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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of GAYLE M. and ANTHONY E. GABRIEL.	B227496 (Los Angeles County Super. Ct. No. ND056012)
GAYLE M. GABRIEL, Appellant, v. ANTHONY E. GABRIEL, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Marjorie S. Steinberg, Judge. Affirmed.

Law Offices of Michael Leight and Michael Leight for Appellant.

Schwamb & Cowhig and John S. Cowhig; Snell & Wilmer and Richard A. Derevan for Respondent.

INTRODUCTION

Gayle M. Gabriel appeals from the judgment on reserved issues in this marital dissolution action. She contends the family court committed reversible error in imputing an annual earning capacity of $180,000 to her when calculating child support and in failing to require her ex-husband, Anthony E. Gabriel, to obtain a life insurance policy benefitting their children. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Gayle and Anthony[2] were married on July 11, 1998. They had two daughters, Katina, born in August 2000, and Kristin, born in August 2002. Gayle and Anthony separated on August 30, 2006.

In July 2007, Gayle moved into a new $2.2 million home she purchased, using $1.2 million in community funds for a down payment, and began living with her fiancé and his two children. On September 20, 2008, Gayle filed a petition for dissolution of marriage.

The parties stipulated to a bifurcated trial on status, and on December 1, 2008, the family court announced a judgment of dissolution. Judgment as to status only was entered on June 25, 2009.

A trial on reserved issues, including Gayle's order to show cause for child support, spousal support and attorney's fees, was held on December 19, 2008 and April 17, 2009. Pursuant to the stipulation of counsel, closing argument was submitted to the court in writing.

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[1] We limit our factual statement to those facts relevant to the specific issues raised on appeal.

[2] We refer to the parties by their first names for purposes of clarity. No disrespect is intended.

In her closing argument, Gayle, among other things, asked the court to award her substantial spousal support and child support. In calculating these amounts, Gayle urged the court to impute only $50,000 in annual income to her. Gayle asked the trial court to give no weight to Anthony's vocational expert, David Rinehart (Rinehart), who opined that $180,000 in annual income should be imputed to her.[3]

Gayle also asked the court to order Anthony to obtain a $5 million life insurance policy naming her as the irrevocable primary beneficiary and their daughters as the alternate beneficiaries. Specifically, Gayle asked the court to include the following provision in the judgment: "'Within thirty days after entry of this judgment, Anthony shall obtain a policy of insurance insuring his life and paying a death benefit of no less than $5 million to Gayle, as the sole irrevocable primary beneficiary of the policy. Kristin and Katina will be named irrevocable alternate beneficiaries. Anthony will make all premium payments on the policy in a timely manner as long as he has any obligation to pay spousal support or child support, or both, for the benefit of Gayle or his daughters, or both.

"He will direct the insurer in writing, within ten days of obtaining the policy, to send Gayle all premium notices, lapse notices, and receipts for premiums paid. If Anthony fails to make any premium payments as required, Gayle may, at her option, make such payments and which she will be entitled to recover from Anthony or his estate all premiums paid by her to preserve the policy together with interest on each payment at the rate of ten percent per annum from the date of payment. She will also be entitled to recover her attorney fees incurred in connection with seeking reimbursement for those premiums.

"If the policy lapses because of Anthony's default in payment of the premiums or because of any action taken by him, Gayle will be entitled to payment from Anthony's estate of the full amount of all death benefits to which she would have been entitled but

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3 Rinehart's testimony will be detailed more fully in the legal discussion.

for the lapse of the policy or the action of Anthony. Anthony waives the right, during the period that he is required to maintain Gayle as the sole primary beneficiary of the policy, to exercise any rights, privileges, and options granted to the owner of the policy without the prior written consent of Gayle.

"The issuer of the policy shall be a company acceptable to Gayle or, in the event of a dispute between the parties, approved by this court, which retains jurisdiction to enforce this provision." (Italics omitted.)

In his written closing argument, Anthony, relying on the testimony of Rinehart, asked the court to impute $180,000 of annual income to Gayle. With regard to child support, Anthony proposed that the family court base its award of guideline child support on his salary and bonuses and require him to pay a percentage of all stock option income when the options become exercisable. Anthony opposed an award of spousal support, and asked the court to terminate such support.

With regard to the issue of life insurance, Anthony argued that it would not be proper to maintain life insurance for Gayle's benefit if the court ordered him to pay spousal support since such an obligation would terminate if he died. With regard to life insurance for his daughters, Anthony argued that he "has a group life insurance policy through his employment and he will name the children as beneficiaries, if they are not so named already." Anthony added that "the children are already the named beneficiaries of the KK Gabriel trust,[4] so in the event of [his] death the assets of the trust would pass to them." Thus, he argued, that a $5 million life insurance policy was excessive.

