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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| RICHARD B. LEWIS,<br><br>Petitioner and Appellant,<br><br>v.<br><br>MARY LEWIS,<br><br>Respondent and Respondent. | 2d Civil No. B236017<br>(Super. Ct. No. SD038828)<br>(Ventura County) |

Richard B. Lewis (husband) appeals from the trial court's order awarding temporary spousal and child support to Mary Lewis (wife). We affirm.

*Factual and Procedural Background*

The parties were married in 1991. They have an adult son and a minor son born in 2000. The parties separated in November 2009. On January 14, 2010, husband served wife with a petition to dissolve the marriage. On January 27, 2010, wife filed a response. In her response, wife requested spousal and child support.

Husband was employed as a corporate vice-president. In 2007 the corporation went public, and husband exercised his stock options. He "netted" $2.6 million after taxes. In September 2008 husband resigned from the corporation. Since his resignation, husband has been unemployed. In 2011 husband was 53 years old.

On February 1, 2011, wife filed an order to show cause requesting temporary spousal and child support. Wife was 51 years old and unemployed. Wife declared that,

before husband's resignation from the corporation, "[h]e was earning income in the range of $225,000-$250,000 per year." Husband informed wife that after his resignation "he was offered a job, but didn't take it because he didn't want to pay [her] spousal support." Wife requested that the court "impute an income to [husband], based either on his historical earnings during the marriage or on the vocational evaluation to be performed by [wife's expert,] John Meyer. According to wife, husband had "paid no child or spousal support since the date of separation." Husband did not object to the court's consideration of this declaration.

In March 2011 husband filed an Income and Expense Declaration. The declaration showed average monthly income of $1,053 and average monthly expenses of $6,725. Husband estimated that the fair market value of the parties' community property was $2,148,819.49.

On June 3, 2011, wife filed an Income and Expense Declaration showing average monthly income of $700 and average monthly expenses of $7,419. Cash and deposit accounts totaled $75,000. She had no other liquid assets.[1] In January 2011 wife declared that each month husband deposited between $600 and $700 into a joint account. She had "been living on" this monthly deposit and funds in another account that was "divided equally between [the parties], $194,355.36 each." In January 2011 the funds in this account had dwindled to about $100,000. Based on wife's June 2011 Income and Expense Declaration, at that time the $100,000 had decreased to $75,000.

On the same date that wife filed her June 2011 Income and Expense Declaration, the trial court conducted a live witness evidentiary hearing. Wife testified that she did not have a college degree. Her last full time job was in 1995, when she earned $12.00 per hour. For the past two years, she has been in therapy for depression. Wife asserted that she was emotionally "unhinged" and "incapable of interacting with the public." Husband had the opportunity to, but did not, cross-examine wife concerning his turning down employment to avoid a support order.

[1] Wife listed her nonliquid assets as follows: "[Wife's] community share: Real Estate ($325,000); Auto ($30,000); Investment & tax deferred accounts ($100,000)."

Wife's vocational expert witness, John Meyers, opined that wife "doesn't have any earning ability at this point." His opinion was based on her depressive disorder, age, limited education, and lack of work experience and marketable skills. He also took into account "the current job market." On the other hand, Meyers opined that husband has an annual earning capacity of $150,000 to $160,000 and would be able find work within 34 weeks. Husband has a college degree in economics and years of experience as a corporate executive. From 2001 until his resignation in 2008, his annual earnings were at least $157,000.[2]

Husband's vocational expert witness, Howard Goldfarb, opined that wife is employable and has an annual earning capacity of up to $31,000. It would take up to 34 weeks for her to find employment. Goldfarb agreed with Meyers that husband "does possess skills [so] that he can secure employment at a skilled level," and that he would be "able to secure employment within 34 weeks."

Husband testified that he had "just started" looking for employment. (RT 109, lines 5-7) He admitted that, when he was served with wife's response to his petition for dissolution, he was put on notice that she was requesting spousal and child support. (RT 123)

In July 2011 the trial court filed its findings and orders. The court imputed to husband an annual income of $130,000. The court found that husband "has the ability and opportunity to work and earn $130,000 per year," while wife "can work and earn minimum wage when she gains control over her depression and obtains remedial training which is expected to take six (6) months." The court ordered husband to pay monthly child support of $732 retroactively from February 1 until December 1, 2011, when it will be reduced to $430. Husband was ordered to pay monthly spousal support of $2,988 retroactively from February 1 until December 1, 2011, when it will be reduced to $2,756. Starting on December 1, 2011, the court imputed to wife earnings at

[2] Husband's Social Security Earnings Statement showed the following earnings history: 2001 - $157,642; 2002 - $178,815; 2003 - $198,561; 2004 - $204,643; 2005 - $227,465; 2006 - $243,228; 2007 - $4,998,779; 2008 - $238,839; 2009 - $983. (1CT 151)

the minimum wage. The trial court denied husband's motion for reconsideration and to set aside the orders.

