Filed 11/16/18 Woods v. Jenkins CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KEVIN WOODS, Appellant, v. HELEN JENKINS, Respondent.	B279555 (Los Angeles County Super. Ct. No. MD042190)

APPEAL from an order of the Superior Court of Los Angeles County, Scott J. Nord, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of John K. Fu and John Fu for Appellant.

No appearance for Respondent.

In this marital dissolution action, Kevin Woods (Woods) appeals from an order denying his petition for a modification or termination of the spousal support he agreed to pay Helen Jenkins (Jenkins) in the parties' marital settlement agreement.

On appeal, Woods makes two arguments. First, he maintains that the trial court erred by not finding that he no longer has the ability to pay spousal support. Second, Woods contends that the trial court erred because Jenkins failed to abide by a purported *Gavron* warning[1] in the parties' marital settlement agreement.

We are not persuaded by either of Woods's arguments. Accordingly, we affirm the trial court's order.

BACKGROUND

I. The Marital Settlement Agreement

Woods and Jenkins married in 1996; they separated in 2012. In 2013, they entered into a marital settlement agreement.

The settlement agreement, a handwritten document on a court form, provided that Woods would pay $1,400 per month in spousal support to Jenkins. The agreement provided further that

---

[1] A *Gavron* warning is a " 'fair warning to the supported spouse [that] he or she is expected to become self-supporting.' " (*In re Marriage of McLain* (2017) 7 Cal.App.5th 262, 271.) *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705 (*Gavron*) stated: " '[T]he Legislature intended that all supported spouses who were able to do so should seek employment. It also appears the Legislature expected that courts would issue orders encouraging these spouses to seek employment and to work toward becoming self-supporting.' [Citations.]" (*Id*. at p. 711.)

Woods's monthly payment of $1,400 "shall continue until further order of [the] court, marriage of [Jenkins], or death of either party." In addition, the agreement provided as follows: "In one year parties to have a review-status hearing to assure [that Jenkins] has taken a review course . . . and exam for certification for being [a licensed Vocational Nurse (LVN)]. [Jenkins] to have . . . obtained employment as LVN or something." The agreement, however, did not expressly provide that Jenkins had to be self-supporting within one year's time or, in fact, by any time. The agreement went on to note that at the time Jenkins was "not working" and Woods was employed and making $6,304.02 per month without overtime.

The trial court subsequently entered a judgment dissolving the marriage on May 29, 2014.[2]

---

[2] The record before us does not contain any documents (other than the settlement agreement) or hearing transcripts from the divorce proceedings. As a result, we do not know what, if anything, the trial court initially advised the parties with regard to spousal support and the settlement agreement's purported *Gavron* warning. Under section 4330, subdivision (b) of the Family Code, "[w]hen making an order for spousal support, the court may advise the recipient of support that he or she should make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances considered by the court pursuant to Section 4320, unless, in the case of a marriage of long duration as provided for in Section 4336, the court decides this warning is inadvisable."

All further statutory references are to the Family Code unless otherwise indicated.

II. The Modification/Termination Petition

On May 9, 2016, Woods, who was 49 years old at the time, petitioned the trial court for an order modifying or terminating his spousal support obligation. Woods based his petition on what he believed to be a material change in circumstances, namely his health. At the time he entered into the settlement agreement, he could afford the spousal support payment because he worked a considerable amount of overtime as a prison correctional officer. Woods estimated that in 2013, he worked between 64 and 72 hours per week at the prison. Since 2013, however, Woods's health (type-2 diabetes and knee injuries) limited the amount of overtime he could work. At the time he submitted his petition, Woods was on "industrial disability" due to a knee injury that he suffered at work.

III. The Trial

On September 29, 2016, the trial court held a bench trial on Woods's petition. Woods testified that he had two surgeries in the last two years, one on each knee. Woods admitted that, while he can still perform his duties as a correctional officer and that he is no longer on disability leave, he is unable to work any overtime as a result of his knee injuries. As an example of his diminished work capacity, Woods testified that where he once worked four or five double shifts (16-hour shifts) per week before his knee surgeries, he is now physically unable to work such long shifts; as a result, he is currently limited to eight-hour days only, with no overtime or overtime pay.

With regard to his income and expenses, Woods reported a higher base gross monthly income than at the time of the settlement agreement: $6,304.02 per month versus $7,992 per

month. His average monthly expenses (not including his spousal support payment) totaled approximately $3,300. Woods's current wife receives $3,800 per month and she contributes $1,000 of that amount toward their household expenses.

