



In re Marriage of James

2004 | Cited 0 times | California Court of Appeal | September 21, 2004

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Theodore James (Ted) Aldershof appeals the trial court's order increasing spousal support for his former wife, Jamie Lee Aldershof. He contends the trial court erred in basing its order on his failure to make an \$85,000 property equalization payment as provided in the parties' judgment of dissolution. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Ted and Jamie¹ were married for 23 years before they separated in 1995. Ted initially was ordered to pay \$6,000 monthly spousal support; this amount was reduced to \$2,500 in 1998. In April 2001 Ted filed an application for an order to show cause (AOSC), requesting a reduction in spousal support payments from \$2,500 to \$500 per month on the ground that his income had decreased while Jamie's had increased. After more than a year of acrimonious discovery battles, Jamie filed a responsive declaration to Ted's AOSC, asking that spousal support be increased to \$5,500 per month. Following several hearings, on September 26, 2002 the court denied Ted's request and instead increased support to \$3,000 per month.

In support of its modification order the court found that Ted's gross monthly income was \$9,489 and Jamie's gross monthly income was approximately \$2,500. The court rejected Jamie's contention the court should impute additional income to Ted based on his assets. The court also ruled in Ted's favor with respect to several other items Jamie had argued should be included in determining his income.

The court then stated, "The court has reviewed and considered all the factors enumerated in Family Code section 4320. The court has looked at those factors both from the perspective of reducing or terminating spousal support as urged by husband and the perspective of increasing spousal support as urged by wife. . . . [¶] . . . [¶] One factor the court has considered is the failure of husband to pay the equalization payment of \$85,000 ordered in the judgment. This appears to have impacted wife's needs. So that factor lobbies in favor of increasing spousal support. [¶] . . . [¶] Husband's ability to pay. The evidence presented shows that husband's income has declined since it was last measured. However, he still has enough money to enable him apparently to help his adult children. . . . This is



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admirable, but suggests that husband has more ability to pay spousal support than his income would indicate. So this factor lobbies against a decrease in spousal support and somewhat in favor of increasing. The goal that wife be self-supporting, the court has considered this factor. The wife's obvious efforts in this regard are at most neutral and may lobby against a decrease.

"There are additional factors. One, the court notes, I don't believe anybody argued it, one is the time elapsed since judgment, which is eight years. This lobbies against an increase and somewhat in favor of a decrease.

"Second, this is argued by wife, husband's failure to pay the equalization payment of \$85,000. This is a significant factor that weighs against decrease and in favor of increasing spousal support. If wife had the benefit of that \$85,000 for the last eight years, she might not need additional support now.

"The third factor also urged by wife, disparity in post-dissolution lifestyles. This is not a significant issue, except with reference to husband's failure to make the equalization payment. He was always the high earner. Presumably, he still has a greater ability to generate income than wife does. Eight years after the divorce, she is no longer entitled to share in his greater ability to earn.

"With the exception of husband's failure to make the equalization payment, which is a significant issue, each party took away from the marriage half the community property. Nobody disputes this.

"That husband has done better with his half -- which may have been the better half, but who knows, the court does not second-guess the parties' eight-year-old stipulated judgment -- is not a factor worthy of significant weight eight years later.

"Based on my consideration of all these factors and the evidence presented, I am going to increase spousal support by \$500 a month retroactive to the filing date."

After the court made its oral ruling, the following colloquy took place between the court and Ted's counsel, Ms. Goodman:

"MS. GOODMAN: Can I inquire, Your Honor, if that equalization payment was paid, would that make a difference? Or would that be grounds to modify the support?"

"THE COURT: It was certainly a significant factor in my determination. Yes, if it was paid, it would make a difference.

"MS. GOODMAN: So that would be grounds to come back in here if that was paid?"

"THE COURT: Let me just give you a heads up. If it were paid, everything would be even. I wouldn't be decreasing, I wouldn't be increasing. That was the most significant factor in my consideration."



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The court's written order, dated March 13, 2003, stated "That based on consideration of all Family Code section 4320 factors and the evidence present, that Spousal Support previously ordered at \$2,500.00 per month, be increased by \$500 per month to the amount of \$3,000.00 per month, retroactive to the filing date of the OSC for modification." Ted was also ordered to pay \$23,500 in attorney fees, \$8,500 of which represented "part of his sentence" in a contempt action brought by Jamie for failure to pay previously-ordered support.² The court ordered the attorney fees and spousal support arrearages paid over four years at the rate of \$1,000 per month, with an acceleration clause if Ted defaulted.

DISCUSSION

1. Standard of Review

Normally we review the trial court's decision to modify spousal support for an abuse of discretion. "Whether a modification of a spousal support order is warranted depends on the facts and circumstances of each case, and its propriety rests in the sound discretion of the trial court the exercise of which this court will not disturb unless as a matter of law an abuse of discretion is shown." [Citation.] An abuse of discretion occurs "where, considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would reasonably make the same order under the same circumstances." [Citation.]" (In re Marriage of Olson (1993) 14 Cal.App.4th 1, 7.) The reviewing court "must accept as true all evidence tending to establish the correctness of the trial judge's findings, resolving all conflicts in the evidence in favor of the prevailing party and indulging in all legitimate and reasonable inferences to uphold the judgment." (In re Marriage of Stephenson (1995) 39 Cal.App.4th 71, 82, fn. 5.)

At the outset, however, we must determine whether the trial court applied the correct legal standard to the issue in exercising its discretion, which is a question of law for the court. "The scope of discretion always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion." (Choice-In-Education League v. Los Angeles Unified School Dist. (1993) 17 Cal.App.4th 415, 422.)

