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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of BRIAN JAMES and ROSARIO RECOR.	B280969
BRIAN JAMES RECOR, Appellant, v. ROSARIO RECOR, Respondent.	(Los Angeles County Super. Ct. No. SD033057)

APPEAL from a judgment of the Superior Court of Los Angeles County, Matthew St. George, Commissioner. Affirmed.

Brian James Recor, in pro. per., for Appellant.

Rosario Recor, in pro. per., for Respondent.

Brian and Rosario Recor entered a Marital Settlement Agreement which became the judgment of the court. Brian Recor now appeals the denial of his request for orders modifying his obligation for child and spousal support under that judgment. The trial court found that appellant failed to meet his burden to show changed circumstances sufficient to justify a change in support. Finding no abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. The Marital Settlement Agreement and Judgment

Brian and Rosario Recor[1] married on November 4, 2000, and separated on December 1, 2013. They had two minor children at the date of separation. Brian petitioned for dissolution of the marriage in 2014; the parties finalized a marital settlement agreement on March 27, 2015; and the court ordered a judgment of dissolution based on that agreement on June 22, 2015.

The parties agreed, as relevant to this dispute, that they would have joint physical and legal custody of the children, with parenting time shared equally. Brian agreed to pay child support to Rosario in the amount of $2000 per month, with each party entitled to claim one dependency exemption. Brian also agreed to pay Rosario spousal support in the amount of $3000 per month; despite the length of the marriage, the parties agreed that support would terminate on April 1, 2020, and was not subject to extension by the court. Brian was ordered to prepare the

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[1] Because both parties share a last name, we shall refer to them by first names for clarity.

judgment and submitted the final judgment packet on May 18, 2015.

B. Brian's First Modification Request

On November 30, 2015, Brian filed a request for order to modify his visitation, to reduce his child support obligation and to eliminate his spousal support obligation. In support of his request, he asserted that at the time of the judgment in June 2015, he was a partner in a law firm, earning in excess of $300,000 annually, but that his partnership was terminated in October 2015. He further asserted that he had sought, but had not found new employment; had moved to Miami, Florida in April 2015; and had started his own law practice in Miami in November 2015. He stated his expected earnings from that law practice would not exceed $3000 per month.

Rosario filed a response, objecting to the requested change in support.

The court heard the matter on January 5, 2016. Prior to the hearing, Brian and Rosario had agreed to a new custody and visitation schedule. When questioned by the court, Brian testified that he had known he would be terminated from his partnership when the parties had negotiated the marital settlement.[2] He

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[2] Brian also testified, inconsistently, that he received notice of his termination in May. There is no dispute, however, that Brian did not file the final judgment papers until May, and was aware of the termination prior to the court's entry of judgment. While Brian argues that the trial court implied that Brian should have petitioned earlier, the trial court appeared instead to be concerned about Brian's failure to disclose the change of

further testified that he had moved to Miami in April, prior to submission of the proposed judgment and the entry of judgment. The court indicated its belief that there was not yet a sufficient record of earnings to find a material change in circumstances, and that Brian had, in the court's view, the ability to earn more money than he had projected. The court also advised Brian to continue looking for new employment, and denied the modification of support. Brian did not appeal.

C. Brian's Renewed Modification Request

Brian filed a renewed request for modification on May 13, 2016. At this time, he was requesting a reduction to guideline child support calculated on his projections of earnings, and the termination of spousal support. He asserted that his law firm would net no more than $3000 per month, attaching pay stubs showing his employee wages at the law firm which he owned with his new wife. Rosario again opposed the request. Brian filed a reply, attaching a calculation of guideline child support prepared by his counsel, based on the parties' respective earnings and a 27 percent custody time for Brian.

The court heard the request on June 20, 2016. After substantial argument, the court withheld a ruling, ordering further briefing concerning the level of income that it should consider in determining whether support should be modified.

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circumstances to Rosario and the court before the judgment was entered.

