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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of RICHARD and
SANDRA BARON.

2d Civil No. B234917
(Super. Ct. No. SD036684)
(Ventura County)

RICHARD BARON,

Appellant,

v.

SANDRA BARON,

Respondent.

Richard Baron and Sandra Baron separated in 2007 after a lengthy marriage. Following dissolution proceedings, the trial court awarded Sandra¹ permanent spousal support and security for that support. (Fam. Code, § 4320.)² Richard appeals that award. We affirm.

¹ "As is customary in family law cases, we refer to the parties by their first names for purposes of clarity and not out of disrespect. [Citations.]" (*Kuehn v. Kuehn* (2000) 85 Cal.App.4th 824, 828, fn. 2.)

² All statutory references are to the Family Code.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in January 1979. They had no children together. Shortly after their marriage, the parties founded a retail and commercial nursery known as Baron Brothers Nursery, Inc. (BBN). Richard's brother, James Baron, owns a 40 percent interest in BBN. Richard also has an interest in several other business entities and limited liability corporations.

Sandra worked for BBN for nearly 30 years, in clerical positions and as office manager, until she was fired in March 2010. During that period, BBN contributed to Richard's Social Security account but not to Sandra's.

The parties lived an upper middle class lifestyle, with BBN paying virtually all of their expenses. They always owned a home and drove luxury automobiles. In approximately 2000, the parties purchased 46 acres of land located at 8860 Stockton Road, Moorpark, California (Stockton Property), containing an 1800-square-foot mobile home with attached garage and a 6500-square-foot barn, with a pool, waterfall, stream, artificial lake and crops. They travelled extensively in the United States and abroad, taking several cruises and flying first class to Europe, China, Hawaii, New Zealand, Thailand and Costa Rica.

The parties separated in November 2007. Sandra petitioned for dissolution and requested spousal support. At that time, BBN had \$50,000 cash on hand, plus another \$150,000 in a safe deposit box. Temporary spousal support was unnecessary because the parties stipulated that BBN would continue paying the Stockton Property expenses as well as the parties' telephone bills, automobile expenses, life and medical insurance and credit card payments.

In December 2010, the parties resolved the property division issues through a partial marital settlement agreement in which Richard agreed to buy out Sandra's share of the community businesses and real property. The agreement requires Richard to make installment payments to Sandra over a period of 15 years in the total amount of \$1 million, plus interest at 4 percent on \$800,000 of the installments, secured by three deeds of trust. It grants Richard all assets of the

family businesses, the Stockton Property, real property in Fillmore, some personal property and the debts accumulated during and after the marriage. The trial court entered a judgment of dissolution based on that agreement, reserving spousal support issues for trial.

At trial, the court considered whether income should be imputed to the parties, the amount of income available to Richard for spousal support and Sandra's request for security for support. At that time, Sandra was 62 years old and unemployed, with arthritis in her hands and shoulder. Richard was 58 and reported his health as "good," notwithstanding a heart attack and bypass surgery in 2004.

The trial court declined to impute income to either party. The court noted that Richard "has continued to try to run the [nursery] business during a[n] economic downturn and by his own testimony, continues to work 60-80 hours a week. Knowing the risks involved, Husband took the community share of the businesses and the real property. The court finds that he is entitled to try to bring the business back to its prior level." As for Sandra, the court stated: "[W]e are dealing with a 62 year old woman who was fired from her only employment of the last 30 years. The court finds it is unrealistic to believe that [she] will find employment in the near future"

With respect to the amount of Richard's income available for support, each party offered evidence from a forensic certified public accountant. Sandra's expert, Ronald Greene, concluded Richard has monthly cash flow available for support totaling \$29,060, of which \$27,892 is non-taxable. Richard's expert, Wayne Lorch, determined Richard has monthly income of \$3,873.

The trial court discerned that the "vast difference" in the opinions arose from conflicting assumptions regarding whether certain expenses were personal or business. After considering the evidence supporting these assumptions, the trial court reduced Green's calculation by \$15,610, finding Richard "has income available for support in the amount of \$13,450.00 per month, of which \$12,282.00 is not-taxable." The court weighed the statutory factors for spousal support

(§ 4320) and ordered Richard to pay Sandra \$5,500 per month until the death of either party, Sandra's remarriage or further order of the court.

