Filed 9/18/17 Marriage of Bulmer CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of DAVID and ALICIA MICHELLE BULMER	2d Civil No. B277266 (Super. Ct. No. D371883) (Ventura County)
DAVID BULMER, Petitioner and Appellant, v. ALICIA MICHELLE BULMER, Respondent.	

David Bulmer appeals a restraining order, support orders, and order to pay respondent Alicia Michelle Bulmer $10,000 attorney fees (Fam. Code, § 271)[1] in a consolidated marital dissolution (case no. D371883) and domestic violence action (case no. D371776). We dismiss as untimely David's appeal of the October 5, 2015 restraining order and December 7, 2015 orders for temporary support. With respect to the September 16, 2016 orders entered after trial, we affirm.

[1] All statutory references are to the Family Code unless otherwise stated.

Procedural History

On September 9, 2015, David filed a petition for marital dissolution to dissolve his seven year four month marriage with Alicia. David and Alicia had one child, seven-year-old Lilith B. The trial court, on its own motion consolidated the marital dissolution action with a domestic violence case initiated by Alicia. (Fam. Code, § 6200 et seq.) On October 5, 2015 the parties stipulated to mutual restraining orders and David was ordered to stay 100 yards away from the schools of Kaylie and Breann, Alicia's two other children. Neither child is biologically related to David.

Temporary custody and visitation orders were entered at a December 7, 2015 hearing. The trial court ordered $1,268 a month temporary child support and $753 a month spousal support, retroactive to November 1, 2015. The support orders were based on David's average income ($4,158 a month), Alicia's income ($600 a month), and a 50/50 time share with Lilith.

For the next 11 months, David attempted to modify the orders by filing 13 motions, all of which were denied. The trial court set the matter for trial on all issues except child support which was being handled by the Department of Child Support Services.

On September 16, 2016, following a two-day trial, the trial court found that David's imputed income as a web designer was $6,000 a month. The court awarded Alicia $750 a month spousal support, effective November 1, 2016, and ordered that spousal support terminate on the death of either party, Alicia's remarriage, or on December 31, 2018, whichever occurred first. The trial court declared David a vexatious litigant (Code Civ.

Proc., § 391) and awarded Alicia $10,000 attorney fees pursuant to section 271. David and Alicia were awarded joint legal and physical custody of Lilith on a week on/week off schedule and Alicia was granted sole authority to choose Lilith's pediatrician, therapist, and school. The trial court ordered David and Alicia to participate in individual therapy twice a month for two years and ordered David not to contact Alicia's other children, Kaylie and Breann.

Dismissal of Appeal: October 5, 2015 and December 7, 2015 Orders

David argues that the October 5, 2015 restraining order and December 7, 2015 temporary support orders are not supported by the evidence. David filed a motion to vacate the orders that was heard and denied at a December 9, 2015 ex parte hearing. Because David was not served with a notice of entry of judgment, he had 180 days from entry of judgment to file the notice of appeal. (Cal. Rules of Ct., rule 8.104(a)(1)(C); *In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 475-476; *Keisha W. v. Marvin M.* (2014) 229 Cal.App.4th 581, 585 [180-day deadline for filing an appeal applies regardless of whether appellant received notice of entry of judgment or a file-stamped copy of the order].)

David filed the notice of appeal on August 19, 2016, more than 180 days after entry of judgment. We conclude that the appeal from the October 5, 2015 restraining order and the December 7, 2015 orders is untimely and dismiss the appeal with respect to those orders. (Cal. Rules of Ct., rule 8.104(a)(1)(C).)

September 16, 2016 Orders Entered After Trial

David has filed a separate and timely notice of appeal from the September 16, 2016 orders entered after trial. David

complains that the orders are not supported by the evidence but failed to provide a reporter's transcript of the trial. On review, the judgment is presumed correct, and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Where the appeal is based on the clerk's transcript or judgment roll and no error is apparent on the face of the existing appellate record, the judgment is conclusively presumed correct as to all evidentiary matters. (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

Alicia contends that David has waived appellate review by not fairly recounting the evidence supporting the trial court's orders. "An appellant, such as [David], who cites and discusses only evidence in [his] favor fails to demonstrate any error and waives the contention that the evidence is insufficient to support the judgment. [Citations.]" (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.) Litigants who represent themselves in propria persona are held to the same restrictive rules of procedure as lawyers. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639.)

David argues that Alicia was not a credible witness and that the joint custody and spousal support orders should be reversed. It is not our function to reweigh the evidence or determine witness credibility. (*In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 34.) It is presumed that the judgment is correct. David has not met his burden to overcome that presumption by demonstrating prejudicial error. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

David contends that the evidence does not support the imputed income findings for spousal support even though he is an accomplished web developer. In December 2015, the trial

court received bank records showing that David's average monthly income deposit was $4,158. At trial, David claimed he was self-employed and that his income had dropped to $1,200 a month. David, however, filed a declaration stating that "I'm a $70/hr web developer."

The trial court found that David had the ability to earn $6,000 a month and that the parties enjoyed a middle standard of living during the marriage. The court acknowledged there "is no order that I can make now or at any point in the future that will enable both parties to live at the marital standard of living." Applying the section 4320 support factors, the trial court awarded Alicia $750 a month support commencing November 1, 2016. We conclude that the support order complies with section 4320 and is just and reasonable (§ 4330). One of the factors in ordering spousal support is "[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. (§ 4320, subd. (c).) The trial court did not abuse its discretion in awarding $750 a month spousal support. (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.)

David argues that the vexatious litigant order and award of $10,000 attorney fees is contrary to the evidence but provides no citation to the record, which in itself is fatal to the appeal. (Cal. Rules of Ct., rule 8.204(a)(1)(C); *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) In an ad hominem attack on Alicia and Alicia's trial attorney, David argues that he was denied a fair trial. These claims are not supported by the record. "Ad hominem arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling

your opponent names . . . only shows the paucity of your own reasoning." (*Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1430.)

David also contends that the trial court was biased but did not object or move to disqualify the trial judge, thus forfeiting the error. A litigant may not go to trial before a judge and gamble on a favorable result, and then assert for the first time that the judge was biased. (*People v. Rodriguez* (2014) 58 Cal.4th 587, 626; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218.) The record contains not even a hint of judicial bias. We accordingly reject the argument that the orders should be rewritten or that a new trial judge should be assigned to the case.

Disposition

We dismiss as untimely the appeal from the October 5, 2015 and December 7, 2015 orders. The judgment with respect to the September 16, 2016 orders, entered after trial, is affirmed. Alicia is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

John R. Smiley, Judge

Superior Court County of Ventura

David Bulmer, in propria persona, for Petitioner and Appellant.

Bamieh & Erickson and Jennifer B. Yates, for Respondent.