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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STACY E. SIMONE, Plaintiff and Appellant, v. ERIC M. KERENSKY, Defendant and Respondent.	B275537 (Los Angeles County Super. Ct. No. PD051008)

APPEAL from an order of the Superior Court of Los Angeles County. Christine W. Byrd, Judge. Affirmed in part, reversed in part and remanded with directions.

Marcus & Associates and Steven H. Marcus for Plaintiff and Appellant.

Broedlow Lewis, Jeffrey Lewis and Kelly B. Dunagan for Defendant and Respondent.

Appellant Stacy E. Simone (Stacy) appeals from a move-away order made after a judgment dissolving marriage. Specifically, Stacy challenges that part of the order allowing respondent Eric M. Kerensky (Eric)[1] to divert $1,000 of his monthly support arrearages into a travel trust. We agree with Stacy that this portion of the move-away order must be reversed because accrued support cannot be modified and because the trial court did not make an analysis of each parent's ability to pay travel expenses related to Eric's visitation with the couple's children. Accordingly, the matter is remanded for such an analysis.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in June 2006 and separated four years later in September 2010. They have two minor children. Stacy petitioned for divorce. In 2012, she was granted sole legal custody of the children, who reside primarily with her, and Eric was ordered to pay child and spousal support. The amount of support owed by Eric was eventually reduced to $1,436 per month. At some point, Eric fell behind in his payments and in April 2014, he stipulated to owing more than $32,000 in arrears for both child and spousal support. On September 25, 2015, the trial court ordered Eric to pay an additional $1,000 per month until the arrearage balance was paid in full (the "09-25-15 Stipulation and Order Re: Support Arrearages").

On September 2, 2015, Stacy filed a request to move with the children to Rhode Island. In her supporting declaration, Stacy stated: "I am more than willing to work with [Eric] with

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[1] We refer to the parties by their first names because they do so in their briefs. We do not intend any disrespect.

regard to reasonable travel expenses and to encourage visitation on holidays, vacations, summers, etc."

Eric opposed the move-away request. The trial court held an unrecorded conference with the parties in chambers on February 26, 2016, following the testimony of a child custody evaluator on February 18, 2016. On March 7, 2016, the court held a hearing and indicated that it would grant Stacy's move-away request. The court requested the parties to submit written closing arguments on remaining issues.

In his written closing argument, Eric proposed that a "travel trust" be maintained by his attorney to coordinate and account for the cross-country travel expenses created by Stacy's move with the children. Eric proposed that the source of the travel funds be the additional $1,000 per month he was paying in support arrearages.

In her written closing argument, Stacy argued that Eric's "request for travel expenses is a child support issue and the issue of child support is not before the Court." She further argued that if Eric wanted an order related to the payment of travel expenses, he was required to file a request for modification of child support, along with an income and expense declaration, pay stubs, and tax returns.

The children's attorney also filed a written closing argument, contending that Stacy should bear the costs of travel between California and Rhode Island either directly or by way of an offset from child support.

On April 8, 2016, the trial court issued an "Order After Hearing" ("the move-away order") which granted Stacy's move-away request, subject to enumerated conditions. The move-away order also stated the following under the heading "Travel Trust":

"Pursuant to Family Code [section] 4062, [Eric] is authorized to redirect the sum of $1,000 per month until further court order. The same shall be redirected from 09-25-15 Stipulation and Order re: Support Arrearages and said funds shall be placed into the attorney-client trust account of [Eric's attorney]. [¶] . . . An accounting and receipts will be provided to [Stacy] at the end of the year and any unused funds will be forwarded to [Stacy]."[2]

This appeal by Stacy followed.

DISCUSSION

Stacy contends the provisions of the move-away order authorizing Eric to redirect his support arrears into a travel trust should be reversed. She makes four arguments in support of her contention: (1) the trial court exceeded its authority by modifying an existing child support order when the issue of child support was not before the court, (2) diversion of accrued support arrears into a travel trust is not permitted, (3) deducting travel expenses from Eric's accrued support payments penalizes Stacy for moving, and (4) there was no evidence on which to base an award of travel expenses.

We do not address each of Stacy's individual arguments, largely because it is not possible to do so on the record before us. For example, we cannot determine whether the issue of child support was in fact before the trial court because there is no copy of the reporter's transcript from the March 7, 2016 hearing in the appellate record. From the record we do have before us, it appears that at this hearing the trial court directed the parties to file written closing arguments addressing remaining issues and to submit written proposals. The written closing arguments filed

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

by Eric and the children's attorney each make proposals regarding travel expenses for visitation, which are considered an additional element of child support (§ 4062, subd. (b)(2)), but Stacy's written closing argument does not make any proposal. Nor are any of the parties' separate written proposals part of the appellate record.

