Filed 6/22/17 Marriage of Smith and Dutton CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of SUZANNE J. and MICHAEL A. DUTTON. _____ SUZANNE J. SMITH, Respondent, v. MICHAEL A. DUTTON, Appellant; COUNTY OF LOS ANGELES CHILD SUPPORT SERVICES DEPARTMENT, Respondent.	B265680 (Los Angeles County Super. Ct. No. BL050351)

APPEAL from an order of the Superior Court of Los Angeles County, William N. Shepherd, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Michael A. Dutton, in pro. per., for Appellant.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Linda M. Gonzalez and Jennevee H. De Guzman, Deputy Attorneys General, for Respondent County of Los Angeles Child Support Services Department.

Appellant Michael Dutton (Dutton) appeals from an order determining that he owes child support arrearages to his former wife, Suzanne Smith (Smith). Respondent is the County of Los Angeles Child Support Services Department (the Department), which provided support services to Smith. We affirm the order.

BACKGROUND

I. Dutton is ordered to pay child support

Smith and Dutton were married in 1987. They had one child, born in May 1991. After the parties separated, the San Bernardino Superior Court ordered Dutton to pay $305 in monthly child support beginning on June 1, 1994. Under the later May 1995 judgment of dissolution, Dutton was to pay that same amount until their child was 18 or until further order of the court.

Dutton, however, failed to make all payments, and, over the years, various contempt proceedings were held based on his failure to comply with the support order.[1] In January 1998, for example, Dutton was ordered to pay child support arrears of

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[1] Dutton questions whether the contempt proceedings "were properly performed." To the extent he raises an issue about the validity of those proceedings, they are not properly before us.

$9,585.03 at a rate of $325 per month. About a year later, in February 1999, he was ordered to pay child support arrears in the amount of $14,166.41 at the rate of $120 per month. In November 2002, Dutton was placed on two years' diversion on the condition, among others, that he pay child support arrears of $15,619.16 at the rate of $446 per month. In July 2008, he was ordered to pay child support arrears at the rate of $50 per month. How these figures were calculated, however, is unclear.

Indeed, it was not always clear to the Department. On September 20, 2004, for example, the Department filed a statement for registration of California support order against Dutton in Los Angeles County, which said that the arrearage balance was unknown.

Some of this ambiguity arose from Smith's March 1, 2007 declaration regarding the history of support payments from Dutton. Although Smith was supposed to list only payments received directly from Dutton she instead listed payments collected by the Department. The declaration therefore incorrectly credited Dutton with payments he hadn't made.

Thereafter, the Department sent Dutton a monthly billing statement dated March 1, 2009 showing a total balance of $9,754.16. But, just a month later, on April 30, 2009, the Department generated a report showing that Dutton owed much more than that: $46,362.43 ($32,279.65 in principal and $14,082.78 in interest). After Smith prepared, in May 2013, a revised declaration of support history showing that she received *no* payments directly from Dutton, the Department prepared new arrearages reports. One, dated June 2013, reported arrearages of $44,889.54. But the Department's final audit, dated

December 31, 2013, had a balance of $39,986.83 ($15,515.15 in principal and $24,471.68 in interest).

II. Dutton requests a determination of arrearages

Dutton filed two requests for a determination of arrearages, one in November 2013 and the second in May 2014. Dutton's position at the long-cause hearings on his requests[2] was the Department hadn't kept accurate records, was "hiding information," had "deleted" payments, and that he was owed over $7,500 in overpayments. "Maybe" at the "beginning" he made a payment directly to Smith, but he could not be certain and he had no proof of such payment. Indeed, he had no records from 1994 to 2004, although he insisted that he'd made payments prior to 2004.

Smith, however, testified that she never received payments directly from Dutton; they all came from the Department.

Dennis Coe, a Department attorney, explained the discrepancies between the two support payment histories that Smith created. In the first, dated March 2007, she listed payments that the Department collected but she was only supposed to list ones sent directly from Dutton. In the second, dated May 2013, she correctly listed only payments received directly from Dutton.

III. The statement of decision

The family court (Commissioner Drewry) issued a tentative statement of decision on January 29, 2015. Although the court understood Dutton's "dismay" over the Department's inaccurate billing records showing that Dutton owed only approximately $9000, the court refused to estop the Department from relying on

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[2] Three hearings were held, the last on June 26, 2015.

its December 2013 audit. The "accounting irregularities" did not diminish that audit, especially since Dutton failed to produce evidence he made support payments from June 1, 1994 to November 2004. The court therefore found that support payments commenced on June 1, 1994 and that Dutton owed $39,612.83 as of December 31, 2013.[3]

After Dutton objected to the tentative statement of decision,[4] the family court, on May 20, 2015, issued its "ruling on submitted matter," which was substantively no different than the prior tentative statement of decision. The court reopened evidence by setting a date to examine Coe and indicated that if nothing came of Coe's testimony the court would adopt the tentative as its final statement of decision.