The trial court issued a statement of decision, in which it set forth the following undisputed facts:

"Both parties have Medical Doctor degrees. [Gayle] graduated in the top 5% of her class from the University of Southern California Medical School in 1994. She did a

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[4] After the parties separated, Anthony formed the K.K. Gabriel Trust, dated July 27, 2007, primarily for "estate planning purposes for the benefit of my children." Anthony was the sole trustee of this trust. "K.K." referred to Katina and Kristin.

one year internship at the University of California at San Francisco and then a one year internship in internal medicine at UCLA from 1995 to 1996. She was a resident at UCLA in 1996. She was paid both as an intern and a resident. Following a one year residency in internal medicine she had a rheumatology fellowship until the end of 2000. This was also a paid position at UCLA. She then worked in a private rheumatology practice for about six months beginning in January 2001 and then went to work for a company called QTC, giving physicals and making disability assessments. She left that job a month or two before the birth of Kristin in August 2002. She joined the Arthritis Treatment Center in September 2002 where she worked 16 hours a week at a[n] annual salary of $70,000. In 2003, she stopped working.

"[Gayle] . . . does not plan to resume work as a physician full time or even to practice medicine. She is now thinking of teaching or writing a book; she has no definite plans for future employment at this time. She has not pursued the education to renew her Board Certification in Internal Medicine which lapsed in December 2008. She is currently Board Certified in Rheumatology.

"[Gayle] began to work for Shade MedSpa, the community business, in April 2004 when it opened. She was the medical director. She worked Monday through Friday and sometime[s] on Saturdays. She stopped working at Shade MedSpa in May 2007. [Anthony's] grandparents and parents provided some child care for the minor children while [Gayle] was working. The parties also employed a nanny from time to time. [Gayle] has neither sought to work nor worked following her voluntary separation from Shade MedSpa in May 2007.

"[Anthony] graduated in 1993 from Ohio State University Medical School. He has a Masters of Business Administration from UCLA in 1998. He works as an executive for Da[V]ita, a national dialysis company."

The court further set forth the parties income as follows:

"In 2003 [Anthony] earned $507,074 in W-2 wages. [Citation.] No evidence was presented as to [Gayle's] income, if any, that year.

"In 2004 [Anthony] earned $711,000 as reflected on his W-2. Of that amount, $470,000 was income from stock options. [Citation.] In that year Shade MedSpa was established and [Gayle] began working at it. The parties testified that the company was never profitable so the only income of the parties during the marriage was from their earnings and wages as well as some interest on investments. No evidence was presented of [Gayle's] income for that year from Shade MedSpa.

"The federal joint tax return of the parties for the year 2005 shows adjusted gross income of $1,600,035, which included $4,800 of wages of [Gayle] from Shade MedSpa and $1,187,589.00 from stock options. [Citations.]

"The 2006 joint federal return shows adjusted gross income of $2,052,094. This amount includes $21,007 paid to [Gayle] as salary from Shade MedSpa and $1,652,000 in stock options. [Citations.]

"The parties filed a joint federal return in 2007. It showed adjusted gross income of $3,090,260, including $10,960 in wages of [Gayle] earned working at Shade MedSpa, $189,166 in bonuses and $2,672,000 in stock option proceeds. [Citations.]

"[Anthony's] base salary in 2008 was $225,000. He did not exercise any stock options in that year but did receive restricted stock units valued at $103,760. He also received a cash bonus of $187,500 in 2008 related to his work in 2007. Thus his total compensation was $482,544. [Citations.] No stock option proceeds other than the restricted stock unit proceeds were received by [Anthony] in that year. [Gayle] had no earnings this year.

"Currently, in 2009 [Anthony's] base pay from his employer Da[V]ita is $225,000 a year. In addition he has received in 2009 a cash bonus of $257,500 related to his work in 2008. [Citation.] [Gayle] had no earnings as of the last day of trial." (Bold deleted.)

In calculating the amount of child support to be awarded, the trial court found credible Rinehart's testimony that Gayle could earn at least $180,000 as a physician. It determined that, for 2009, Anthony would be required to pay child support of $3,175 per month—$1,190 for Katina and $1,985 for Kristin. The court further noted that "[t]he support amount for 2009 shall be augmented by a percentage of any bonus or exercisable

stock option received by [Anthony] in excess of $454,752, which is the amount upon which the current order is made. . . ."

With regard to Gayle's request for insurance, the trial court observed that "Petitioner seeks an order that Respondent maintain life insurance to secure his child and spousal support obligations. He has no further spousal support obligation. He has agreed, and the Court orders, that he will maintain the children as beneficiaries as to any group life insurance policy provided by his employer."

