Borson* motion filed by Bloom.

Hearing was held on Bloom's *Borson* motion on July 10, 2002. Kraut was represented by counsel Dennis Greene. Boden informed the court he was representing himself. McClinton, his former counsel, was present and "just observing," because he "had to sub out." Greene asked for a continuance, having been informed by Boden that he had retained new counsel who would be unavailable until July 22, 2002. Further, Greene had noticed Boden's deposition, but he had not appeared, and Greene wished to depose Boden before proceeding. The court continued the hearing until September 5, 2002.

On July 3, 2002, Boden filed a declaration in opposition to Kraut's OSC regarding attorney fees and costs, and modification of child support. Therein he detailed his knowledge of Kraut's assets and her involvement in her family's business partnership during their marriage, and the bases for his allegation that Kraut had fraudulently transferred both her home and her interest in her family's business to Nate Kraut. He requested that her motion for attorney fees be denied, and that she be sanctioned pursuant to Family Code section 3027 and ordered to pay his attorney fees and costs in the amount of \$50,685.

Kraut filed a supplemental brief regarding financial issues on July 8, 2002. She asserted that Boden had consistently underrepresented his income and

continued to resist Kraut's efforts to effectively conduct discovery.³ She detailed her allegations regarding his purportedly fraudulent representations about his income and assets. She argued that due to his failure to comply with discovery requests, the court should use his last known verified income and impute to him that earning capacity.

Kraut filed additional supplemental papers on September 18, 2002. By then Boden had appeared for deposition on August 20, 2002, at which time according to Kraut he gave evasive answers regarding his income and assets, claiming for example that he sold his interest in a game show he co-created, which allegedly generated over \$1 million in income during one television season, for the nominal sum of \$1.

Boden filed a summary memorandum of points and authorities on or about September 18, 2002. Therein he summarized his contentions with regard to the issues of child support and attorney fees and costs.

The hearing on the financial issues was held on September 23, 2002. After hearing argument from both counsel, the court ruled that it would use the income figures used by Boden in his summary memorandum of points and authorities to calculate child support.⁴ It found that Boden had overpaid child support dating back to April 2001.

The court awarded attorney fees to Susan Weiss, Michelle's attorney. For the 91 hours she billed, the court ordered that the County would pay her at the regular rate of \$120 per hour. Weiss's hourly fee was \$275, leaving a \$155 per

³ Kraut also filed a declaration by Mark Kohn, a certified public accountant retained by her as an expert witness. Attached as an exhibit was a list prepared by Kohn of the documents requested of Boden which had not yet been produced.

⁴ These figures included \$512 as Kraut's monthly net disposable income.

hour shortfall, times 91 is \$14,105. He ordered the parties to split that amount, with Boden paying Weiss \$600 per month and Kraut paying \$300 per month. Kraut's counsel represented to the court that Kraut could not afford to pay that amount. The court replied: "Well, I have heard that story before. [¶] So I am going to order her to pay \$300.00 a month and that will be starting November 1st." If any payment was late more than 15 days the entire amount would become due and payable and would begin to accrue interest at the rate of 10 percent.

The court then turned to the *Borson* motion filed by Kraut's former attorney Richard Bloom. He requested the court grant his attorney fees in the amount of \$28,257. He told the court he had received payments from Kraut of \$15,300, leaving an unpaid balance of \$14,207.57.

Counsel for Boden argued that a significant portion of the fees incurred by Kraut were due to her own conduct, including the fact the Department of Children and Family Services became involved.⁵ He further argued that only the unpaid amount of fees should be considered. He found no fault with the time Bloom incurred, except to the extent it was occasioned by Kraut's conduct. He urged the court "to consider the need and ability issues cautiously because of the history of this case." Bloom responded that the DCFS involvement occurred prior to his representation, and that the majority of time spent was in lengthy hearings and in negotiating the minutiae of the custody order, and that it was very difficult to bring the parties to agreement. Kraut's counsel noted that Michelle had reported to a counselor that she was molested by Boden's new wife, which occasioned DCFS involvement; he denied Kraut was responsible for the report.

⁵ Boden stated in previous declarations that the allegations of molestation advanced by Kraut were the reason he filed his OSC to obtain sole custody.