In any event, we agree with Stacy that the trial court erred in adopting Eric's proposal that his $1,000 monthly arrears support payment required by the 09-25-2015 Stipulation and Order Re: Support Arrearages (also not part of the appellate record) be "redirected" to a travel trust. This is so for two reasons.

First, as Stacy notes, while a trial court has broad discretion to modify a support order "at any time as the court determines to be necessary" (§ 3651, subd. (a)), a court is expressly prohibited from modifying or terminating any amount that accrued before the date of the petition for modification (§ 3651, subd. (c)(1) ["a support order may not be modified or terminated 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"]). The law "does not countenance" a noncustodial parent's attempt to retroactively reduce support owed to the custodial parent by seeking amounts already accrued, and neither does equity. (*In re Marriage of Sabine & Toshio M.* (2007) 153 Cal.App.4th 1203, 1217; *In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 625–626 ["The Legislature has established a bright-line rule that accrued child support vests and may not be adjusted up or down. (See §§ 3651, subd. (c)(1), 3653, subd. (a), 3692.) If a parent feels the amount ordered is too

high—or too low—he or she must seek prospective modification"].)

The $1,000 additional monthly payment to be made by Eric pursuant to the 09-25-2015 Stipulation and Order Re: Support Arrearages was for support Stacy accrued while living with the couple's children in California. The support has vested and the order is final. Stacy is therefore correct that any modification of that support order is an impermissible retroactive modification. "[I]n general, arrearages—support payments that are past due—cannot be forgiven." (*In re Marriage of Sabine & Toshio M., supra*, 153 Cal.App.4th at p. 1216; *County of Santa Clara v. Wilson* (2003) 111 Cal.App.4th 1324, 1327 ["the retroactive modification of accrued child support arrearages is statutorily barred"].) Only prospective payments can be modified. (*In re Marriage of Tavares, supra*, 151 Cal.App.4th at p. 626.)

Eric's argument—that the creation of a travel trust is not the same as a retroactive reduction of support because "[i]t is the functional equivalent of Eric paying Stacy $2,436 and Stacy writing a check for $1,000 for travel expenses to Eric each month"—misses the point because Stacy is entitled to the full amount of support arrearages. Eric cites to *Wilson v. Shea* (2001) 87 Cal.App.4th 887, 895, where the appellate court approved the practice of "allowing the noncustodial parent to deduct an amount from the guideline [formula] and set that amount aside for the exclusive purpose of the concomitant travel" under section 4057.[3] But *Wilson v. Shea* did not involve modification of a

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[3] Section 4057, subdivision (b)(5) provides that a party may show that "[a]pplication of the [guideline] formula would be unjust or inappropriate due to special circumstances in the particular case."

support order for amounts already accrued, and therefore does not assist Eric.

Second, the trial court made no analysis of each parent's respective ability to pay travel expenses and no evidence was presented on this issue. In making support orders, the trial court shall consider each parent's ability to pay. (§ 4053, subd. (d) ["Each parent should pay for the support of the children according to his or her ability"].) While Eric argues that the trial court was not required to conduct such an analysis before allocating travel expenses in a move-away case, he does not cite any authority supporting his argument.[4] We note that California Rules of Court, rule 5.260(a) requires that "for all hearings involving child . . . support, both parties must complete, file, and serve a current *Income and Expense Declaration* (form FL-150) on all parties." Indeed, in *Wilson v. Shea, supra*, 87 Cal.App.4th 887, on which Eric relies, while the appellate court there condoned the practice of allowing the noncustodial parent to deduct amounts from child support and place them in a travel trust, the appellate court also specifically held that the lower court erred by not recalculating the guideline child support amount in light of the evidence presented about the parties' income. (*Id*. at pp. 891–892.)

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[4] Eric mistakenly asserts that Stacy did not raise this issue in the trial court. Stacy specifically argued in her written closing statement that "If Respondent wants an order related to the payment of travel expenses, he is required to file . . . an Income and Expense Declaration, paystubs, and tax returns." Eric also mistakenly asserts that Stacy offered to pay his travel expenses. Stacy only offered "to work with Respondent with regard to reasonable travel expenses."

As it stands, Stacy bears the full burden of paying the travel-related expenses for Eric's visitation with the couple's children. It may well turn out to be the proper result that Stacy bears most or all of the burden, such that Stacy must reimburse Eric or that Eric's prospective support payments can be reduced. But this outcome cannot be predetermined in the absence of an analysis of each parent's ability to pay.

DISPOSITION

The move-away order is reversed insofar as it allows Eric to redirect $1,000 in accrued monthly support to a travel trust. In all other respects, the move-away order is affirmed. The case is remanded to the trial court to make an analysis of Stacy's and Eric's respective ability to pay for travel expenses related to Eric's visitation. Stacy is entitled to costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

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