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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of MARILYN and MICHAEL POSNER.	2d Civ. No. B283978 (Super. Ct. No. D179978) (Ventura County)
MARILYN POSNER, Respondent, v. MICHAEL POSNER, Appellant.	

Michael Posner (Michael) appeals a superior court order denying his motion to terminate or reduce his monthly spousal support obligation to his ex-wife Marilyn Posner (Marilyn).[1] We conclude, among other things, that the court did not abuse its discretion. We affirm.

[1] We refer to the parties by their first names for clarity.

FACTS

Michael and Marilyn were married in 1962. A judgment of dissolution of their marriage was entered in 1989. In 1991, Michael was ordered to pay $4,530 a month as spousal support for Marilyn. In 1995, that amount was reduced to $4,093 per month.

In 2015, Michael filed a motion to terminate or modify spousal support. At that time Marilyn was 72 years of age, retired and receiving Social Security benefits. Michael was 75 years of age and "effectively retired from his work as an attorney." Michael "remarried over 25 years ago," and he and Cassandra, "his new wife, . . . currently own a home with [a] net equity of approximately $800,000." Michael received $550,000 "as a buy-out of his partnership interest" in his law firm.

In Michael's income and expense declaration, he said he receives $3,522 per month as Social Security benefits and $9,840 per month in pension and retirement payments. He said his gross monthly income is $13,362.01.

At the hearing on his motion, Michael testified that he currently receives $1,000 a month as fees for consulting with two organizations. That amount was not mentioned in his income and expense declaration.

Donald Pyne, a CPA retained by Michael, testified Michael's income available for spousal support is $6,748 per month. On cross-examination, he said he was aware of *In re Marriage of Peterson* (2016) 243 Cal.App.4th 923, 930, which holds that "federal law mandates that Social Security is separate property." Pyne said that in calculating Michael's income, he divided his Social Security payment "in half" because he believed Michael's "spouse is entitled to half."

Patrick Greene, a "forensic" accountant retained by Marilyn, testified Michael's "current gross income available for support is approximately $9,437 per month."

Pyne and Greene calculated the available monthly income figures by adding Michael's Social Security benefits to the required minimum distribution (RMD) withdrawals he was required to make from his pension and investment accounts given his age. Both said they apportioned a percentage of the benefits to account for Cassandra's community interest in the benefits.

The trial court modified spousal support for a four-month period (September 2015 through December 2015), but otherwise denied Michael's motion. It found: 1) Marilyn "is not self-supporting"; 2) Michael "continues to have the financial ability to contribute to [her] support"; 3) "there continues to be a substantial disparity in the income and assets of the parties"; 4) during the marriage Michael was the "primary wage earner" as an attorney and Marilyn "devoted herself to domestic duties with an earning capacity slightly higher than minimum wage"; 5) Marilyn's income "has not increased since the time that spousal support was reduced to $4,083 in 1995"; Marilyn's income "has decreased since that time"; and 6) Michael "has failed to show [that] a material change in circumstances . . . has reduced his financial ability to pay the amount of support that was previously ordered."

Michael objected after the trial court made its decision. He claimed the court improperly considered and used Cassandra's income in deciding the motion. The court overruled the objection. It said that it "did not take into account any income on behalf of [Michael's] present spouse."

DISCUSSION

Denying the Motion to Modify Support

Michael contends the trial court abused its discretion by not granting his motion to terminate or reduce his spousal support obligation. We disagree.

"'"[T]he trial court's determination to grant or deny a modification of a support order will ordinarily be upheld on appeal unless an abuse of discretion is demonstrated."'" (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1150-1151.) "A court may modify a spousal support order upon a showing of a material change of circumstances since the last order." (*In re Marriage of Berman* (2017) 15 Cal.App.5th 914, 920.) "In evaluating the supporting party's ability to pay support, the court may take into account not only income actually earned, but also unearned income and assets." (*Ibid.*) "Even upon proof of a change in circumstances, 'modification is not necessarily mandated given the court's obligation to reconsider the statutory standard . . . .'" (*Ibid.*)

"[I]f a court finds that a supporting party has structured ownership of his or her assets to avoid his or her financial obligations, the court may 'look past the apparent form of ownership . . . to determine the extent of [the supporting party's] true interest in them and the availability of those assets in assessing [the supporting party's] ability to pay.'" (*In re Marriage of Berman*, *supra*, 15 Cal.App.5th at p. 921.) A party moving to modify a support order has the burden to establish grounds to support such a modification. (*Id.* at p. 920.)

In reviewing the record, we do not weigh the evidence or decide the credibility of the witnesses. Those are matters exclusively determined by the trial court. (*In re Marriage of Hill*

& Dittmer (2011) 202 Cal.App.4th 1046, 1051-1052.) We must draw all reasonable inferences from the evidence in the record in favor of the trial court's factual findings. (*Id.* at p. 1051.)

Michael contends the trial court erred by considering the income of his "new spouse" in calculating the income available to pay spousal support. "'The income of a supporting spouse's subsequent spouse . . . shall not be considered when determining or modifying spousal support.'" (*In re Marriage of Romero* (2002) 99 Cal.App.4th 1436, 1442; Fam. Code, § 4323, subd. (b).)