The court ruled that it would require on “a 2030, 2032 basis” that Boden pay \$10,000 toward Bloom’s fees and Kraut would be responsible for the balance. “This case finally got some order to it thanks to Mr. Bloom, Mr. McClinton and Ms. Weiss. It was very difficult on [Kraut’s] side when she was representing herself and when she had Mr. Kraut, her brother, in this case which caused fees and expenses to go up and the case to drag on for quite some time.” Boden was ordered to pay at the rate of \$500 per month.

Kraut’s attorney Greene claimed fees of \$41,250, at the rate of \$250 per hour for 165 hours. He asked the court to consider awarding at least some portion of the \$41,987 in fees incurred by Nate Kraut. He requested that the court award \$3,400 to Attorney Vacchio who represented Kraut at her deposition. Finally, he requested expert witness fees for psychologist Jeffrey Arden (\$8,800) and forensic accountant Mark Kohn (\$5,317.50). Counsel acknowledged that Arden “couldn’t be used because the psychologist [Bathurst] would not turn over the raw data . . . which is crucial to any psychologist to make an analysis, until 11:00 o’clock the night before the hearing.” Bloom and Greene both urged the court to take into account Boden’s income at the time the motion for pendente lite attorney fees was filed, January 2001. Boden admitted his income in 2000 was \$1.2 million.

As to Nate Kraut’s fees, Boden’s counsel argued that Kraut acknowledged transferring her assets to him to pay his fees, so nothing was owed to him. The court agreed, and noted that Nate Kraut admitted that he was not skilled in family law matters. As to Greene, counsel argued he failed to submit billing statements to explain the 165 hours he claimed. He just substituted in as Kraut’s counsel in June 2002, and Boden’s counsel therefore argued that his claim of having spent 165 hours was “a total misrepresentation.” Counsel further argued that the second supplemental brief Greene filed was simply repetitive of the first one. Counsel mentioned Arden’s fees, and the court interjected: “You don’t really have to

address that.” Finally, Boden’s counsel argued that Kohn’s services were not worth \$5,300, and asked that the parties split the fee paid to Bathurst for the psychological evaluation in the amount of \$8,700. Counsel represented that Boden had incurred about \$20,000 in legal fees since July 2002 when counsel substituted in as Boden’s attorney.

Greene responded that he had not lied in his declaration about the number of hours he spent on the case, and also noted that the second supplemental brief incorporated information obtained when Boden finally appeared for his deposition.

The court stated: “[Kraut] has never satisfactorily factually shown the court that she received anything of value for her transfer of her interest in the family corporation in the real property that she held. She never showed these things.” The court continued: “[A] lot of this happened at the time that a civil suit was filed which she divested herself of the property in her name and she is now supposedly paying Nate Kraut, I believe, \$1500.00 a month to live in the house that is supposedly -- well, it was hers until she transferred it to Nate Kraut in return for what, I am not sure, supposedly attorneys fees. It’s very difficult for me to believe that she is living on \$532.00 a month when her brother pays all her expenses. There is some laundering going on there. She never showed the court that that wasn’t the fact. . . . [¶] So there is [*sic*] assets out there.” Kraut’s counsel replied that she used the proceeds of the transfers for her criminal defense fees.

The court awarded Greene the amount of \$10,000, payable by Boden at the rate of \$250 per month. It awarded Kohn fees of \$1,000, payable by January 30, 2003. Kraut’s costs were denied.

The court entered its order on December 6, 2002. The order specified the child support payments which had been made since April 1, 2001, and the amounts that should have been paid since that date, resulting in overpayment of \$3,099. Boden was ordered to pay child support commencing October 1, 2002, in the

amount of \$1,186 per month, with a \$200 per month reduction until the \$3,099 overpayment was exhausted. The order noted that Boden's obligation to pay Bloom \$10,000 (at the rate of \$500 per month) had in fact been fully satisfied.

Kraut's counsel filed an ex parte application to modify the order, on January 13, 2003, objecting to inclusion in the order of the purported fact that Boden's obligation to Bloom had been fully satisfied. Citing *In re Marriage of Tushinsky* (1988) 203 Cal.App.3d 136, 142, Kraut argued that the right to attorney fees and costs under former Civil Code section 4370 results in an award to the client spouse and not the attorney; the attorney must institute an independent action against the client to recover attorney fees.

Kraut filed a notice of appeal on January 30, 2003, from the order entered on December 6, 2002.

Pursuant to Kraut's request and finding good cause, we ordered the appeals in case numbers B164780 and B162065 consolidated.

