Filed 9/16/15 Marriage of Hartwell CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of CHERYL and CURTIS STEVEN HARTWELL.	B256892 (Los Angeles County Super. Ct. No. VD050297)
CHERYL LYN HARTWELL, Appellant, v. CURTIS STEVEN HARTWELL, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles Q. Clay, III, Judge. Affirmed in part and reversed in part and remanded.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller for Appellant.

Myers & Associates and Lisa G. Myers for Respondent.

Cheryl Lyn Hartwell appeals from the judgment in her marital dissolution action, contending the trial court erred in retroactively modifying the temporary spousal support award and abused its discretion in reimbursing Curtis Hartwell for postseparation home loan payments he made, failing to assess a charge for the rental value of the home for the period he exclusively occupied it and denying her request for attorney fees. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Award of Spousal Support*

Cheryl and Curtis separated in December 1981 after five years and three months of marriage.[1] Cheryl remained in the family home with their daughter, Jennifer. After Cheryl moved out in 1999, Jennifer, then an adult, remained in the home. Curtis, who worked out of state five days a week, stayed in a trailer in the driveway when he was in town.

Although Cheryl and Curtis were separated, no legal action was taken to end their marriage for more than 20 years. On August 9, 2002 Cheryl petitioned for dissolution of the marriage, indicating that the date of separation was October 22, 1999. She also applied for an order to show cause for temporary spousal support and attorney fees. In a supporting declaration Cheryl stated she would be unemployed in 30 days because her employer was relocating. She contended Curtis earned approximately $130,000 per year and had never given her money for spousal or child support although he had paid the monthly home loan obligation, secured by a first deed of trust (first home loan), of $586 and monthly home equity line of credit obligation of $130. She asserted she had paid an additional monthly home loan obligation, secured by a second deed of trust (second home loan), of $400.

After a hearing in September 2002 the family law court ordered Curtis to pay $2,053 per month in spousal support and, as "additional spousal support," 26 percent of

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1 As is customary in family law matters, we refer to the parties by their first names for convenience and clarity.

any gross income he earned in excess of $7,885 per month. Curtis was further ordered to pay $3,500 toward Cheryl's attorney fees and costs.

Almost nine years later, on November 11, 2011 Curtis applied for an order to show cause to terminate the spousal support order. He contended he was unemployed and disputed the date of separation Cheryl had asserted in her petition. His income and expense declaration reflected monthly income of $1,829 (unemployment compensation of $1,800 and dividend/interest income of $29). He asserted Jennifer and her two children and fiancé were living in the family home, he was still living in a trailer in the driveway on weekends, he paid monthly expenses of $2,664 and only Jennifer's fiancé reimbursed him for some portion of the household expenses.

In her January 2012 response, Cheryl contended Curtis had never paid her 26 percent of his gross income exceeding $7,885, as ordered by the trial court in 2002, and had failed to pay her any spousal support whatsoever after making the November 2011 payment. She argued in part Curtis's claim of financial hardship lacked credibility, his financial disclosure omitted a statement of assets and his primary financial responsibility was to her, not to the other adults living in the household whom he was apparently supporting.

2. *Trial on the Application To Terminate Spousal Support and the Dissolution*

Trial was initially scheduled for May 17, 2012, but was continued several times until January 17, 2013. Prior to trial the parties stipulated Curtis would pay $10,000 as a contribution toward spousal support arrearages and the date of separation was December 15, 1981.

a. *Summary of the evidence*

Trial commenced on January 17, 2013 and took place over four partial days through June 2013. (An order dissolving the marriage was filed January 17, 2013.) Cheryl's income and expense declaration as of the first day of trial reflected she received average monthly disability payments of $1,674 and rental property income of $2,315, but had estimated monthly expenses of $4,046. In his income and expense declaration Curtis maintained his only income was $29 a month in dividends/interest; he had monthly

estimated expenses of $2,664 excluding credit card debt payments; and he, his daughter, her husband, and their two children were living in the home (Curtis's brother was living in the trailer in the driveway), but he was the only person paying household expenses.