Jenkins, who was 47 years old at the time of the hearing, testified that she holds certificates, but not licenses, for the following professions: Certified Nursing Assistant; Licensed Vocational Nurse; and Cosmetologist. Jenkins further indicated that she had not worked in any field since 2003 due to her diabetes and a back injury. Jenkins testified that she had been searching for work since 2003 as a LVN, but due to her disabilities and the lack of a license, she had not found any work in that field. As a result, Jenkins's monthly income was limited to the $1,400 she received in spousal support plus $194 in food stamps.

During the hearing, in response to argument by Woods's counsel that Jenkins had failed to live up to the terms of the separation agreement by not obtaining work as an "LVN or something," the trial court noted that Woods had never asked for a "seek work" order for Jenkins. When the trial court offered to consider issuing a seek work order as one possible response to the petition, Woods's counsel stated that his client would be amendable to such a result. At the conclusion of the hearing, the trial court took the matter under submission.

IV. The Order

On September 29, 2016, following trial, the trial court issued a seven-page written decision denying the petition. "After reviewing all of the evidence, tax consequences, the [p]arties' marital standard of living both pre and post separation," the trial

court found that, "after balancing the equities and [the] requirements of [s]ection 4320," there was no basis for a modification at that time. Specifically, the trial court found that there had been no material change in Woods's circumstances: "The [c]ourt finds that while [Woods] was out on disability, he has since returned to fulltime employment at his original salary, not including any overtime which, at one point was extensive. No evidence was presented that [Woods's] salary was reduced during his time off due to injury. Nothing indicates that the current amount [of his income] was based on his overtime."

At the same time that it denied the petition, the trial court also issued a seek work order directed to Jenkins: "[Jenkins] is to seek work on a full[-]time basis. Should [at] a later date, a further motion be brought for modification of spousal support by [Woods], and the [c]ourt were to find that [Jenkins] has not made reasonable efforts to find such employment, the [c]ourt may impute wages to her at the minimum wage rate which may result in [a] lower spousal support award."

Woods timely appealed.

DISCUSSION[3]

On appeal, Woods contends that the trial court abused its discretion in denying his motion for termination or modification of spousal support. We begin our evaluation of his contention with an overview of the rules governing the modification of spousal support and the applicable standard of review.

I. Guiding Legal Principles

A. *Key Factors for Spousal Support Awards*

Section 3651, subdivision (a), provides, with exceptions not relevant here, that "a support order may be modified or terminated at any time as the court determines to be necessary." "In exercising discretion whether to modify a spousal support order, 'the court considers the same criteria set forth in section 4320 as it considered when making the initial order . . . .' " (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 899; see *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1273.)

---

[3] Although Jenkins did not file a respondent's brief in this appeal, her failure to do so does not mandate a reversal. (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 505; *Kruger v. Department of Motor Vehicles* (1993) 13 Cal.App.4th 541, 546.) It is well established that an appellant "still bears the 'affirmative burden to show error whether or not the respondent's brief has been filed.' " (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1078; see *In re Marriage of Rifkin and Carty* (2015) 234 Cal.App.4th 1339, 1342, fn. 1.) Accordingly, we will decide the appeal on the record and the opening brief, and will reverse "only if prejudicial error is found." (*Petrosyan v. Prince Corp*. (2013) 223 Cal.App.4th 587, 593, fn. 2; Cal. Rules of Court, rule 8.220(a)(2).)

Section 4320, in pertinent part, provides: "In ordering spousal support under this part, the court shall consider all of the following circumstances: [¶] (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following: [¶] (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment. [¶] . . . [¶] (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living. [¶] (d) The needs of each party based on the standard of living established during the marriage. [¶] . . . [¶] (f) The duration of the marriage. [¶] . . . [¶] (h) The age and health of the parties. [¶] . . . [¶] (k) The balance of the hardships to each party. [¶] . . . [¶] (n) Any other factors the court determines are just and equitable."

B. *Material Change In Circumstances*

It is well established that " '[m]odification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.]' [Citation.]" (*In re Marriage of Khera and Sameer* (2012) 206 Cal.App.4th 1467, 1475.) Without the material change requirement, " 'dissolution cases would have no finality and unhappy former spouses could bring repeated actions for modification with no burden of showing a justification to change the order. Litigants " 'are entitled to attempt, with some degree

of certainty, to reorder their finances and life style [*sic*] in reliance upon the finality of the decree.' " [Citation.] Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order. [Citation.]' [Citation.]" (*Id*. at p. 1479.)