Judgment thereafter was entered ordering Anthony to pay child support as noted in the statement of decision and to "maintain the children as beneficiaries as to any group life insurance policy provided by his employer," and terminating the court's jurisdiction to award spousal support.

This appeal followed.[5]

DISCUSSION

A. *Gayle's Earning Capacity*

Gayle contends that, in computing the amount of child support Anthony had to pay, the family court committed reversible error by imputing $180,000 in annual income to her, in that she was unemployed at the time of trial and never earned more than $67,500 annually after she graduated from medical school. We disagree.

1. Rinehart's Testimony

In imputing $180,000 in yearly income to her, the court relied upon the testimony of Rinehart. At the time of trial, Rinehart had been a qualified vocational examiner for approximately 12 years. He held a master's degree in clinical psychology and had approximately 32 years experience in the field of vocational evaluation and rehabilitation.

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[5] Additional facts will be incorporated into discussion where relevant.

Besides “a marriage and family license,” Rinehart had about seven related certificates that address a person’s ability to work and earn money.

Anthony’s counsel retained Rinehart to perform a vocational evaluation of Gayle. Pursuant to the request of counsel, Rinehart submitted a list of questions to be asked of Gayle during her deposition. Rinehart included all the questions that he thought were important to his work. Other questions that he might have added to his list were answered during the deposition. After Gayle was deposed, Rinehart carefully watched the video of the proceeding and took notes. He then conducted research. Specifically, he explored Gayle’s education, residency, fellowship and internship. He also considered the prestige of the medical school she attended. Armed with this information, Rinehart researched jobs that would be suitable for Gayle, given her background, and compiled a report dated June 27, 2008. He prepared an updated report on November 12, 2008. He conducted his research by looking for job opportunities on the Internet. On each occasion, Rinehart looked at regional job openings from San Diego County through Orange County, focusing on medical positions that agreed with Gayle’s background in internal medicine and rheumatology.

Rinehart contacted the persons or entities that posted job offerings. Of the 12 listed in his November 12, 2008 report, Rinehart contacted half of the recruiters, as well as the personnel department of Talbert Medical Group. Rinehart made these contacts to determine if the jobs still were available and whether Gayle qualified for the jobs.

Rinehart acknowledged that he did not meet with Gayle in person. Rinehart opined that the manner in which he obtained relevant information in this particular case was just as effective as if he had meet with her personally. Inasmuch as Gayle is an internal medicine doctor and a rheumatologist whose qualifications and education were revealed in Gayle’s sworn deposition testimony, Rinehart “was very comfortable with making conclusions based upon that.” For other professions, Rinehart acknowledged that “a one-to-one interview” or “testing” would be warranted. Rinehart believed that the information he received was sufficient to support the opinions he reached regarding Gayle’s marketable skills and job opportunities.

Of the family law cases in which Rinehart conducted vocational examinations and testified in court, he did not meet face-to-face with the examinee on 75 occasions. Of these cases, seven or eight involved physicians.

2. The Court Finds Rinehart to be a Qualified and Credible Expert

In its statement of decision, the trial court stated: "[Anthony's] vocational expert David Rinehart testified that Petitioner could make at least $180,000 a year as a full time physician now. He cited various opportunities available to her given her credentials. [Gayle] has questioned Mr. Rinehart's opinion because he did not interview [her] personally nor did he independently verify that the jobs he was advised were available by the prospective employer were in fact available or that she could have obtained such a job. [Gayle] also argues that it is not in her children's best interest that she works more than part time.

"Plainly [Gayle] has the ability to work. [Gayle] has a medical degree from a distinguished university. She is board certified in rheumatology and would still be certified in internal medicine had she kept up with the requirements for that certification. She has work experience. Nevertheless, in order to impute income to the other party, a party must show that the party has the opportunity to work. However, where a parent decides not to seek employment, the Court may impute income without a finding of opportunity. *In Re Marriage of* [*Moseley*] (2008) 165 Cal.App.4th [1375]; *In Re Marriage of LaBass* [&] *Munsee* (1997) 56 Cal.App.4th 1331. [Gayle] has made no efforts to become employed and has no plan for seeking work. Imputation of income is appropriate here.