*Standard of Review*

We review temporary spousal and child support awards under an abuse of discretion standard. (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.) A court abuses its discretion when its ruling exceeds the bounds of reason. (*Estate of Gilkison* (1998.) 65 Cal.App.4th 1443, 1449.) " ' "[W]e must consider the evidence in the light most favorable to the prevailing party and take into account every reasonable inference supporting the trial court's decision." ' [Citation.] The court's findings based on conflicting evidence are conclusive on appeal. [Citation.]" *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 230.) The order appealed from "is presumed to be correct . . . , and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

*Temporary Spousal Support: Marital Status Quo*

The purpose of temporary spousal support is " ' "to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and obligations." [Citations.]' [Citation.]" (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.) "[I]n exercising its broad discretion, the court may properly consider the 'big picture' concerning the parties' assets and income available for support in light of the marriage standard of living. [Citation.]" (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.) "The court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount. [Citation.]" (***Ibid***.)

Husband contends that "there was no basis for temporary spousal support because the marital status quo was both parties living off the community assets." (Bold and capitalization omitted.) The contention is without merit. Husband ignores the years through 2008 when his annual earnings exceeded $200,000. (See fn. 1, *ante*.) The trial

court could properly consider these years of high earnings in ascertaining wife's marital status quo position.

Furthermore, the marital status quo was both parties living together in a single household. Wife noted that, when husband resigned, the parties "were not contemplating that we would be splitting our financial assets to support two separate households." The cost of supporting two households was greater than the cost of supporting a single household. Wife's living expenses were more than husband's because she rented an apartment, while husband continued to live in the mortgage-free family residence. Wife declared: "My home is a two-bedroom apartment . . . for which I had to advance a year's rent out of my assets due to being unable to show an income . . . . [Husband] resides, mortgage free, . . . in our . . . home in Simi Valley. *He* may be living substantially the same lifestyle as when we were married, but I, certainly am not."

*Imputation of Income to Husband*

" 'It has long been the rule in this state that a parent's earning capacity may be considered in determining spousal and child support. [Citations.]' [Citation.] '[F]or purposes of determining support, "earning capacity" represents the income the spouse is reasonably capable of earning based upon the spouse's age, health, education, marketable skills, employment history, and the availability of employment opportunities.' [Citation.]" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 301.) "By express statutory provision, trial courts have discretion to impute income to a parent based on earning capacity. ([Family Code] § 4058, subd. (b).)[3] Case law also recognizes that discretion. [Citations.] . . . [¶] But no authority permits a court to impute earning capacity to a parent unless doing so is in the best interest of the children. By explicit statutory direction, the court's determination of earning capacity must be 'consistent with the best interest of the children.' (§ 4058, subd. (b) . . . .)" (***Ibid***.)

[3] All statutory references are to the Family Code.

Husband contends that the trial court abused its discretion in imputing income to him based on his earning capacity because it "completely failed to consider whether its orders were in the best interest of the minor child." But husband has not cited any authority requiring the court to expressly consider this issue. We presume that the court impliedly found that the imputation of income to husband would be in the child's best interest. (See *Shaw v. County of Santa Cruz* 170 Cal.App.4th 229, 267 [where, as here, there is no statement of decision, "the necessary findings of ultimate facts will be implied"].)[4] The trial court could have reasonably concluded that imputing income to husband would benefit the minor child because it would effectively increase the child's overall monetary support. (Cf. *In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at pp. 301-302 ["We find it difficult to imagine how the children's interests are served by [imputing income to mother], since the imputation . . . effectively *reduces* overall monetary support for the children" (italics added)].)

Husband faults the court for failing to take into account that he was the "primary custodial parent." But the evidence does not support husband's assertion that the minor child was primarily in his physical custody. Wife declared that in September 2010 the parties had "filed a *Stipulation and Order* for temporary custody of our [minor] son, . . . which provides for joint legal and joint physical custody and equally shared custodial time." She further declared that since September 2010 she has "exercised equal custodial time with [the minor child]." Husband declared: "While it was and continues to be my position that it is in [the minor child's] best interest to be primarily in my physical custody, at the Mandatory Settlement Conference in September 2010, I agreed to a temporary 50% custody schedule, conditional on a full custody evaluation being conducted."