A material change of circumstances "means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. It includes all factors affecting need and the ability to pay." (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 246.) Moreover, the mere passage of time will not justify a modification. "With the passage of time, changed circumstances may occur, but it is the change in circumstances and not the passage of time which is material." (*In re Marriage of Heistermann* (1991) 234 Cal.App.3d 1195, 1202.) "The moving party has the burden of showing a material change of circumstances since the last order was made." (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.)

In reviewing the trial court's order denying Woods's motion for termination of spousal support, we are also mindful that the parties agreed to spousal support of $1,400 per month in their marital settlement agreement. " '[A] marital settlement agreement is a contract between the parties. [Citations.] Where the agreement permits modifications, those modifications require a showing of a change in circumstances. [Citations.] Moreover, in determining what constitutes a change in circumstances the trial court is bound to give effect to the intent and reasonable expectations of the parties as expressed in the agreement,' and, thus, 'the trial court's discretion to modify the spousal support order is constrained by the terms of the marital settlement agreement.' [Citation.]" (*In re Marriage of Dietz* (2009) 176

Cal.App.4th 387, 398.) "The court may not simply reevaluate the spousal support award." (*In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 238.)

A supported spouse's failure to become self-sufficient can constitute changed circumstances for purposes of modifying spousal support. (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1238 (*Shaughnessy*).) In *Shaughnessy*, the parties married in 1979 and separated in 1995, with the former husband paying spousal support beginning from the time of the separation. (*Id*. at pp. 1230, 1231.) The trial court entered a judgment dissolving their marital status in 2003. (*Id*. at p. 1231.) In 2004, the husband moved the court to terminate spousal support or to "issue a jurisdictional step-down order pertaining to spousal support." (*Id*. at p. 1233.) In April 2005, the court entered an order reducing spousal support beginning January 1, 2006, and terminating support on June 30, 2006, unless the wife "demonstrate[d] a compelling reason to extend the period of support." (*Ibid*.) The trial court's order was based on findings that included the following: the parties were married for 15 years; the husband paid spousal support for almost 10 years; the wife was "forewarned" by the trial judge that she should begin to be self-supporting within seven years; the wife was " 'still relatively young at 46 years of age' "; and she had investments of her own and received financial support from her parents. (*Id*. at pp. 1233-1234.) The Court of Appeal affirmed, explaining that "a material change of circumstances warranting a modification of spousal support may stem from unrealized expectations embodied in the previous order. [Citation.] Specifically, changed expectations pertaining to the ability of a supported spouse to become self-supporting may constitute a change of circumstances

warranting a modification of spousal support. [Citation.] Thus, if a court's initial spousal support award contemplates that a supported spouse will take some action to decrease the need for spousal support following the issuance of the order and the supported spouse fails to take that action, the court may modify the award on the ground of changed circumstances." (*Id*. at p. 1238.) "There is no requirement that the failure to exercise diligence in seeking gainful employment has been in bad faith." (*Ibid*.)

II. Standard of Review

We review an order granting or denying a motion to modify a spousal support order for abuse of discretion. (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7.) "In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence. If the trial court conforms to these requirements its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court." (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47, fn. omitted.)

The trial court's discretion to act, however, "is not an uncontrolled power. A proper exercise of judicial discretion requires the exercise of discriminating judgment within the bounds of reason, and an absence of arbitrary determination, capricious disposition, or whimsical thinking. A court must know and consider all the material facts and legal principles essential to an informed, intelligent, and just decision in the particular case before it." (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682-683.) In other words, "[d]iscretion is abused in the legal sense 'whenever it may be fairly said that in its exercise the court

in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.' [Citation.]" (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527; see *In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 1377 [discretion abused " 'when, after calm and careful reflection upon the entire matter, it can fairly be said that no judge would reasonably make the same order under the same circumstances' "].)

The burden is on the appellant to establish an abuse of discretion. (*In re Marriage of Rothrock* (2008) 159 Cal.App.4th 223, 230.)

III. No Abuse of Discretion

Here, the trial court did not abuse its discretion in denying the petition, because Woods failed to meet his burden of showing a material change in the parties' circumstances.