DISCUSSION

I. Pendente Lite Attorney Fees

Appellant contends the trial court erred by deferring ruling on her motion for pendente lite attorney fees until after deciding the custody issues, and in so doing, denied her due process of law because she could not afford to pay an attorney to vigorously litigate the custody issues and indeed her attorney did not do so.

Boden counters that the custody order was made on April 5, 2002, and the notice of appeal thereto was filed on the 181st day thereafter, on October 3, 2002 (a Thursday). He claims that therefore the issue of the denial of pendente lite attorney fees prior to decision of the custody issues is not properly before us.

We agree with Boden's contention. To the extent that Kraut seeks a reversal of the April 5, 2002 order and remand for a proper award of attorney fees, followed by a full trial on the merits of Boden's OSC to terminate Kraut's parental rights, we conclude that we have no jurisdiction to reverse the order of April 5, 2002, and the custody issues resolved therein.⁶

California Rules of Court, rule 2(a) provides: "Unless a statute or rule 3 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment."

The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56; citing *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674.) We have no jurisdiction to reverse the order of April 5, 2002, on any basis, including a purported denial of due process.

The amount of attorney fees eventually awarded to Kraut's counsel, or the failure to award any amount in some cases, is properly before us, as the order of

⁶ Boden filed a motion to dismiss the appeal on April 7, 2003, which we denied on April 23, 2003. The motion urged dismissal of the appeal as to the award of sanctions against Kraut and Nate Kraut, which we find we may consider. Rather than dismiss issues piecemeal on the prior motion, we now consider and discuss the merits of the various contentions of untimeliness of the notices of appeal.

December 6, 2002, which finally resolved the attorney fee issues was timely appealed.

Kraut incurred \$116,114 in attorney fees (Dennis Greene \$41,250; Richard Bloom \$29,507; Michael Vacchio \$3,400; Nate Kraut \$41,987). The court ordered that Kraut was entitled to attorney fees but awarded only \$20,000 in fees, \$10,000 each to Bloom and Greene.

On appeal, Kraut defends the validity of the work performed by each of the attorneys, and argues reduction or denial of their fees was an abuse of discretion. In so doing, however, Kraut ignores the fact that the court made the factual finding that Kraut had engaged in fraudulent transfers of property, and that she was not destitute as she claimed. That she was awarded any attorney fees under these circumstances demonstrates the court's attempt to level the playing field in a dispassionate manner. Kraut does not convincingly demonstrate that the court lacked substantial evidence to make the factual finding that it did with regard to her financial ability to pay attorney fees. We will not disturb the court's ruling as to the award of attorney fees.

In addition, Kraut argues that the court erred in ordering Boden to pay \$10,000 to Bloom, rather than directly to her. Kraut argues she was entitled to decide whether to first repay people who loaned her the money which she used to pay Bloom or to pay Bloom. We find no error. While attorney fees in a marital dissolution case are awarded for the benefit of the party concerned and only indirectly benefit the attorney, attorney fees allowed may in the discretion of the court be made payable to the attorney. (Fam. Code, § 272; see *Wong v. Superior Court* (1966) 246 Cal.App.2d 541, 545, 546.)

II. Refusal to Grant Continuance of Trial

Kraut contends that Boden's psychological expert witness, Dr. Kay Bathurst, failed to turn over relevant documents to Kraut and her psychological expert witness, Jeffrey Arden, until the late evening preceding the hearing of the custody issues on August 14, 2001. Kraut's counsel asked for a continuance of the hearing on that basis, but according to Kraut, the court denied the request for a continuance, "indicating that it would hear Dr. Bathurst's direct testimony that day and make interim orders based on her testimony," without the benefit of any cross-examination since Kraut's counsel and expert witness were unprepared. She argues she was therefore forced to enter into a settlement of the custody arrangements which gave Boden the bulk of the custodial time and virtually all decision-making authority regarding Michelle, because otherwise the court would follow Bathurst's recommendation to deprive Kraut of legal custody altogether.

We again must conclude that we are without jurisdiction to consider the issue presented, i.e., purported denial of a continuance, as it pertains directly to the validity of the custody ruling embodied in the order of April 5, 2002, from which notice of appeal was not timely filed.

We note, however, that in fact the court did not deny Kraut's counsel's request for a continuance, nor directly threaten to make interim orders solely based on Bathurst's testimony (who, incidentally, was the Evidence Code section 730 evaluator appointed by the court and not Boden's retained expert). Rather counsel announced to the court that it had issued what amounted to a settlement proposal, and all parties agreed to recess and discuss the custody issues. The court merely noted that the discussion should not drag on too long because for Michelle's benefit the custody issues needed to be decided. Nonetheless, the negotiations to

resolve the custody arrangements continued until *January 17, 2002*, when the parties presented the few unresolved issues to the court for resolution.