Cheryl testified she was seeking one-half of the community property interest in the home valued by stipulation at $336,911; $11,000 to pay off a loan secured by the home;[2] $28,194.73 in past due spousal support plus interest for the missed monthly payments of $2,053 from December 2011 through December 2012; $49,678.69 in past due spousal support plus interest for the 26 percent of Curtis's gross income in excess of $7,885 that had never been paid; her community property share of the reasonable rental value of the home while Curtis lived in it ($120,600 based on an appraisal) and $10,000 in attorney fees. She further testified she was not seeking future spousal support.

Cheryl only had a vague recollection as to what the line of credit had been used for (that is, to pay her bills, Curtis's bills or home improvements), whether she had made repayments on it, and how long she had paid the second home loan (approximately $400 per month) although she testified she thought she had stopped making loan payments when the spousal support order was issued in 2002. She admitted her boyfriend had lived in the family home for about eight years (1986-1993). She testified the rental property income reflected on her January 2013 income and expense declaration was expected to decrease because the tenants were moving out and farm property she owned was not expected to produce income until the following year.

Curtis testified he had paid Cheryl almost $240,000 in spousal support from 2002 through 2011, but was seeking credit for it because Cheryl had misrepresented that their date of separation was in 1999 in her petition for dissolution and in her pleadings in support of her request for spousal support. He said he was also seeking credit and

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2 Cheryl testified she thought the $11,000 balance due was for a loan Curtis had taken out after the family law court had ordered the parties not to do so and the home equity line of credit had been paid off. Curtis testified the $11,000 loan was the home equity line of credit that had not been previously paid off and the debt had been incurred by Cheryl for her personal use.

reimbursement for payment of the first home loan, which included taxes and insurance, from 1982 through 2005 (approximately $575 per month); for payment of the home equity line of credit as well as attribution of that outstanding debt to Cheryl because the money was used solely for her personal expenses after they had separated; and for payment of Cheryl's medical insurance after Curtis became unemployed ($9,288).[3]

Curtis testified he had lived in a trailer in the driveway about two weekends a month while his daughter and grandson lived in the house beginning in 1999, but he moved into the house in 2005.[4] He further testified he paid the first home loan until it was satisfied in 2007; Cheryl had paid the second home loan ($35,000 taken out in 1991 to pay for a roof and both parties' credit card debt) from 1991 through 2002 at which time Curtis took over the monthly payments until he paid off the balance approximately two years later (Curtis was not seeking any reimbursement for this loan); and he had always paid the home equity line of credit, established in 1991 at the same time as the second home loan, even though only Cheryl had drawn on it for her personal use.

Curtis admitted the last spousal support payment he made was for November 2011 and had never paid Cheryl 26 percent of his gross income exceeding $7,885. He testified he became unemployed in October 2010, but stopped receiving unemployment income in September 2012.

During closing argument Cheryl's counsel argued that documents obtained from Curtis demonstrated he had liquid assets—for example, a retirement fund, certificates of deposit and balances in various checking and savings accounts—in excess of $600,000 and thus had the ability to pay attorneys fees (Cheryl was now seeking $20,000) and the spousal support arrearages.

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3 During closing argument counsel for Curtis argued he was also seeking reimbursement for the fair rental value of the house while Cheryl lived in it—"if [Cheryl] is asking for it, my client is asking for it." Counsel also stated Curtis was seeking attorney fees and costs incurred to litigate the parties' date of separation.

4 Curtis said he had a company apartment in Phoenix, Arizona, where he lived most of the time.

b. *The trial court's tentative ruling; the final judgment*

On June 27, 2013 the court announced its tentative ruling: Based on the stipulated value of $336,911, each party's community interest in the family home was $168,455.50; neither party was entitled to credit for the reasonable rental value of the home while the other lived in it because both parties had lived in it separately for approximately the same amount of time; Curtis was entitled to credit for payment of the first home loan in the amount of $170,184 because it was paid with separate property or assets; no credits would be awarded to either party for the second home loan because, although Cheryl had paid it for many years, Curtis took over payments and ultimately paid off the loan with separate property income for which he was not seeking reimbursement; Curtis was entitled to credit for payment of the home equity line of credit indebtedness in the amount of $25,755.79 with the balance of the debt ($11,659.54) awarded to Cheryl; the spousal support order was reduced to zero based on the length of the marriage and the amount already paid by Curtis; and the portion of the spousal support award that required Curtis to pay 26 percent in excess of his gross salary of $7,885 was retroactively vacated. With respect to the retroactive modification, the court explained, "I'm not going to go so far as to say that Ms. Hartwell was unjustly enriched, but I do believe that Mr. Hartwell more than satisfied his obligation by paying [$2,053 per month] for that lengthy period of time even though he didn't pay the additional support that would have been based on that income."

