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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of ADRIAN BAILEY and
REBECCA NATION.

B236851
(Los Angeles County
Super. Ct. No. SD025781)

ADRIAN BAILEY,

Respondent,

v.

REBECCA NATION,

Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. David J. Cowan, Commissioner. Reversed.

Friedman & Friedman, Ira M. Friedman and Gail S. Green for Appellant.

Adrian Bailey, in pro. per., for Respondent.

* * * * *

We reverse an attorney fee award made pursuant to Family Code section 2030 (section 2030) because there was no evidence the party ordered to pay the fees – appellant Rebecca Nation – had the ability to pay them. Although there was evidence that Nation’s mother, a nonparty, had the ability to pay, Nation’s mother could not be ordered under section 2030 to finance her ex-son-in-law’s litigation.

FACTS

Nation and respondent Adrian Bailey were divorced in Connecticut in 2007.¹ They have one child. Under the terms of the divorce decree, Bailey was required to pay Nation a minimum of \$3,500 monthly in spousal and child support.

In July 2009, Bailey stopped making payments, and Nation represents that he is in arrears over \$90,000, although the amount has not been adjudicated. Bailey’s August 2011 income and expense declaration indicated that he had no income and his expenses totaled \$2,360 a month. Bailey acknowledged working as a computer software programmer for 26 years, but stated that in the last few years his income deteriorated as a result of the economic crisis. Bailey lives with his long-term partner, pays no rent, and drives his partner’s vehicle.

Like Bailey, Nation also claimed to be unemployed and have no income except in May 2009 when she had a one-month job. Her August 2011 income and expense declaration showed no income and monthly expenses of \$6,073, paid by others. Her income and expense declaration indicated she owed her mother \$230,000 for legal expenses and \$173,098 for living expenses.

The parties estimated each other’s income differently from that reported on their income and expense declarations. Nation estimated Bailey’s monthly income at \$23,000. Bailey estimated Nation’s monthly income at \$30,000. Bailey’s estimate was based on his belief that Nation’s family was wealthy, Nation lived a “lavish” lifestyle, and the fact that Nation had paid off debt incurred during their marriage.

¹ The judgment has since been registered as a California judgment.

On June 6, 2011, Bailey sought a new child support order and fees to retain counsel. Bailey claimed fees were necessary for him to discover Nation's financial status. Following a hearing, the trial court ordered Nation to pay Bailey's attorney fees "in the initial sum of \$10,000." Nation appealed from the order.

DISCUSSION

Section 2030, subdivision (a) provides:

"(1) In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.

"(2) When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether *one party is able to pay for legal representation of both parties*. If the findings demonstrate disparity in access *and ability to pay*, the court shall make an order awarding attorney's fees and costs. A party who lacks the financial ability to hire an attorney may request, as an in [pro. per.] litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward." (Italics added.)

The public policy underlying section 2030 is to "level[] the playing field" and permit[] the lower-earning spouse to pay counsel and experts to litigate the issues in the same manner as the spouse with higher earnings.' [Citation.]" (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1315.) A trial court "must consider the respective incomes and needs of the parties, including all evidence concerning income, assets, and

abilities, in exercising its discretion to award attorney's fees. [Citations.]””” (*In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360, 371.) The trial court has discretion in awarding attorney fees under section 2030. (*In re Marriage of Tharp, supra*, at pp. 1313-1314.) We review the trial court's order for abuse of discretion. (*In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 662.)

It cannot reasonably be disputed that there is a disparity in access to funds to retain counsel. Bailey argues that Nation's ongoing representation by counsel demonstrates her access to funds and we agree. Bailey also argues that Nation's income and expense declaration shows that her mother “has paid all of [Nation's] attorney's fees” and we agree. Whereas Bailey has represented himself in this proceeding, Nation consistently has been represented by counsel. In fashioning its order, the trial court appropriately relied on Nation's continued representation as evidence of a disparity in access to funds.

But section 2030 requires not only a disparity in access to funds, but also evidence that one party is able to pay for legal representation of both parties. Section 2030, subdivision (b) provides: “the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether *one party is able to pay for legal representation of both parties.*” (Italics added.) Thus, under the plain language of the statute, in addition to determining that there was a disparity in access to funds, the court was required to consider whether Nation was able to pay for the legal representation of both parties.

Here, there was no evidence Nation was able to pay for her attorney fees or Bailey's attorney fees. Nation's 2011 income and expense declaration indicated that she had *no* income. No evidence contradicted her income and expense declaration. No evidence demonstrates Nation was given a recurring monetary benefit, which under certain circumstances may be deemed income. (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 737 [holding that periodic, regular payments made over a decade could be considered in calculating the child support a father owed].) Because no evidence

supported a finding that Nation was able to pay for the legal representation of both parties, the trial court erred in ordering Nation to pay Bailey's attorney fees.

The undisputed evidence that Nation's mother funded her attorneys does not support the trial court's order awarding Bailey attorney fees. Nation's mother is not a party to this action and cannot be forced to pay for Bailey's attorney fees. Generally, "[p]arents are not obligated to pay the costs of their children's divorces." (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 532.) There is an exception for a grandparent who is a party to the lawsuit. (*In re Marriage of Perry* (1998) 61 Cal.App.4th 295, 310-311 [ordering grandmother who became party to pay other side's attorney fees]; see also § 2030, subd. (d) [nonspouse party may be ordered to pay fees in an amount necessary to maintain or defend the action "on the issues relating to that party"].) But Nation's mother was not a party to the lawsuit, and therefore could not be ordered to pay Bailey's fees.

Citing *In re Marriage of Hofer* (2012) 208 Cal.App.4th 454, Bailey argues that Nation forfeited the right to appeal the attorney fee award because she "did not report the amount paid to . . . counsel in fees." We disagree. In *Hofer*, the husband who "chose not to disclose evidence of his financial circumstances despite three separate discovery orders and sanctions" was "disentitle[d]" to appeal from the attorney fee award. (*Id.* at p. 456.) The husband's refusal to comply with the court's discovery orders "precluded the trial court from considering the very evidence [husband] claims is necessary to support the attorney fee award." (*Id.* at p. 458.) The disentitlement doctrine is premised on a refusal to obey a superior court order. (*Id.* at p. 459.) Here, Nation was not in violation of any court order and the disentitlement doctrine is inapplicable.²

² Because we conclude the order must be reversed, we need not consider Nation's argument that the court erred in failing to consider her evidentiary objections.

DISPOSITION

The order requiring Nation to pay Bailey \$10,000 in attorney fees is reversed.
Each party shall bear his or her own costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.