Citing Sandra's age and lack of Social Security benefits, the trial court granted Sandra's request for security for spousal support. Richard contended security is unnecessary because upon his death Sandra would receive the remaining balance of the equalizing payment. The court disagreed, noting "that [the] equalizing payment is Wife's fair division of the community." The court ordered Richard to provide a \$500,000 term life insurance policy for a period of 10 years, and a \$200,000 policy for the following 5 years.

Finally, the trial court denied Sandra's request for attorney's fees. Observing that each party incurred in excess of \$250,000 in fees, the court stated: "Because the parties entered into a Stipulated Settlement agreement, the value of Respondent's assets cannot be determined. Petitioner will have spousal support income in the amount of \$5,500.00 per month. Her assets will be paid to her over a fifteen year period. Therefore in consideration of the factors set forth in . . . § 2030, the court cannot find a basis for the payment of fees to Petitioner by Respondent."

At Richard's request, the trial court issued a statement of decision which was substantially the same as its original decision. On July 14, 2011, the court entered judgment on the reserved spousal support issues. Richard appeals.

DISCUSSION

Spousal Support

In assessing the need for spousal support, the trial court must weigh the factors set forth in section 4320, including each party's earning capacity, the supporting party's ability to pay spousal support, the parties' needs based on the marital standard of living, "[t]he obligations and assets, including the separate property, of each party," the supported party's ability to work, the age and health of the parties, the tax consequences of the award, the balance of the hardships to each party, and "[a]ny other factors the court determines are just and equitable.

[Citation.]" (*In re Marriage of Lynn* (2002) 101 Cal.App.4th 120, 131-132.)

Richard does not dispute that the trial court weighed the relevant statutory factors. He challenges the weight accorded certain factors and claims the award does not leave him sufficient income for his own support. We disagree.

"As a general rule, we review spousal support orders under the deferential abuse of discretion standard. [Citation.] We examine the challenged order for legal and factual support. 'As long as the court exercised its discretion along legal lines, its decision will be affirmed on appeal if there is substantial evidence to support it.' [Citations.] 'To the extent that a trial court's exercise of discretion is based on the facts of the case, it will be upheld "as long as its determination is within the range of the evidence presented.'" [Citation.]" (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1443.)

The trial court determined Richard has \$13,450 in monthly income available for support. After reducing this sum by the \$11,478.35 required for his monthly spousal support and property division payments, Richard complains the remaining \$1,971.65 is insufficient to meet his monthly cash needs of \$2,876.

Richard's analysis is based on the incorrect assumption that his property division obligation affects his ability to pay spousal support. In *In re Marriage of Martin* (1991) 229 Cal.App.3d 1196, 1198 (*Martin*), we held that a spouse may not "finance a 'buy-out' of community property and then successfully claim inability to pay spousal support." (*Id.* at pp. 1198, 1201.) In that case, the parties agreed to a property division that allowed the husband to retain community assets and to buy out the wife's community interest. To make this payment, the husband had to borrow money and make monthly payments on the loan. (*Id.* at p. 1199.) After considering this and other relevant factors, the trial court ordered the husband to pay spousal support. (*Ibid.*) We affirmed, reasoning that a spouse should not be penalized for agreeing to a cash buy-out of an interest in community assets. (*Id.* at p. 1201; see *In re Marriage of West* (2007) 152 Cal.App.4th 240, 250-251 [wife's receipt of a portion of the proceeds from sale of community business and her failure to invest the principal did not provide a basis for reducing

support]; *In re Marriage of Rabkin* (1986) 179 Cal.App.3d 1071, 1081 ["It makes no more sense to reduce wife's spousal support because she received her rightful share of the community property than it would to increase wife's spousal support because husband received his rightful share of the community property"].)

Here, Sandra allowed Richard to retain virtually all the community assets, including the income producing assets, in exchange for a cash buy-out payable over 15 years. Richard testified that although he has assumed debt to make the installments, he has approximately \$2.7 million in equity in two separate properties. Sandra's \$1 million buy-out is less than half the equity in those properties and is payable over a substantial period of time. Given that Sandra has no employment prospects or Social Security income, the trial court properly considered the installments as "Wife's fair division of the community." (See *Martin, supra*, 229 Cal.App.3d at p. 1198.) To do otherwise would penalize Sandra for agreeing to the cash buy-out. (*Id.* at p. 1201.)

Because the monthly installment payments are attributable to Sandra's share of the community assets, Richard may not use them to reduce his income available for support. (*Martin, supra*, 229 Cal.App.3d at pp. 1198-1199.) As a result, Richard's monthly income after payment of spousal support is actually \$7,950,³ easily satisfying his stated monthly cash needs of \$2,876.