Based upon the foregoing calculations, the court ordered Cheryl to make an equalization payment to Curtis of $27,484.29. The court also denied Cheryl's request for additional attorney fees, finding neither party was significantly more able to pay the attorney fees and there was not "a significant disparity in access to funds from which to pay legal counsel."

On July 5, 2013 the court sua sponte modified its oral pronouncement, giving Curtis "a credit of $85,092.75 for payments made towards the mortgage on the family residence, or one-half of the amounts of Petitioner's $168,455.50 community property interest."

On April 15, 2014 judgment was entered that differed in some respects from the court's oral pronouncement and sua sponte modification. The judgment in part vacated or suspended the portion of the spousal support award requiring Curtis to pay more than $2,053 per month; awarded Curtis credit for the 2012 payment of $10,000 toward spousal support arrears; denied either party credit for the reasonable rental value of the home for the period of time each lived in it separately; awarded Curtis credit of $85,092.75 for payment of the first home loan from the date of separation until the loan was paid off; awarded Curtis credit of $25,755.79 for payment of the home equity line of credit; awarded the remaining debt on the home equity line of credit to Cheryl; valued each party's one-half community property interest in the home at $168,455.50; and denied Cheryl's request for additional attorney fees. Based on the foregoing calculations, Curtis was ordered to pay Cheryl an equalizing payment of $47,606.96.

DISCUSSION

1. *The Court Lacked Jurisdiction To Retroactively Modify the Spousal Support Award*

A spousal support order may be modified if there has been "a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs." (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982; accord, *In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396.) The requirement there be a material change of circumstances is necessary to ensure the finality of dissolution cases. (See *In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1068-1069.)

A trial court, however, may not retroactively modify an appealable spousal support award, even on a showing of changed circumstances, unless the court has expressly reserved jurisdiction to amend its original support order. (See *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 631, 638 (*Gruen*) ["family court exceeded its jurisdiction by modifying a pendente lite child and spousal support order"]; *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 595 ["a court may not retroactively modify a prior order for temporary spousal support"]; cf. *In re Marriage of Freitas*, *supra*, 209 Cal.App.4th at p. 1075 ["neither *Gruen*, nor the authority upon which

Gruen is based, precludes a trial court from reserving jurisdiction to amend a *nonfinal* order based on the anticipated presentation of additional evidence"].) "[Family Code] [s]ection 3603[5] provides: 'An order made pursuant to this chapter may be modified or terminated at any time except as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate.' (See also §§ 3651, subd. (c) [permanent support orders], 3653, subd. (a) [modification of support orders in general], 3692 ['support order may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the support ordered to become excessive or inadequate'].) Section 3603 'makes no provision for "suspending"' a spousal support order, or for modifying it retroactively beyond the date the underlying request for modification was filed.' [Citation.] 'The filing date . . . establishes the outermost limit of retroactivity.'"' (*Gruen*, at p. 638.) A court acts in excess of jurisdiction when it orders relief it is not authorized to grant or fails to follow certain procedural prerequisites. (*Id.* at p. 639.)

Despite acknowledging a trial court lacks jurisdiction to retroactively modify a temporary spousal support order, Curtis argues the court "exercised its broad powers of equitable jurisdiction in order to suspend the supplemental portion of the spousal support order, and the same was within its power. It considered its action in the nature of a set-off given the $240,000 in payments to [Cheryl] over the years, and specifically chose not to modify the order, but suspend the supplemental portion of the support order." Even if not forfeited because of the failure to cite legal authority (see Cal. Rules of Court, rule 8.204(a)(1)(B); *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 743 [appellate court may treat as forfeited any argument not "supported by both coherent argument and pertinent legal authority"]), the argument lacks merit. "Suspending" a spousal support order is no different from modifying it. (See *Gruen*, *supra*, 191 Cal.App.4th at p. 638.) And, a trial court may not grant relief that is prohibited by statute under the guise of equity. (See *Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1368, fn. 5

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5 Statutory references are to this code.