The court set a briefing schedule, and indicated it would rule without further appearances. [3]

D. The Court's Order Denying Modification

After both parties filed further briefing, the court issued its ruling on October 13, 2016. The court denied the request for modification. The order recited the court's factual findings, and included the interim orders from the hearing of June 20, allowing Rosario to claim both children as dependents, and mandating compliance with Family Code section 4063 concerning unreimbursed medical expenses.

The court noted that Brian, as petitioner, bore "the burden of proof to show a change in circumstances which would justify the requested reduction in the support," and that he was required to show a lack of both ability and opportunity to earn income. The court explained:

"This court has balanced several factors in reaching its decision in this matter. As stated above, Petitioner has the burden of proof to show that he may request a modification in support due to changed circumstances. The evidence shows that Petitioner did attempt to locate similar job opportunities during the six-month window provided after his termination notice in May 2015. For a variety of reasons cited by Petitioner, he was unable to obtain such employment. Petitioner has become a member of the State Bar of Florida, and, opened a law

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[3] Brian appears to have misunderstood the court's intentions, arguing in his brief that the court "had a change of heart" before issuing the written ruling. The record is clear, however: the court declined to make a final ruling until the additional briefing was submitted.

firm in partnership with his new wife. While Petitioner asserts that his ability and opportunity to earn income were impaired once he was terminated from his partnership with Bryan Cave LLP in October, 2015, the court finds, based on the evidence of his own Declaration, filed November 30, 2015, that he moved to Miami, Florida in April, 2015, in pursuit of new opportunities in his life. This was prior to the May, 2015 decision by Bryan Cave LLP to terminate his employment as of October of that year, as described in his Supplemental Declaration filed on July 13, 2016[.] [¶] Petitioner does not explain how circumstances have changed when the court considers the following evidence. He was informed in May 2015, prior to the entry of this Judgment, that Bryan Cave LLP would no longer employ him. This Agreement was negotiated with the knowledge that Respondent was teaching 10 1/2 months each year and could be self-supporting within a reasonable period of time. However, whereas Petitioner has been employed as an attorney for over 13 years, Respondent is a new teacher at a charter school. Her employment picture is by no means secure. Petitioner's declarations and exhibits show that he has continued to travel extensively with the minor children and his partner—visiting France twice in 2015—and has paid for frequent trips from Los Angeles to Miami in 2016. [¶] The issue before the court is whether the change in circumstances is such as to allow for modification of bargained-for levels of child and spousal support, when part of that bargain was to restrict the court's jurisdiction under F.C. §4336 from indefinite to a limited period of five years, and, to terminate Respondent's ability to receive spousal support after that date. [¶] Based on the pleadings, testimony, and evidence submitted as exhibits attached to the

pleadings, the court finds that Petitioner has not met his burden that circumstances have changed since the entry of Judgment so that the bargained-for levels of child and spousal support should be modified or terminated. His obligation to support his children continues unabated, regardless of where he may live and what income he now earns until ended by operation of law. It is in the best interests of his children that the court take into consideration his potential to realize income based on his years of experience in the practice of law at a large international law firm in California as it may translate into his ability to earn income at his law partnership (or any other legal employment opportunity) in Florida. Because of this potential, and based on the timeline set forth above, the court finds that Petitioner should be held to the Settlement Agreement he negotiated with Respondent, which provides for a lowering of his support obligations after a period of five years by terminating Respondent's ability to receive spousal support after that time. It would be inequitable to suspend or reduce these obligations so soon after they were set in place and with no ability for Respondent to extend spousal support beyond negotiated termination date."

Brian appealed.[4]

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[4] Rosario argues that Brian waived his right to appeal the judgment in the marital settlement agreement. This appeal, however, is not from that judgment, but rather from a post-judgment order.

DISCUSSION

A. We Review The Trial Court's Order For Abuse of Discretion

A party seeking to modify child support or spousal support orders bears the burden of showing a material change in circumstances sufficient to justify the requested modification. The trial court must determine whether that modification is justified based on the specific facts before it; a reviewing court will not disturb the trial court's determination unless abuse of discretion is shown as a matter of law. (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1479-1480 (*Khera & Sameer*) [moving party has burden of producing evidence of changed circumstances but showing of changed circumstances does not mandate modification of spousal support]; *In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1247 [in reviewing modification of child support based on change in earning capacity, the reviewing court does not substitute its judgment for that of the trial court but determines if any judge could have reasonably made the order under review].) The reviewing court neither reweighs the evidence nor reconsiders credibility determinations made by the trial court. (*In re Calcaterra and Badakhsk* (2005) 132 Cal.App.4th 28, 34.)