First, Woods did not produce any evidence showing a reduction in his ability to pay the $1,400 spousal support award that the parties agreed upon in their settlement agreement. In fact, the evidence showed that despite the loss of overtime due to his knee surgeries, Woods's gross monthly income had increased significantly (22 percent) from 2013 to 2016: $6,304 per month in 2013 versus $7,992 per month in 2016. Although Woods was physically unable to work overtime in 2016, there was no evidence that this limitation would be permanent. At the time of the hearing, Woods had been back at work for only two weeks. In addition, Woods failed to show that there had been an improvement in Jenkins's ability to support herself.

Second, Woods failed to show that Jenkins's purported failure to become self-supporting by the time of the petition constituted an unrealized expectation sufficient to justify the

modification or termination of spousal support. As a preliminary matter, we note that the purported *Gavron* provision in the parties' settlement agreement did not require Jenkins to be self-supporting within one year; it merely required her to obtain a LVN certification and a job doing "something." As a result, there is—given the limited nature of the record before us—an open question whether Jenkins ever received the "reasonable advanced warning" of a requirement that she be self-supporting within a specific period of time as required under *Gavron*. (*Gavron, supra*, 203 Cal.App.3d at p. 712.) In *Gavron*, the Court of Appeal concluded that the trial court erred in reducing a party's spousal support from $1,100 per month to $0 after a 25-year marriage and approximately eight years of support, where "the record d[id] not indicate that th[e] unemployed 57-year-old wife had any prior awareness that the court would require her to become self-sufficient." (*Ibid.*)

Any failure of expectations with regard to the settlement agreement's purported *Gavron* provision was only a partial failure. That provision required Jenkins within one year to get her LVN certification and to obtain "employment as [a] LVN or something." Here, it is undisputed that, while Jenkins had not secured employment as a LVN or anything else, she had obtained her LVN certificate. The separation agreement did not require Jenkins to obtain a LVN license within a certain period, or at all and, according to Jenkins's testimony, a license is necessary for her to be employed by a hospital as a LVN.

In addition, under section 4320, a supported spouse is entitled to "a reasonable period"—generally one-half the length of the marriage—to become self-supporting. (§ 4320, subd. (*l*).) Woods and Jenkins had been married for 18 years; as a result, all

other things being equal, Jenkins would arguably be entitled to a nine-year period in which to become self-supporting. Woods's petition, however, was filed less than two years after entry of the divorce judgment.

The facts of this case stand in contrast to those in *Shaughnessy*, *supra*, 139 Cal.App.4th 1225. In that case, which also involved a marriage of long duration,[4] the trial court had repeatedly and "clearly communicated to [the supported spouse] its expectation that she would attempt to become self-supporting." (*Id*. at p. 1249.) On the record before us, we are uncertain whether Jenkins ever received any warning from the trial court that she was to be self-supporting within a specific period of time. Moreover, the supported spouse in *Shaughnessy* was younger than Jenkins at the time of separation (35 years old versus 43) and, unlike Jenkins, had been working before and after the divorce as a self-employed florist. (*Id*. at pp. 1230, 1231-1232.) In addition, the supporting spouse in *Shaughnessy* had been paying support for 10 years after a 15-year marriage, whereas Woods had been paying the agreed upon $1,400 per month for only three years after an 18-year marriage.

Where, as here, the marriage has been one of long duration, courts are reluctant to terminate spousal support within a short period following the divorce due to the supported spouse's failure to become self-supporting, unless the supported spouse has directly contravened an express warning from the court to become self-supporting. For example, in *In re Marriage of Sheridan* (1983) 140 Cal.App.3d 742, the Court of Appeal held

---

[4] See section 4336, subdivision (b) [a marriage of 10 years or more is one of long duration].

that the trial court acted within its discretion in refusing to continue spousal support after five years following a 13-year marriage, where the supported spouse "had done little to prepare herself for or to seek gainful employment." (*Id*. at p. 749.) In that case, the trial court had advised the supported spouse at the time of the original support order that it expected her to be "self-supporting within five years." (*Id*. at p. 748.)

Under these circumstances, we cannot hold that the trial court acted capriciously, arbitrarily, or beyond the bounds of reason. Indeed, on the record before us, the trial court acted both justly and reasonably in denying the petition and issuing the seek work order. Accordingly, we hold that the trial court did not abuse its discretion in denying Woods's petition.

DISPOSITION

The order is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J. CURREY, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.