[“““‘Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute [citation]. Neither a fiction nor a maxim may nullify a statute [citation]. Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly [citation].’”””]; accord, *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 499-500.) The trial court acted in excess of its jurisdiction when it retroactively vacated or suspended the portion of the spousal support award requiring Curtis to pay Cheryl 26 percent of his gross income exceeding $7,885 per month. That portion of the order is reversed. On remand the trial court is directed to determine the amount of arrearages and interest due and modify the equalizing payment to include that sum.

2. *The Trial Court Did Not Abuse Its Broad Discretion in Finding Curtis Was Entitled to Reimbursement for Postseparation Home Loan Payments Made with His Separate Property*

In a marital dissolution action the court “must divide the community estate of the parties equally” unless the parties agree otherwise. (§ 2550; see *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 514 (*Gray*).) “Trial courts have considerable discretion to determine the value of community property and to formulate a practical way in which to divide property equally.” (*In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 423; see *Gray*, at p. 514 [“when the court concludes that property contains both separate and community interests, the court has very broad discretion to fashion an apportionment of interests that is equitable under the circumstances of the case”].) Similarly, the court has discretion to determine whether the community should reimburse a spouse who uses separate property to pay community debt. “[R]eimbursement is not automatic, but involves the consideration of . . . a variety of factors . . . .” (*In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 625.)

As a general rule, a spouse who, after separation of the parties, uses his or her separate funds to pay preexisting community obligations is entitled to be reimbursed for those expenditures from community property. (*In re Marriage of Epstein* (1979) 24 Cal.3d 76, 84 (*Epstein*).) Conversely, the community is entitled to reimbursement for

one spouse's postseparation exclusive use of the family residence or other community asset. (*In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 374 [trial court has authority to order reimbursement to community for value of spouse's exclusive use of family residence between separation and trial].) These two general rules, providing for "*Epstein* credits" and "*Watts* charges," intersect when the spouse who continues to reside in the family residence also makes the monthly home loan payments: When an asset like the family home "is not owned outright by the community but is being financed, and the monthly payments equal or exceed the reasonable value of the asset's use, the spouse may satisfy the duty to compensate the community for use of the asset by making the monthly finance payments from his or her separate property." (*In re Marriage of Garcia* (1990) 224 Cal.App.3d 885, 890-891; accord *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 978-979; see *Epstein*, at pp. 84-85; *In re Marriage of Watts*, at p. 374.) Likewise, no reimbursement of the community is required when the use of separate property to pay a preexisting community obligation "constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties. Both spouses have a duty to support their dependent children. [Citation.] Similarly, the spouses owe to each other mutual duties of support.'" (*Epstein*, at p. 84.) "Inasmuch as both spouses have an equal interest in community assets [citation], and in light of a trial court's obligation under the Family Law Act to divide community assets equally between the parties upon a dissolution of the marriage [citation], it follows that the *net* effect of allocating '*Epstein* credits' and '*Watts* charges' in a division of community assets should be (1) the equal sharing of '*Epstein* credits' by both spouses and (2) the equal bearing of '*Watts* charges' by both spouses." (*In re Marriage of Jeffries* (1991) 228 Cal.App.3d 548, 553; see *Epstein*, at p. 84.)

Cheryl contends the trial court abused its discretion in allocating *Epstein* credits of $170,814 to the community (with a net effect of deducting $85,092.75 from Cheryl's share of community property) because the first home loan payments made by Curtis constituted his duty to support her and their then-minor child while they were living in

the home.[6] She further contends Curtis should not be entitled to reimbursement for the period of time he lived in the home, after she moved out, because the value of his occupancy was substantially in excess of the first home loan payments he made. Cheryl argues, "To order reimbursement to Curtis for either of these times periods would be to provide him with a windfall: he would have been deemed excused from making any child support or spousal support from the date of separation in 1981 until the first time a support order was entered in 2002 (when his child was already an adult).