"The Court finds that Mr. Rinehart is qualified and credible. His investigation of employment opportunities was appropriate and thorough. He contacted the employers to confirm the availability of the job and the necessary qualifications for the job. His conclusion that [Gayle] could make $180,000 per year was well supported and credible. No showing was made that having [Gayle] work full time would not be in the best interest of the children. [Gayle] had used child care when the children were younger so

that she could work part time. The court finds that [Gayle has] an earning capacity of $180,000 per year as a physician. The imputation of this income will commence as of January 1, 2009. No evidence was provided as to the child care expenses she would incur were she to work full time. She will be entitled to reimbursement for one half any child care expense actually incurred in order for her to work. The Court imputes $70,000 per annum in earnings to her for the period prior to January 1, 2009. That is the amount she earned working part time before she quit in 2003. She was able to work part time at Shade MedSpa from 2004 to May 2007. She could have worked part time thereafter but chose not to."

3. Gayle's Challenges

Gayle challenges Rinehart's qualifications to testify as an expert and the court's reliance on Rinehart's testimony. She further maintains that imputing annual income of $180,000 to her was contrary to her daughters' best interests. We address these challenges in turn.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) Whether a witness qualifies to testify as an expert is committed to the sound discretion of the trial court. On appeal, the court's determination may not be disturbed absent an abuse of discretion. (*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1383.)

Gail did not object to Rinehart's qualifications below and therefore has forfeited this challenge on appeal. (Evid. Code, § 353, subd. (a).) In any event, ample evidence supports the trial court's determination that Rinehart was qualified to testify as a vocational expert. No abuse of discretion has been demonstrated. (*TG Oceanside, L.P. v. City of Oceanside, supra,* 156 Cal.App.4th at p. 1383.)

Gayle's challenge to the court's reliance on Rinehart's testimony is nothing more than an attempt to have this court reevaluate and reweigh the expert's testimony and opinions. This we will not do. The trial court found Rinehart to be credible and properly

ruled that he could rely on hearsay in rendering his opinions. (*People v. Yuksel* (2012) 207 Cal.App.4th 850, 856; *Maatuk v. Guttman* (2009) 173 Cal.App.4th 1191, 1198.)

That Rinehart did not personally interview Gayle is inconsequential, as the court impliedly found. At her deposition, Anthony's counsel asked Gayle questions that had been formulated by Rinehart with an eye toward conducting the evaluation he had been retained to perform. Rinehart viewed Gayle's deposition, conducted ample research and ultimately testified that in performing his vocational evaluation of Gayle, he had all the information he needed.

Finally, Gayle points to no evidence establishing that her daughters will be harmed if she works full time. Thus, we reject Gayle's assertion that the trial court abused its discretion in imputing $180,000 in annual income to her. As the trial court found, Gayle is clearly qualified to enter the workforce as a physician. That she does not want to work does not change the fact that she is qualified to work.

B. *Insurance Policy*

Gayle contends that the court committed reversible error by failing to require Anthony to obtain a policy of insurance on his life paying a death benefit to his minor daughters sufficient to replace child support that he will be paying annually for their benefit if he dies while still having an obligation to pay child support.

A parent's child support obligation "is a continuing one which survives the death of the obligor and extends to his estate." (*Franklin Life Ins. Co. v. Kitchens* (1967) 249 Cal.App.2d 623, 631; accord, *In re Marriage of O'Connell* (1992) 8 Cal.App.4th 565, 572.) "Children of divorced parents, often excessively vulnerable to an uncertain future, may need greater protection from the law than children of a united household. On separation or divorce, normally both spouses wish to assure their minor children's future—insofar as it is possible to do so without undue sacrifice of present enjoyments. Insurance provides a relatively painless manner to achieve this objective, particularly when community property insurance on the life of a parent exists." (*Franklin Life Ins. Co. v. Kitchens*, *supra*, 249 Cal.App.2d at p. 631.) Thus, "courts have the power in

marital dissolutions to order maintenance of life insurance for the benefit of children . . . as a support substitute." (*In re Marriage of O'Connell*, *supra*, 8 Cal.App.4th at p. 573.)

While Gayle correctly points out that the family court has the authority to order a parent with a child support obligation to obtain a life insurance policy for the benefit of the children, Gayle does not point to any authority which mandates the court to do so in all cases. Gayle does not point to any evidence suggesting that Anthony was or would be unable to pay child support for the benefit of their children during his lifetime or that upon his death his estate would be insufficient to fulfill any continuing parental support obligation.

Anthony testified that he had "some basic life insurance through [his] work." He did not know the policy limit or who was listed as the beneficiary or beneficiaries. In his written closing argument, he represented that he "has a group life insurance policy through his employment and he will name the children as beneficiaries, if they are not so named already." Given Anthony's agreement to do so, the court ordered him to "maintain the children as beneficiaries" on the policy provided by his employer. Under the circumstances of this case, we cannot conclude that the trial court was required to do any more.

DISPOSITION

The judgment is affirmed. Anthony is to recover his costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J. WOODS, J.