III. Assisting Boden in Retaining a Federal Employee as Counsel

Kraut argues that Boden's former counsel, McClinton, purportedly violated federal regulations that prohibit federal employees from representing private litigants, when he continued to represent Boden after becoming employed by the Equal Employment Opportunity Commission. She further charges that the court assisted him in doing so by ordering him back to appear at subsequent hearings, pursuant to McClinton's request. She argues that the lopsided treatment of the parties regarding obtaining counsel "raises the specter of bias."

Whether this issue is cognizable on this appeal, or instead is also untimely because the events at issue preceded the April 5, 2002 order, is difficult to discern since the issue was not addressed in any form in the order itself. In any event, the argument is simply beyond the pale. What arrangements, or lack thereof, McClinton made with his federal employer are not revealed in the record, and indeed are none of our concern. We soundly reject the notion that by ordering McClinton back for two hearings the court was demonstrating bias or assisting a federal employee in violating federal regulations. This makeweight argument adds nothing to this prolix appeal.

IV. Order on Kraut's OSC re Modification of Child Support

Kraut argues that the court erred in its order setting the amount of child support Boden must pay each month. She contends that (1) he persisted in refusing to produce documentation regarding his earnings and assets, and that the court should have imputed to him the earning capacity he demonstrated in 2000 when he

earned \$1.2 million; (2) the court abused its discretion by looking only at his net disposable income without consideration of his assets; and (3) the court abused its discretion by reducing Boden's monthly child support obligation because he did not file an OSC requesting such a reduction and did not show a material change of circumstances.

The first argument amounts to nothing more than an attack on the substantiality of the evidence to support the judgment. The court impliedly found that the financial information Boden had supplied was adequate and reliable. Kraut's assertions that he misrepresented his income previously and therefore his current representations could not be trusted merely invites us to reweigh the evidence. We decline to do so.

Kraut cites in support of her second argument that the court failed to consider Boden's assets the case of *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269. The *Cheriton* court did in fact rule in that case that the trial court erred by failing to consider the father's assets in computing child support. However, the assets at issue "included stock and options worth tens of millions of dollars." (*Id.* at pp. 289-290.) There is no evidence here that Boden's assets were substantial enough to affect his or Michelle's lifestyle in any material fashion. As recognized by the *Cheriton* court, "the 'key financial factor in the guideline formula is net disposable income. [Citations.]" (*Johnson v. Superior Court*, [(1998)] 66 Cal.App.4th [68] at p. 75.)" (92 Cal.App.4th at p. 290.) We find no abuse of discretion in the trial court's computation of child support for failure to include Boden's assets.

Finally, as to the contention that the court was without jurisdiction to reduce Boden's child support obligation because he had not filed an OSC to do so, and had not demonstrated a material change in circumstances, we find no merit in this contention. In his responsive declaration to Kraut's OSC raising the issue of child

support, Boden requested that his support obligation be reduced and that his overpayment of past fees be rectified. A responsive declaration may be used to request affirmative modification relief alternative to that requested by the moving party on the same issues raised by the moving party. (Fam. Code, § 213.) (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 1981) ¶ 17:394, p. 17-89 (rev. # 1, 2003).)

V. Kraut's Expert Witness Fees

Kraut incurred \$5,317.50 for the services of forensic accountant Mark Kohn and \$8,800 for the services of psychologist Dr. Jeffrey Arden. She contends on appeal that the court's award of \$1,000 for Kohn and nothing to Arden constituted an abuse of discretion. We disagree.

We note that Arden did not testify in this matter, nor apparently did he submit a report that the court ever considered. The denial of any award for his fee does not constitute an abuse of discretion. In any event, we reiterate that the trial court explicitly rejected Kraut's contention that she is destitute and cannot afford to pay for the expert witness fees she incurred. We cannot disturb this ruling where, as here, substantial evidence was presented to the trial court in support of its finding. Thus, as to Arden and Kohn, the trial court implicitly ruled that even if their fees were valid, Kraut had the ability to pay for the vast majority of their services.