The record is devoid of evidence upon which to evaluate Cheryl's contention the first home loan payments made by Curtis constituted his duty to support her and Jennifer. The amount of spousal support and child support a party may be entitled to receive is predicated upon the weighing of several considerations including the parties' respective incomes and the standard of living established during the marriage. (See §§ 3600 [temporary spousal support], 4053 [child support]; 4320 [permanent spousal support]; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302 ["[i]n ordering spousal support, the trial court *must* consider and weigh all of the circumstances enumerated in the statute, to the extent they are relevant to the case before it"].) There is simply no evidence of Cheryl or Curtis's income before 2002, their respective needs, Jennifer's needs or the established standard of living. Thus, in light of the fundamental principles of appellate review that "(1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error" (*Fladeboe v. American*

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6 Cheryl also contends the period for which the court credited Curtis for making the first home loan payments is unclear and no explanation was provided for the court's modification reducing the initial credit of $170,814 to $85,092.75. When giving its oral ruling, however, the court explained $170,814 was the amount Curtis had paid postseparation. Although Cheryl is correct the court did not explain why it subsequently reduced the credit to $85,092.75, given that the amount is approximately half of $170,814, it is a reasonable inference the court realized that, consistent with *In re Marriage of Jeffries*, *supra*, 228 Cal.App.3d at page 554, the total credit should be allocated equally between the parties.

Isuzu Motors, Inc. (2007) 150 Cal.App.4th 42, 58), the trial court's implied finding Curtis's loan payments were not in satisfaction of his support obligations must be upheld.

The court also reasonably found Curtis's right to reimbursement should not be decreased by his exclusive use of the family home beginning in 1999 because Cheryl's exclusive use from December 1981 through some time in 1999, approximately 17 years, offset Curtis's. Cheryl's argument that an offset is inequitable because she was fully supporting their minor child while she lived in the home suffers from the same infirmity as her argument regarding Curtis's entitlement to reimbursement for the home loan payments. Without any evidence of the parties' financial circumstances before 2002, it was well within the trial court's discretion to view each parties' exclusive use of the home as balancing the scales.

3. *The Trial Court Did Not Abuse Its Discretion in Denying Cheryl's Request for Attorney Fees*

Section 2030 authorizes a need-based award of attorney fees and costs to "ensure that each party has access to legal representation . . . to preserve each party's rights" in a proceeding for dissolution of marriage and in any proceeding subsequent to entry of a judgment of dissolution. (§ 2030, subd. (a)(1).) In determining whether to order one party to pay another party's fees and costs and, if ordered, what amount shall be paid, the court is to consider the respective incomes and needs of the parties and all other circumstances affecting the parties' respective abilities to pay for legal representation. (§ 2030, subd. (a)(2).) "The court may make an award of attorney's fees and costs under Section 2030 . . . where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a); see *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 865.)

Although the payee-spouse's need and the payor-spouse's ability to pay are the primary factors to be considered, the trial court retains broad discretion in determining the amount of fees to award pursuant to section 2030, particularly with respect to the nature and complexity of the litigation. (*In re Marriage of Cheriton, supra*, 92 Cal.App.4th at p. 314; *In re Marriage of Keech*, *supra*, 75 Cal.App.4th at pp. 865-

866.) "'The need of a spouse for an award of attorney's fees and the amount of that award are matters addressed to the sound discretion of the trial court. [Citation.] The exercise of this discretion will not be disturbed on appeal "without a clear showing of abuse."'" (*In re Marriage of Schaffer* (1984) 158 Cal.App.3d 930, 935-936.) "'The discretion invoked is that of the trial court, not the reviewing court, and the trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.'" (*In re Marriage of Keech*, at p. 866.)