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[4] A party is not entitled to a statement of decision after a hearing on an order to show cause. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1496-1497; *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.) The trial court denied husband's request for a statement of decision.

*Retroactive Support*

"[A] temporary spousal support award can be made retroactively, at least to the date of the order to show cause requesting spousal support. [Citations.]" (*In re Marriage of MacManus* (2010) 182 Cal.App.4th 330, 337.) Husband contends that the trial court abused its discretion in awarding spousal and child support retroactively to February 1, 2011, the date of the order to show cause. Since the vocational experts opined that he would be able to find employment within 34 weeks, husband argues that the court should have allowed him 34 weeks to find a job before imputing income to him.

The court's ruling did not exceed the bounds of reason. (*Estate of Gilkison supra*, 65 Cal.App.4th at p.1449.) The court found that on January 27, 2010, when wife filed a response to husband's petition for dissolution, husband was put on notice that wife was seeking spousal and child support. The court could have reasonably concluded that husband should have started looking for work no later than February 2010 and, had he done so, would have been employed one year later when the order to show cause was issued. Meyers, wife's vocational expert, opined that if husband had started looking for work 34 weeks before the June 2011 hearing on the order to show cause, he would have been employed by the time of the hearing. But husband made no effort to look for work until just before the June 2011 hearing.

Based on wife's declaration, the trial court implicitly and reasonably concluded that husband had elected not to work to avoid payment of spousal support. Husband told wife that after his resignation "he was offered a job, but didn't take it because he didn't want to pay [her] spousal support." Husband's declaration was to the contrary: "Since retiring in 2008, . . . I have not been offered a job or turned down a job offer." We presume that the trial court found in wife's favor on this disputed factual issue. (*Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403.) " '[T]he trial court's resolution of any factual disputes arising from the evidence is conclusive. [Citations.]' [Citation.]" (***Ibid***.)

*Hardship Deduction*

"Circumstances evidencing hardship include . . . [e]xtraordinary health expenses for which the parent is financially responsible . . . ." (§ 4071, subd. (a)(1).) Husband contends that the trial court erroneously awarded wife a $787 hardship deduction for healthcare costs not paid by insurance. Husband argues that the evidence is insufficient to support the hardship deduction. He also argues that the trial court erred in not making findings under section 4072, which required it to (1) "[s]tate the reasons supporting the deduction in writing or on the record," (2) "[d]ocument the amount of the deduction and the underlying facts and circumstances," and (3) "[w]henever possible, . . . specify the duration of the deduction." (***Ibid***.)

The court stated its reasons supporting the deduction and documented the amount of the deduction. When husband's counsel argued that "[n]ot one peace [*sic*] of evidence was submitted in this court on that hardship deduction," the court replied, "It's on [wife's June 2011] Income and Expense Declaration." The declaration asked the court to consider as a hardship "[e]xtraordinary health expenses" of $787 per month. This amount included $542 per month for therapy for her depressive disorder, with the balance for prescriptions and "doctor co-pays."

"[T]he determination of whether the criteria are present to permit application of a hardship deduction is reviewed for substantial evidence. [Citation.]" (*In re Marriage of Carlsen* (1996) 50 Cal.App.4th 212, 215.) Viewing the "evidence in the light most favorable to [wife], giving her the benefit of every reasonable inference, and resolving all conflicts in her favor, as we must under the rules of appellate review" (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614), we conclude that substantial evidence supports the finding that wife's monthly health expenses of $787 caused her to experience "extreme financial hardship." (§ 4070) According to wife's June 2011 Income and Expense Declaration, her expenses exceeded her average monthly income by almost $7,000. (See *In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1382 [substantial evidence supported father's hardship deduction where Income and Expense

Declaration showed that father had total monthly expenses of $4,753 and a net monthly disposable income of $3,943 before payment of child support].)

Wife had $75,000 in liquid assets, but the trial court reasonably refused to require the exhaustion of these funds before allowing a hardship deduction. In a declaration filed in April 2011, wife noted that her assets "are rapidly being depleted," and "when they are gone [she] will have little, if anything, left to support [her]." Wife continued: "I have little education and few skills to attract employment to earn an income to meet my needs . . . . [Husband], on the other hand, has the education, experience and skills, and work history to find employment that will support him at a reasonable level, consistent with the marital standard of living." "Husband may be able to afford to spend his share of the community assets and then, once they are sufficiently depleted, step into a job where he can earn substantial income and regenerate a comfortable financial estate for his retirement years. I know that I am unable to do so."