Where, as here, appellant fails to request a statement of decision, we presume the trial court made all necessary factual findings, and the appellant may not argue that the trial court failed to make any finding necessary to the determination. (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549-550; *In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928 (*Cohn*).)

B. Brian Failed To Show Facts Sufficient to Terminate Spousal Support

Brian and Rosario were married for 13 years, a marriage of long duration as a matter of law, potentially entitling Rosario to a lengthy period of support. (Fam. Code, § 4336, subd. (b); 4320.) Notwithstanding that fact, the parties agreed to limit spousal support to a five-year period that was not subject to extension by the court. Brian moved to terminate that support within five months of entry of judgment. As the moving party, it was his burden to show a material change of circumstances sufficient to justify that early termination of a time-limited order. (*Khera & Sameer, supra,* 206 Cal.App.4th at pp. 1480, 1484.*)*

The trial court found that Brian failed to meet his burden of proof. As a result, the question before this court is "whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.] [Citation.]" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838; *quoting, In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

"Where, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found the plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof. [Citations.] We have no power on appeal to judge the credibility of witnesses or to

reweigh the evidence." (*Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

In this case, the trial court did not make findings of fact in Brian's favor, nor does the evidence compel such findings as a matter of law. To the contrary, the brief period of time that had elapsed since Brian began his law practice in Florida did not demonstrate that his income would remain limited in the manner he posited; Brian produced no evidence that his initial earnings, even if accepted as credible by the court on the limited evidence provided, would continue to be so restricted. Brian's years of sophisticated legal experience, described by the court, supported the trial court's doubts that his earnings could not be increased. Brian failed to counter that conclusion with any evidence concerning the earnings of practitioners with similar levels of training and experience in the Miami market, to which he had voluntarily relocated. (*See Cohn, supra*, 65 Cal.App.4th 923, 930-931.)[5]

C. Brian Failed To Meet His Burden To Justify Reduction of Child Support

When Brian renewed his modification motion in May 2016, the parties agreed to a change in custody and visitation, consistent with Brian's move to Miami in April 2015. As a result, Rosario moved from a 50 percent custody responsibility to one in

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[5] Rosario argues that Brian never demonstrated a material change of circumstances, because he was aware that his employment would be terminated when the marital settlement agreement was negotiated. However, the facts concerning the exact date of his knowledge are disputed, and, in light of our disposition, we need not reach that issue.

which she had primary custody of the children; by Brian's calculations, she had custody 73 percent of the time. Despite the increase in time during which Rosario was responsible for the children and their expenses, Brian also sought a dramatic reduction in child support.

As is true with respect to the change in spousal support, Brian bore the burden of proof on his request to reduce his child support obligations. "[W]here the payor parent loses his or her job and seeks a reduction in court-ordered support based on the changed circumstances of lack of income, it will be the payor parent, as moving party, who bears the burden of showing a lack of ability and opportunity to earn income." (*In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1304.)

While Brian acknowledges that "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interest of the children" (Fam. Code, § 4058 (b)), he asserts on appeal that it was improper to impute income to him on that basis in this case. He argues that imputation, in the absence of a determination that his change in circumstances was due to bad faith on his part, is improper. That is not the law.[6]

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[6] See, e.g., *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 992 ["we decline to adopt a per se rule that the trial court may only consider parental earning capacity upon a showing of bad faith. Instead, we adhere to the plain language of the Family Code which grants the trial court broad discretion to consider parental earning capacity consistent with the best interests of the supported child."] The court concluded, "the court has the discretion to consider earning capacity when consistent with the child or children's best interests. In the course of exercising this

The trial court relied in part on *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212 (*Padilla*). In that case, the reviewing court concluded that the trial court was not required to make a finding of bad faith before considering imputing income based on a parent's ability to earn. (*Id.* at p. 1216.)