Richard also contends the trial court disregarded the \$137,000 separate property inheritance Sandra received from her mother. To the contrary, the trial court questioned Sandra specifically about the inheritance, asking if it was "137 or 139?" Sandra clarified the amount and stated she did not have current access to the money. Addressing Sandra's request for attorney fees, the trial court noted Sandra had incurred over \$250,000 in fees, more than double the amount of her

³This sum is the difference between the \$5,500 support payment and the \$13,450 available for support each month.

inheritance. The court also stated, without elaboration, that Richard engaged in "the type of conduct which would compel sanctions under the Code." After balancing the parties' respective assets and income, however, the trial court held Sandra responsible for her own fees. Under these circumstances, we cannot say the trial court improperly disregarded or discounted the inheritance in awarding spousal support. The trial court has discretion to decide how much weight to give each factor under section 4320. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304, 308.)

Richard maintains the spousal support award is unfair because most of his monthly "cash flow" is not actually cash. We disagree. Section 4320, subdivision (c) requires that the trial court consider "[t]he 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." The statute does not exclude non-taxable income. Richard opted to pay his personal expenses from the business rather than to draw a salary for that purpose. Consequently, almost all his income is tax free, flowing directly from BBN for his personal benefit.

The record confirms the trial court considered and weighed all relevant factors set forth in section 4320. There is nothing to indicate that the trial court's weighing or application of these factors was arbitrary or capricious. Therefore, we conclude the trial court did not abuse its discretion in fixing permanent spousal support at \$5,500 per month. (*In re Marriage of Lynn, supra*, 101 Cal.App.4th at p. 132.)

Security for Spousal Support

Richard asserts the trial court abused its discretion by requiring him to purchase a \$500,000 term life insurance policy as security for spousal support. He claims security is unnecessary because upon his death Sandra would receive the entire property division settlement. He also contends there is no evidence that life insurance is available or affordable. We are not persuaded.

Section 4360 permits a trial court, where "just and reasonable in view of the circumstances of the parties," to include in the spousal support award an amount sufficient to purchase an annuity for the supported spouse or to maintain insurance for the benefit of the supported spouse on the life of the obligor spouse, or may require the obligor spouse to establish a trust for support of the supported spouse. (*Id.* at subd. (a).)

In *In re Marriage of Ziegler* (1989) 207 Cal.App.3d 788, the trial court ordered the former husband to make monthly payments to maintain his military survivor benefit plan for the benefit of his former wife. The Court of Appeal upheld the order, deciding that it satisfied the "just and reasonable [under] the circumstances" prong of section 4360 because the wife had less than \$300 in income if the husband died and she received no spousal support, the parties had been married for more than 10 years and the wife was over 50 at the time of the divorce. (*Ziegler, supra*, at p. 793). The circumstances are even more compelling here. The parties were married for almost 30 years and Sandra is over 60, with no employment prospects or retirement income. If Richard dies, she will have virtually nothing available for support other than her remaining share of the community assets. The trial court acted within its discretion in ordering security for the support payments.

In his trial brief, Richard mentioned that requiring him to obtain a life insurance policy at age 58 "would be unjust and financially impossible," but introduced no evidence on that issue. He cites no authority supporting his view that Sandra had an affirmative duty to provide evidence of his insurability. In any event, Richard's assertion is speculative. He does not know if life insurance actually is available to him and, if so, at what cost. Section 4360 orders generally are modifiable or terminable at any time. (*Id.* at subd. (b).) The trial court's order states it will remain in effect "until the death of either party, Wife's remarriage, or *further order of court . . .*" (Italics added.) If Richard discovers that life insurance is indeed unavailable or cost-prohibitive due to his age, health or other circumstance,

he may raise the issue in the trial court. We have no basis to make that determination here.

DISPOSITION

The judgment on the reserved spousal support issues is affirmed.
Sandra shall recover her costs on appeal.⁴

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

⁴ Sandra requests that we award her the attorney fees incurred in defending this appeal, pursuant to sections 2030 and 2032. "Such a request must properly be addressed to the trial court in the first instance, and we express no opinion on that subject." (*In re Marriage of Schofield* (1998) 62 Cal.App.4th 131, 140-141; accord *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 180; *Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 957, fn. 6.)

Ellen Gay Conroy, Judge
Superior Court County of Ventura

Ferguson Case Orr Paterson and Wendy C. Lascher for Appellant.
Goldenring & Prosser, Peter A. Goldenring and Edwin S. Clark for
Respondent.