Cheryl contends the trial court failed to consider the criteria enumerated in sections 2030 and 2032, as well as the factors in section 4320 as directed by section 2032, subdivision (b), before it found there was no significant disparity in the party's ability to pay attorney fees.[7] (See *In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827 ["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"].) Cheryl argues the evidence established she had only $650 in liquid assets (cash, checking, savings and other deposit accounts) with which to pay attorney fees while Curtis had liquid assets in excess of $600,000. Thus, she contends, the trial court clearly failed to

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[7] Section 2032, subdivision (b), provides, in determining what is just and reasonable, "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." Section 4320 enumerates circumstances to be considered in ordering permanent spousal support, including the marketable skills of the supported party, the job market for those skills, the extent to which the supported party's present or future earning capacity was impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties, the supporting party's earning capacity and assets, the age and health of the parties and the goal that the supported party will be self-supporting within a reasonable period of time.

consider the statutory factors, which include consideration of the parties' assets. (See § 4320, subds. (c), (e).)

The record demonstrates the trial court considered the requisite factors in denying Cheryl's request for additional attorney fees. (See *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 254 ["[w]hile no particular language is required in an order awarding attorney fees under sections 2030 and 2032, the record (including, but not limited to, the order itself), must reflect an actual exercise of discretion and a consideration of the statutory factors in the exercise of that discretion"].) The court explained, "The court is also going to deny the request for any additional attorney fees to be paid by [Curtis]. In reviewing the assets and income of each party, the court finds that neither is significantly more able to pay the attorney fees and costs, that there isn't a significant disparity in access to funds from which to pay legal counsel. In turn, there was a great amount of testimony about the assets of each party and the current income of each party. I know that Mr. Hartwell in the past made significantly more money than Ms. Hartwell. There had previously been an order for him to pay a contributory share of Ms. Hartwell's attorney's fees, and I assume that was done because I didn't see anything to indicate that that had not been paid; and so the court will order that each party is to bear his or her own attorney's fees and costs."

Although the court did not explain its rationale with respect to each factor specifically, substantial evidence supports its conclusion neither party was more capable of paying attorney fees. Cheryl's argument Curtis had a greater ability to pay attorney fees primarily focuses on the parties' comparative liquid assets. But liquid assets are only one consideration. Current income is also a factor, and Curtis testified his unemployment income had terminated in September 2012 and he received only $29 of monthly income from dividends/interest. In contrast, Cheryl testified she received monthly disability income of $1,750 and rental property income of $2,250 from debt-free property valued at approximately $450,000 that she had inherited and improved. Although Cheryl testified her tenants were moving out, she also said she might rent the property again if she could not afford to live in it with only disability income and if she

did not need to provide a home for her daughter and grandchildren if the family home had to be sold. The relevant point is not whether Cheryl was conflicted about what to do with the property, as she testified she was, but that she possessed debt-free income property.

With respect to the parties' liquid assets, in addition to her savings of $650, Cheryl testified she was in the process of selling one-half of farm land she owned in Oklahoma for $56,000, less court costs and broker fees.[8] To be sure, any net proceeds from the sale in addition to Cheryl's savings was significantly less than the $600,000 Cheryl contended Curtis possessed in liquid assets,[9] but this was just one of the factors the court was to consider. In conjunction with consideration of the parties' income (virtually none for Curtis) and the short length of the marriage (see § 4320, subd. (f)), we cannot say no reasonable judge would have denied Cheryl's request for $20,000 in additional attorney fees.

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8 The farm property had generated $6,400 annual income although it was not expected to generate income in the coming year. Cheryl's share of income would necessarily be expected to decrease with the sale of 50 percent of her interest in the property, but this was nevertheless another source of income for her that the court could properly take into consideration.

9 Curtis argues his income and expense declaration reflect he had no assets and Cheryl's "summary" of discovery purporting to represent Curtis had more than $600,000 in savings, checking and retirement accounts was "in the nature of advocacy rather than a showing at trial, entered into evidence, and subject to cross-examination." Curtis, however, did not object to the summary of discovery filed by Cheryl on the first day of trial, nor did he testify that any of the records underlying it were inaccurate. Thus, the evidence was properly before the trial court. Moreover, Curtis's attorney asserted during closing argument that Curtis was living off his separate property savings earned by working for more than 32 years.

DISPOSITION

The judgment is affirmed in part and reversed in part, and the matter remanded for further proceedings not inconsistent with the opinion. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.