In re Marriage of Williams

2008 | Cited 0 times | California Court of Appeal | December 29, 2008

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In its order granting dissolution of the marriage between Damon Williams (husband) and Yolanda Williams (wife), the trial court reserved the issue of "Epstein" credits for separate property contributions made by husband toward community obligations. (In re Marriage of Epstein (1979) 24 Cal.3d 76, 84-85 (Epstein), superseded on other grounds as stated in In re Marriage of Walrath (1998) 17 Cal.4th 907, 914.) The court rejected husband's subsequent request for reimbursement of separate property expenditures and awarded wife $4000 in attorney fees. Husband appeals from an order that denied reconsideration of the Epstein credits issue and awarded wife an additional $1000 in attorney fees and costs. Construing the appeal as having been taken from the underlying order rather than the motion for reconsideration, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Husband and wife were married in 1998 and separated in 2005. They had three children and lived in a house that husband had purchased before the marriage. Wife petitioned for divorce. At the time of separation, husband was employed as an officer with the San Francisco Police Department and earned in excess of $10,000 per month including overtime. Wife drew $2,000 in monthly disability payments and was unable to work due to a serious illness. This court has been advised that since this appeal was filed, wife has died of cancer.[1]

Following a contested hearing on January 31, 2007, the court issued an order dissolving the marriage based on the couple's irreconcilable differences. It required husband to pay to wife $2036 per month in child support and $750 in spousal support, noting that although the marriage had been short term, spousal support was warranted given wife's inability to work. The family home was awarded to husband as his separate property, subject to a determination of a community property interest based on reductions in the principal balance of the mortgage during the marriage. (In re Marriage of Moore (1980) 28 Cal.3d 366, 371-372 (Moore); In re Marriage of Marsden (1982) 130 Cal.App.3d 426, 436-437 (Marsden). The court denied husband's request that wife reimburse the community for the fair rental value of the property during the period when she had exclusive possession after separation, noting that husband was paying less than the guideline amount for support and could have expected to pay

more based on his income. (See In re Marriage of Watts (1985) 171 Cal.App.3d 366, 374 (Watts).) Finally, the court noted that while it appeared husband was entitled to some Epstein credits for separate property he had used to pay community obligations, he had not adequately documented the amount of those credits. Husband was granted 30 days from the date of the decision to file a motion for Epstein credits supported by adequate proof of payments made, with failure to do so constituting a waiver of those credits.

On April 18, 2007, the court determined that the community interest in the house under Moore/Marsden was $24,259.00, and ordered husband to pay wife $12,129.50. A hearing on the issue of Epstein credits was set for June 13, 2007.

On July 23, 2007, the court issued an order denying Epstein credits to husband, finding that he had failed to prove he had paid community expenses out of his separate property. It noted that despite having been ordered to submit all documentation at least two weeks before the hearing, husband had arrived at the hearing with cancelled checks which had not been broken down according to category, photocopied or totaled. The court noted that to the extent husband was seeking reimbursement for mortgage and tax payments on the property, he would not have been entitled to reimbursement in any event because he was awarded the house as his separate property. The court also stated that husband had failed to request Watts credits based on the fair rental value of the property for the period when it was occupied by wife after their separation. In any event, no evidence had been presented of the property's fair market rental value. The court awarded wife $4000 in attorney fees.

On August 2, 2007, husband filed a motion for reconsideration of the Epstein credits and reimbursement issues. In support of the motion, he presented a "Supplemental Declaration [] Establishing Epstein Credits Rights of Reimbursement" accompanied by photocopies of a number of checks written for various expenses incurred after the date of separation, including the mortgage, utilities and purchases at various retail establishments. On September 17, 2007, the court denied the motion for reconsideration.

On October 12, 2007, husband filed a notice of appeal from the September 17 order.

II. DISCUSSION

Husband challenges the denial of Epstein credits and reimbursement. This issue was resolved by the court in its July 23, 2007 order and in its September 17, 2007 order denying reconsideration, from which the appeal was taken. There is a split of authority as to whether an order denying reconsideration is itself appealable. (In re Marriage of Burgard (1999) 72 Cal.App.4th 74, 81; Alioto Fish Co. v. Alioto (1994) 27 Cal.App.4th 1669, 1679.) Under one theory, an order denying reconsideration is appealable if the underlying order was appealable and the motion for reconsideration was based on new or different facts. (See Rabbitt v. Vincente (1987) 195 Cal.App.3d 170, 174.) More recent cases hold that orders denying reconsideration are non-appealable. (In re

Marriage of Burgard, supra, 72 Cal.App.4th at p. 81; Reese v. Wal-Mart Stores, Inc. (1999) 73 Cal.App.4th 1225, 1242; Crotty v. Trader (1996) 50 Cal.App.4th 765, 769.)

We need not resolve that split of authority here. If the underlying order is appealable and the notice was timely with respect to that order, we may construe an appeal from an order denying reconsideration as having been taken from the underlying order. (See Walker v. Los Angeles County Metropolitan Transportation Authority (2005) 35 Cal.4th 15, 19-22 (Walker) [appeal from denial of motion for new trial may be construed as appeal from the judgment when it is reasonably clear appellant intended to appeal the judgment and respondent was not misled or prejudiced]; Sabbah v. Sabbah (2007) 151 Cal.App.4th 818, 819-820, fn. 1 [appellant's intention to appeal judgment can be ascertained from issues raised in opening brief].) The denial of the motion for reconsideration is then reviewable in a timely appeal from the underlying order or judgment. (Walker at p. 19.)