In *Padilla*, mother sought an increase in child support, but father refused, based on a reduction in his income after he resigned his previous employment to start a new business. The court initially made no change in order, allowing more time to pass to see what father's income level might become. When the parties returned to court, father indicated his new business was not yet producing income. The court nonetheless imputed earning capacity for purposes of child support, finding father had the ability to work, the willingness to work, and the opportunity to work, in accordance with the test established in *In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367. (*Padilla, supra,* 38 Cal.App.4th at pp. 1218-1219.) Considering, as it concluded it must, the priority to be given to the needs of the children, and the obligation of a parent for payment of support appropriate to those needs, the court imputed income to father. (*Ibid.*)

Brian seeks to distinguish *Padilla*, arguing that his change in employment was not voluntary, but was instead caused by the termination of his prior employment. While Rosario does not dispute that Brian's partnership was terminated, both she and the trial court noted that Brian was aware of this fact before the

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discretion, the court may consider arguments concerning the payor's motivations or the reasonableness of the payor's actions in light of all the relevant circumstances." (*Id.* at p. 999.) The reviewing court upheld the trial court's imputation of income.

court's judgment was entered, and in fact had moved to Miami before the date he now claims he became aware of the termination.

Brian also asserts that he does not have the opportunity to work that will provide income at the level he earned when the judgment was entered, based on his inability to find work commensurate with his prior position. Brian's argument is relevant, but not dispositive.

Brian relies in part on *In re Marriage of Eggers* (2005) 131 Cal.App.4th 695, where husband was involuntarily terminated from his employment for misconduct. The *Eggers* court concluded that it was father's obligation, as the moving party, to show that he could not obtain employment despite reasonable efforts to do so. (*Id.* at p. 701.) The court considered the fact that father, like Brian, did not disclose what jobs he failed to apply for, and gave limited disclosure concerning the jobs for which he did apply. The court reversed because the trial court in that case, unlike this one, failed to consider whether father had met his burden to show he did not have the ability or opportunity to work. (*Id.* at pp. 701-702.)

The facts in this case more closely resemble *Cohn*, *supra,* 65 Cal.App.4th 932. There, father, also a lawyer, lost his position when his employer filed for bankruptcy. After he diligently, but unsuccessfully, sought new employment, he opened his own law practice; when that practice failed to generate income, he determined to try again in a new location. The trial court found that, notwithstanding father's inability to obtain employment, he had the opportunity to work because he was a licensed attorney with the ability to open an independent practice: "a more appropriate definition of 'opportunity to work' is the substantial

likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income. Under this definition, we find substantial evidence of opportunity, (*id.* at p. 930.) Because the trial court did not focus on the reasonable earning expectation of a sole practitioner in the relevant market, however, the reviewing court remanded for a determination based not on the actual earnings of Cohn's practice, but on what "[lawyers] with his background, age, qualifications, and experience" could be expected to earn. (*Id.* at p. 931.) The court noted that the passage of time while the matter was on appeal would provide the court with more of a "track record" and concluded that, if father's income in his private practice continued to be low, the trial court on remand could focus on his diligence in developing that practice or in looking for additional opportunities for employment. (*Ibid.*)

In this case, the trial court found that Brian had both the ability and opportunity to work based on his potential to earn income consistent with his experience, and his ability to work either in his own law practice or in another employment context. Finding Brian had not met the burden of showing that his current income reflected that potential, the trial court denied the motion. The trial court did not abuse its discretion in determining that Brian had not established a sufficient "track record" to conclude that the income he was reporting required a reduction in child support. The evidence does not compel a contrary finding as a matter of law.[7]

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[7] Rosario requests attorney's fees for this appeal, apparently as a sanction. This record does not contain the showing of lack of

DISPOSITION

The order denying modification of child support and termination of spousal support is affirmed. Rosario is to recover her costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.*

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merit sufficient to support her request. (*In re Marriage of Gong and Kwong* (2008) 163 Cal.App.4th 510, 516; see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654.)

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