VI. Fee Award to Child's Attorney

Kraut points out that the only attorney whose fees were not reduced by the court was Weiss, who was paid by the county at the customary rate for appointed counsel. The court ordered the parties to split equally the difference between that

hourly rate (\$120) and Weiss's normal hourly rate (\$275), and ordered Boden to pay Weiss at the rate of \$600 per month, and Kraut to pay Weiss at the rate of \$300 per month. She argues that \$600 per month is a de minimis portion of Boden's monthly income of \$26,934, while Kraut's monthly income is \$512. Again, we note the trial court's finding that Kraut was not accurately reporting her income. The court explicitly rejected Kraut's counsel's assertion that she could not pay Weiss \$300 per month. We will not disturb the ruling.

VII. Imposition of Discovery Sanctions

Kraut argues that Boden's motion to compel Kraut's deposition was not properly before the court on February 28, 2001, and that the court had no jurisdiction to impose sanctions on her and Nate Kraut because proper notice had not been given.⁷

Initially, we conclude that consideration of this ruling and the related denial of Kraut's motion for reconsideration are properly before us. Although the rulings occurred on February 28, 2001, and August 14, 2001, respectively, these were not appealable orders. A discovery sanction such as the monetary sanction imposed here (Code Civ. Proc., § 2023) does not constitute an appealable order, and is ordinarily reviewable only on appeal from the final judgment in the action. (*Bartschi v. Chico Community Memorial Hospital* (1982) 137 Cal.App.3d 502, 507; *In re Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1474-1476.) While the April 5, 2002 order was not timely appealed, the December 6, 2002 order was, and it, rather than the prior order, addressed the financial issues which

⁷ Where applicable, references in this section to Kraut include Nate Kraut, objector and appellant as to the issue of discovery sanctions.

were the primary subject of Kraut's deposition. As we will discuss, the sanctions were awarded by the trial court based either on Kraut's failure to appear at her deposition on financial issues, or on her bringing without good cause a motion for a protective order to avoid that deposition. The rulings thus are properly before us on the appeal from the order of December 6, 2002.

As to the merits of the court's sanction order, our review of the record leads us to conclude that the court's ruling on February 14, 2001, was subject to varying interpretations. At that hearing, the court denied Boden's ex parte application for an order shortening time on a motion to compel Kraut's deposition. But it did not deny outright the motion to compel. In fact, the court noted it was reserving decision until the hearing on February 28, 2001, as to what depositions, if any, would be ordered. Boden did ask that his ex parte motion to compel Kraut's deposition be considered the opposition to the motion for a protective order, and the court granted the request. Counsel then stated: "Your Honor, my feeling is that between now and the 28th, if, in fact, the court is going to hear . . . his request for the protective order on the 28th, *then our motion that we filed today*, we would ask that that be our response to his notice for protective order. I believe it's one in the same, quite honestly, Your Honor. [¶] We are asking that . . . Ms. Kraut be compelled to sit for her deposition" (Emphasis added.)

Thus, there was at the very least ambiguity in whether or not the motion to compel Kraut's deposition was still before the court to be heard on February 28, 2001. The trial court resolved that ambiguity at the hearing on the 28th by stating that it intended to consider the motion to compel, then granted it. It further found that Kraut's motion for a protective order was brought without good cause.

Boden's counsel was wrong in representing that the order shortening time had been granted, but not as to whether the motion to compel remained under consideration.⁸

Since Boden's motion to compel was in fact properly before the court, it had jurisdiction to impose monetary sanctions.

Kraut argues further that even if the motion to compel were properly before the court, the request for sanctions was improperly noticed pursuant to Code of Civil Procedure section 2023, subdivision (c). She contends the notice of motion merely indicated it was a motion to "Compel Depo; Continuance/Sanctions," and failed to indicate the type of sanctions sought, the party or other persons against whom sanctions were sought, or the basis for the sanctions.

We reject this argument. The notice of motion alerted Kraut that Boden was seeking sanctions related to his motion to compel her deposition. The notice of motion was addressed to "Kraut *and her attorney of record*," who at that time was Nate Kraut. The request for sanctions and the basis for it were made abundantly clear in the accompanying memorandum of points and authorities.

DISPOSITION

The appeal from the issues relating to the order of April 5, 2002, is dismissed as untimely. The order of December 6, 2002, is affirmed.

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⁸ Thus, the trial court's later denial of Kraut's motion for reconsideration was also justified.

VOGEL (C.S.), P.J.

We concur:

EPSTEIN, J.

HASTINGS, J.