2. The Court Erred In Basing Its Order on Ted's Failure to Make the Equalization Payment

In considering a request to modify or terminate a spousal support order, "the court considers the same criteria set forth in [Family Code] section 4320 as it considered when making the initial order . . . [Citation.] These factors include the ability of the supporting party to pay; the needs of each party based on the standard of living established during the marriage; the obligations and assets of each party; and the balance of hardships to each party. [Citation.]" (In re Marriage of Terry (2000) 80 Cal.App.4th 921, 928; see also In re Marriage of Farrell (1985) 171 Cal.App.3d 695, 700 (Farrell) ["While the trial court has wide latitude in exercising its discretion to modify an award of spousal



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support, there must be demonstrated a material change of circumstances subsequent to the prior order. [Citation.] In the absence of such a substantial change of circumstances, the court has no authority to modify a spousal support award.".)

Although the trial court referred to a number of the factors identified in Family Code section 4320 in its ruling on September 26, 2002, the court acknowledged the reason it ordered an increase in spousal support was Ted's failure to make an \$85,000 equalization payment as provided in the parties' marital settlement agreement. That was error.

In *Farrell*, supra, 171 Cal.App.3d 695, the Court of Appeal held the husband's failure to discharge a debt pursuant to the parties' judgment of dissolution did not constitute a change of circumstances that could justify a modification in spousal support. (Id. at p. 700.) The court explained that, although the trial court had increased spousal support to compensate wife for husband's failure to discharge the debt, "husband's contractual obligation would not be suspended during the period of increased spousal support nor would it be extinguished at the termination thereof. Seventy months later, the husband would still be indebted to the wife for the entire amount of the [obligation]." (Id. at p. 702.) The trial court's conversion of a property division obligation into spousal support was impermissible "because it was apparent that the spousal support increase was not based on consideration of the parties' needs and abilities to meet those needs." (Ibid., citing *In re Marriage of Cobb* (1977) 68 Cal.App.3d 855, 860-861.)

3. The Trial Court Was Within Its Discretion to Leave Spousal Support Unchanged Absent Consideration of the Unpaid Equalization Payment

Because the trial court used the wrong standard in ruling on the AOSC, we must reverse. However, we need not remand the matter for a new hearing because the trial court stated, explicitly and on the record, that had it not considered Ted's failure to make the \$85,000 equalization payment, it would have neither increased nor decreased the level of spousal support. We, therefore, review that alternate ruling for abuse of discretion.

Substantial evidence supports the trial court's factual findings with respect to the parties' income and expenses. Moreover, the trial court explicitly considered the factors set forth in Family Code section 4320 and found, on balance, that no adjustment in support was appropriate. The trial court's implied finding that the change in the parties' income since the original support order did not constitute a material change in circumstances was supported by substantial evidence and was well within the court's discretion. (See *In re Marriage of Terry*, supra, 80 Cal.App.4th at p. 928 ["The trial court has broad discretion to decide whether to modify a spousal support order based on a material change of circumstances."].) Accordingly, we remand to the trial court with directions to vacate its order increasing support and to enter a new and different order leaving spousal support unchanged.³

4. The Award of Attorney Fees Did Not Constitute an Abuse of Discretion



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Ted contends the order he pay \$23,500 in attorney fees to Jamie under Family Code section 2030 was an abuse of discretion because the court failed to consider the relevant statutory factors as required by *In re Marriage of Lynn* (2002) 101 Cal.App.4th 120. In *Lynn* the court held, "[T]rial courts enjoy broad discretion in awarding attorneys' fees in marital proceedings. [Citation.] The exercise of that discretion is guided by statute." [Citation.] As relevant here, section 2032 provides: "(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties. (b) In determining what is just and reasonable under the relative circumstances, the court shall 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. . . ." "It is well established in California that, 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.] [Citation.]" (*Lynn*, at pp. 133-134.)

We do not agree that the record fails to reflect either the trial court's consideration of the relevant factors or its exercise of its discretion. Where counsel have argued the relevant factors and the court awards less than the full amount of fees requested, we can reasonably infer findings to support the award. (See *People v. Johnson* (1987) 193 Cal.App.3d 1570, 1573-1577 [in ruling on evidentiary objections under Evid. Code, § 352, "the content and context of the argument that preceded the court's ruling, and the nature of the ruling itself, adequately demonstrates a reflection and weighing of Evidence Code section 352 factors."].) Counsel for both parties argued extensively to the trial court about the relevant factors governing an award of fees, including the parties' comparative financial situations and the reasonableness of the services provided by Jamie's counsel. The court's exercise of its discretion is apparent because it awarded \$23,500 in attorney fees (including \$8,500 in connection with a contempt proceeding from which Ted has not appealed) in response to Jamie's application for more than \$80,000. We find no procedural infirmity or abuse of discretion.

DISPOSITION

The order increasing spousal support is vacated, and the matter is remanded to the trial court with directions to issue an order denying the parties' applications to decrease or increase support. The order granting attorney fees is affirmed. Appellant is to bear his own costs on appeal.

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We concur:

WOODS, J.



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ZELON, J.

1. As is customary in family law proceedings, we refer to the parties by their first names, not out of disrespect, but to avoid confusion. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)
2. Ted has not appealed the contempt order.
3. We need not decide Ted's contention that the trial court erred in excluding the declaration of his accountant Bruce Lang because he has not demonstrated any prejudice. (Evid. Code, § 354 ["A verdict or findings shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court . . . is of the opinion that the error or errors complained of resulted in a miscarriage of justice"]; *In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 751 [erroneous exclusion of evidence harmless where there was no reasonable probability of a different result had it been admitted].) Indeed, it appears that the trial court resolved most, if not all, of the forensic accounting issues in Ted's favor.