"'"'[A] trial court is presumed to have been aware of and followed the applicable law.'"'" (*Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150, 1175.) Marilyn claims Michael has not shown that the trial court was unaware of the *Romero* standard. She correctly notes that the court's findings show that it did not take into consideration the income of Michael's new spouse. The court said, "The issue that has been raised is that the Court mistakenly attributed more income to [Michael] by virtue of not taking into account what would be the community property interest of his present spouse in the earnings, the retirement account, and Social Security benefits that are attributed to [Michael]. [T]he Court *did not take into account any income on behalf of his present spouse*." (Italics added.)

Michael contends the trial court erred by finding "the sum of $13,360 was available for payment of spousal support" per month. He claims two "financial accounting experts, Mr. Greene and Mr. Pyne, each stated that [his] income available for support was only $6,748.00 up to $9,031.00 per month." He suggests the court had to accept their opinions. But their opinions were in conflict, and the credibility of all witnesses and experts is decided exclusively by the trial court. (*In re Marriage of Hill & Dittmer*,

supra, 202 Cal.App.4th at pps. 1051-1052; *Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 139.) "A trial court is not required to accept even unanimous expert opinion at face value." (*In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.)

Here the trial court could reasonably find Pyne was impeached on cross-examination. Marilyn also notes that Greene and Pyne relied on RMD figures from Michael's investment account companies to base their calculations on his available monthly income. She contends they used the RMD figures as a limit for Michael's monthly income. She correctly notes that did not limit the court's discretion. "[O]nce the participant reaches age 70 1/2, the court possesses discretion to consider as income available for spousal support *an amount greater than the statutorily mandated minimum withdrawals*." (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 13, italics added.) It may consider Michael's assets which were considerable. (*In re Marriage of Berman*, *supra*, 15 Cal.App.5th at p. 920.)

Moreover, Marilyn notes, the monthly income figures provided by these experts were "contradicted by Michael's income and expense declaration." There he declared his monthly gross income was $13,362.01. A trial court may rely on an income and expense declaration as substantial evidence to support its findings. (*In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1382.) Marilyn claims the court could also reasonably infer from Michael's testimony that he received more per month than the amount listed in his declaration.

In Michael's trial brief, he said his income was community property with Cassandra, but he listed his monthly income to be higher than the amount listed in his declaration. He said his

"income after retirement will be moderate and monthly income will likely be *in excess of approximately $15,000.00 per month*." (Italics added.) "[I]n the face of an ambiguity as to whether disputed sums represent income available for support, that determination is committed to the court's discretion." (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1448.)

Moreover, a court on a motion to modify support also considers other factors. These include the age, needs and earning capacity of each party, the duration of the marriage, the parties' hardships and other "just and equitable" factors. (Fam. Code, § 4320; *In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396-398.)

Michael contends there was a change in circumstances because of his retirement. He highlights income as the critical factor. But "even if [a party] shows a change of circumstances in actual income as the result of retirement, modification is not necessarily mandated given the court's obligation to reconsider the statutory standard, especially the reasonable needs and financial abilities of the parties." (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 78.) "[A] key factor is the supporting party's 'ability to pay,' which encompasses assets as well as income." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304.) "[I]t is 'proper for the court to look to assets controlled by husband, other than income, as a basis for the award [of spousal support].'" (*Id.* at p. 305.) Here the court carefully considered the impact of Michael's retirement, his ability to pay, his assets and other relevant factors.

The trial court found Michael received $550,000 as a "buy-out" of his interest in the law firm. It said Michael "has been prudent with his investments and has planned well for his

retirement," while Marilyn is "not self-supporting." It noted the current "substantial disparity in the income and assets of the parties," that Marilyn was 72 years of age, not employed, and Michael continues to "have the financial ability to contribute to [her] support." They had been married for 27 years. It found Marilyn's income has decreased since 1995. It said given her age, education, skills and work history, she "cannot be forced to seek employment." Her work history showed an "earning capacity slightly higher than minimum wage." Marilyn "does not have any retirement income other than her social security benefits." The court properly considered these factors in deciding Michael's motion. (*In re Marriage of Dietz*, *supra*, 176 Cal.App.4th at pps. 397-398.) We do not weigh the evidence, decide the credibility of witnesses or resolve evidentiary conflicts. (*In re Marriage of Hill & Dittmer*, *supra*, 202 Cal.App.4th at pps. 1051-1052.) Michael has not shown why the court could not reasonably deny his motion given its findings and the evidence in the record. (*In re Marriage of Stephenson*, *supra*, 39 Cal.App.4th at p. 78.)

Michael contends the trial court placed too much weight on the marital standard of living given the lapse of time (27 years) since the parties' separation.

The "'marital standard of living'" is "a general description of the station in life that the parties had achieved by the date of separation." (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1560.) It is "merely a threshold or reference point against which all of the statutory factors may be weighed." (*Ibid.*) "It is neither a floor nor a ceiling for a spousal support award." (*Ibid.*)

But here the trial court's order was not based on an entitlement to a past lifestyle status. Instead, the court found Marilyn "*is not self-supporting* and that [Michael] *continues to*

have the financial ability to contribute to the support of [Marilyn]." (Italics added.) Michael has not shown grounds for reversal.

DISPOSITION

The order is affirmed. Costs on appeal are awarded in favor of respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Manuel J. Covarrubias, Judge

Superior Court County of Ventura

Lowthorp, Richards, McMillan, Miller & Templeman, Jeffrey D. Johnsen for Appellant.

Milhaupt and Cohen, Melissa E. Cohen; Ferguson Case Orr Paterson, LLP, Wendy C. Lascher for Respondent.