Here, the notice of appeal was timely as to the July 23, 2007 order of which reconsideration was sought, because it was filed within 30 days of the date the order denying the motion for reconsideration was entered, within 90 days of the date the motion for reconsideration was filed, and within 180 days after the underlying order was entered. (Cal. Rules of Court, rule 8.108(e)(1).) From the issues raised in the opening brief, it is reasonably clear that husband intended to challenge the denial of Epstein credits and reimbursement. (See Walker, supra, 35 Cal.4th at p. 22.) We treat husband's appeal as having been taken from the July 23 order denying his request for Epstein credits and reimbursements.

Turning to the merits, husband has not established that he is entitled to a reversal of the July 23 order. It is a party's duty "by argument and citation of authority to show in what respects rulings complained of are erroneous." (Wint v. Fidelity & Casualty Co. (1973) 9 Cal.3d 257, 265.) The opening brief articulates no factual or legal arguments explaining why the trial court's rejection of husband's claims was erroneous.

Moreover, husband has not provided us with a reporter's transcript for any of the hearings, but has instead elected to proceed on a judgment roll appeal based on a clerk's transcript. We therefore make every presumption in favor of the judgment and the existence of all facts consistent with its validity. (Bond v. Pulsar Video Productions (1996) 50 Cal.App.4th 918, 924.) "The sufficiency of the evidence is not open to review. The trial court's findings of fact and conclusions of law are presumed to be supported by substantial evidence and are binding on the appellate court, unless reversible error appears on the record. [Citation.]" (Ibid.)

The record itself does not demonstrate either error or prejudice on the part of the trial court. As the court noted in its July 23 order, husband's Epstein claim was based in part on payments of the mortgage, taxes and upkeep on the home, which was awarded to him as his separate property. He cannot, therefore, complain that in making these payments, he utilized separate property on behalf of the community. As to the other payments, the record contains no documents filed in connection with

the July 23 hearing that shows separate property funds were used to benefit the community. It appears from the court's ruling that wife filed a responsive declaration rebutting husband's claims that was credited by the court, but this declaration has not been included in the record on appeal. We presume it supports the trial court's ruling.

We likewise find no error in the court's denial of husband's motion for reconsideration. Code of Civil Procedure section 1008[2] permits a trial court to reconsider a prior ruling only on a showing that the alleged new evidence could not with reasonable diligence have been presented earlier. It is not a vehicle for making an argument that could have been made, but was not, during the earlier proceedings. (McPherson v. City of Manhattan Beach (2000) 78 Cal.App.4th 1252, 1265; Baldwin v. Home Savings of America (1997) 59 Cal.App.4th 1192, 1198-1200.) Husband's reconsideration motion was accompanied by photocopies of checks he had written, itemized lists of expenditures he purportedly made from his separate property to benefit the community, and rental listings of comparable homes to demonstrate the fair market rental value of his home in support of a Watts credit to the community. In his accompanying declaration, husband explained that he had not provided copies of the checks in support of his prior motion because the expense of making copies would have been onerous. He has not explained why he couldn't have at least provided itemized lists of his expenditures and presented his checkbook register and/or cancelled checks to the court in some organized fashion. Nor has he explained his failure to present a claim for Watts credits based on the fair rental value of the home at the original hearing. The court did not abuse its discretion in denying the motion for reconsideration. (See New York Times Co. v. Superior Court (2005) 135 Cal.App.4th 206, 212.)

We also reject husband's challenge to the orders awarding attorney fees to wife. Wife was unable to work due to a terminal illness and there was a significant disparity in their income and earning capacity. The court did not abuse its discretion in ordering husband to pay her attorney fees to insure her access to the court. (Fam. Code, § 2030, subd. (a); Marriage of Rosen (2002) 105 Cal.App.4th 808, 829.)

Finally, husband has raised a number of issues unrelated to either the July 23 order regarding Epstein credits and attorney fees or the September 17 order denying reconsideration: the calculation of the community property interest in the home under Moore/Marsden, a challenge to the trial judge for cause, child support and medical payments on behalf of the children and misconduct by wife's attorney. These issues arose in prior proceedings resulting in appealable orders from which no timely appeal was taken, and we cannot now consider them. (See Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal.4th 51, 56; Strathvale Holdings v. E.B.H. (2005) 126 Cal.App.4th 1241, 1248.)

III. DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

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We concur. JONES, P. J., SIMONS, J.

1. Wife was unrepresented by counsel on appeal and no respondent's brief was filed on her behalf. The issues raised in this appeal are not rendered moot by her death, because they affect the property that will ultimately pass to her estate and the attorney fees payable to her counsel for services already rendered. Because we have not received any request for a substitution of parties in light of wife's death (see Code. Civ. Proc., §§ 375, 377.41; Cal. Rules of Court, rule 8.36(a)), we have retained the original title of the case. (See Konig v. Fair Employment & Housing Com. (2002) 28 Cal.4th 743, 745-746, fn. 3.) We note that since we received notification of wife's death (through a letter submitted by her former trial counsel) we have sent notices on the case to wife's sister, who was granted a power of attorney over wife's affairs.

2. Although the reconsideration of certain family law orders is governed by more specific statutes in the Family Code (see In re Marriage of Hobdy (2004) 123 Cal.App.4th 360, 364-373), husband filed his motion for reconsideration under Code of Civil Procedure section 1008 and he cites no authority suggesting it was governed by a different provision.