Husband maintains that the trial court erroneously relied on wife's June 2011 Income and Expense Declaration because it "was never entered into evidence" at the hearing. But when the parties rested, wife's counsel requested that the court "review her Income and Expense Declaration filed today." Husband did not object. During closing argument, the court stated: "[T]he court has an obligation to review the entire file and the contents of it, and the Court did review both parties['] Income and Expense Declarations that were filed prior to today. The court also has reviewed the declarations that were filed today." Husband again failed to object and has therefore forfeited the issue.[5] (*People v. Blacksher* (2011) 52 Cal.4th 769, 797.)

Husband argues that the trial court erroneously made the hardship deduction retroactive to February 1, 2011, the date that the order to show cause was issued. Husband asserts, "[T]here was no evidence at all that the purported hardship existed

[5] The court further stated without objection: "The court has reviewed all of the papers leading up to this OSC [Order to Show Cause] and including this OSC and the response and the reply and everything else in this case."

between February 1, 2011 and June 3, 2011." We disagree. Wife's depressive disorder did not begin in June 2011. She testified that for the past two years she had been in therapy for the disorder.

The trial court did not specify the duration of the hardship deduction, but this was not error. The duration depended upon wife's mental health. Since this was subject to change, the court could have reasonably found that it was not feasible to determine the duration of the deduction.

*Other Issues*

I

Husband contends that, in calculating spousal and child support, the trial court erroneously "attributed a deductible interest expense of $256 a month to [him.]" (AOB 21) This contention is precluded by the "fundamental rule of appellate procedure which precludes an appellant from raising issues [that have been decided] favorabl[y] to himself. [Citations.]" (*People v. Webb* (1986) 186 Cal.App.3d 401, 411; see also *Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233, 241.) Husband's interest deduction decreased the amount of support payable by him.

II

The trial court allowed wife a $388 deduction for health insurance and made the deduction retroactive to February 1, 2011. Husband contests the retroactive application of the deduction. Wife's June 2011 Income and Expense Declaration showed that in May 2011 she had incurred an expense of $321 for her health insurance and $67 for her childrens' health insurance. But these were new expenses. Wife's February 2011 Income and Expense Declaration showed that husband was paying the health insurance premiums for both her and the children. In husband's March 2011 responsive declaration to the order to show cause, he claimed that he was paying the health insurance premiums. In wife's April 2011 reply to husband's responsive declaration, she did not dispute husband's claim. Accordingly, insofar as this deduction was applied retroactively from February 1 through April 30, 2011, it is unsupported by the evidence

before the court when it allowed the deduction following the June 2011 evidentiary hearing.[6]

But any error was harmless because the trial court made a corresponding error in calculating husband's deduction for health insurance. Husband's March 2011 Income and Expense Declaration showed a monthly health insurance expense of $626. The expense was broken down as follows: husband's policy - $171 per month; wife's policy - $321 per month; policy for the two children - $134 per month. Husband was entitled to the $626 deduction through April 30, 2011. But in May 2011 wife started paying for her own health insurance and for one-half of the childrens' insurance ($321 + $67 = $388.) Yet, the trial court allowed husband the full $626 deduction for the period after April 30, 2011. Husband's deduction for this period should have been $238, exactly $388 less than the $626 deduction that he received.

III

The court's DissoMaster entries show other taxable income of $1,124 for husband and $722 for wife. Without further discussion, husband asserts that the parties' other taxable income "must be equal because [it] represents the income generated from the parties[']community assets that were being divided equally." "[W]e treat this issue as waived for want of cognizable legal argument. [Citation.]" (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 821.)

IV

Husband asserts that "[h]e is going broke" and requests that wife pay his attorney fees pursuant to section 2030. " 'Such a request must properly be addressed to the trial court in the first instance, and we express no opinion on that subject.' [Citations.]" (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 180.)

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[6] In response to husband's subsequent motion to reconsider and set aside the trial court's orders on temporary spousal and child support, wife declared that husband had been paying her "insurance premiums and one-half (1/2) of our sons' insurance premiums with [her] share of community property funds he received in mid-November 2010 and deposited in his separate account, which he did not disclose to [wife] until May 31, 2011.

*Disposition*

The order awarding temporary spousal and child support is affirmed. Wife shall recover her costs on appeal.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Roger L. Lund, Judge

Superior Court County of Ventura

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Oddenino & Gaule; Michael L. Oddenino, for Appellant.

Alexander, Clayton & Wilson; Marguerite A. Wilson. Taylor, McCord, Praver & Cherry; Patrick G. Cherry, for Respondent.