Coe then testified on June 26, 2015.[5] He explained, again, that when the case was opened in Los Angeles, Smith was asked

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[3] The court gave Dutton a $374 credit based on a 2002 order which, probably due to clerical error, incorrectly stated that the support order was $300—instead of $305—per month. Dutton therefore received the benefit of that error.

[4] Dutton also filed a "motion for sanctions-unperformed service," a "request for judicial notice preliminary fact", a request for judicial notice of " 'twice credited' payments", a request for judicial notice that the Department deleted payments, a request for judicial notice of "audit variances", a motion to strike "all items relating to $36,704.63 preliminary fact", and a "reassert[ion]" of "objections made and new objections to pleadings received". The court denied the motions/requests.

[5] By this time, Commissioner Drewry had retired and the matter was assigned to Commissioner Shepherd.

to prepare an affidavit of arrears. Smith listed everything she received directly from Dutton and everything she received through the Department's collection efforts. She was supposed to list, however, only payments received directly from Dutton. Years later, when the Department discovered the error, it asked Smith to prepare a second affidavit, this time listing only payments she received directly from Dutton. There were none. Coe denied that the Department deleted payments. At the conclusion of the hearing, Commissioner Shepherd adopted the tentative decision that Dutton owed $39,612.83 as of December 13, 2013.

CONTENTIONS

Dutton contends **I.** he does not owe child support arrearages because Smith violated Title IV-D of the Social Security Act, **II.** venue in Los Angeles County was improper, and **III.** there were "false" orders.

DISCUSSION

I. The child support arrearages

Dutton's primary challenge to the order directing him to pay child support arrearages is based on Smith's alleged violations of Title IV-D of the Social Security Act, which Congress enacted to recoup welfare costs from absent parents of children given public assistance. (*Clark v. Superior Court* (1998) 62 Cal.App.4th 576, 579 [aid recipients required to assign support rights to state]; Welf. & Inst. Code, § 11477 [same].) Dutton raises Title IV-D for the first time on appeal based on an appellate record silent as to that fact-based issue. The issue is therefore forfeited. (See *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1488-1489 [argument deemed forfeited if not raised below and requires

consideration of new factual questions]; *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 983 [general rule is that new theory may not be presented for first time on appeal unless it raises only a question of law and can be decided based on undisputed facts].) It is, moreover, unclear why Title IV-D is relevant. Even if Smith violated Title IV-D, how does that impact what Dutton owes in arrearages?

To the extent Dutton also challenges the arrearages order on the ground there were "material flaws" in the Department's audits, we reject the challenge. Although child support orders are generally reviewed for an abuse of discretion (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 285, 288-289), the issue here is whether Dutton owes arrearages and, if so, the amount. Such a disputed factual issue is one subject to the substantial evidence standard of review. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Under that standard, " ' "[w]hen a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." ' [Citations.] ' "[W]e have no power to judge . . . the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." ' [Citations.] Our role is limited to determining whether the evidence before the trier of fact supports its findings." (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.)

There is no question there was conflicting evidence. Dutton testified that he made payments from 1994 to 2004. More

notably, the Department sent Dutton a monthly billing statement dated March 1, 2009 showing a $9,754.16 balance. Just one month or so later, in April, the Department reported that he owed almost four times that, $46,362.43. Thus, accounting errors obviously were made, as the Department conceded.

The family court, however, rejected Dutton's explanation for the accounting errors—that the Department deliberately deleted payments Dutton made in order to create a fraudulent balance.[6] The court instead found credible the December 31, 2013 audit and the Department's explanation for what happened. Coe explained that, in March 2007, Smith prepared a support payment history showing amounts paid from 1994 to 2008. Smith, however, was supposed to list only payments she received *directly* from Dutton and not ones she received from the Department. But, as Smith testified, she never received payments directly from Dutton, who agreed that he never sent payments directly to Smith. All payments came from the Department. Smith therefore prepared another history, dated May 1, 2013, showing that she received no payments directly from Dutton. The final December 2013 audit was based on Smith's revised payment history. The Department therefore did not fraudulently "delete" payments Dutton made. Rather, the

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[6] The court rejected Dutton's unclean hands and equitable estoppel arguments. On appeal, Dutton distances himself from those theories and says that what he "actually" argued below was judicial estoppel. In fact, he did not raise judicial estoppel. The court below therefore had no occasion to consider that theory, and neither do we. (*Piscitelli v. Friedenberg*, *supra*, 87 Cal.App.4th at p. 983.)

Department corrected the accounting error in which Dutton received double credit for payments he'd made.[7]

Other evidence tended to show that Dutton owed arrearages. Orders were issued in contempt proceedings indicating Dutton owed $9,585.03 in 1998, $14,166.41 in 1999 and $15,619.16 in 2002. Although how these figures were calculated is vague, they nonetheless buttress the Department's claim that Dutton failed to make full support payments prior to 2004. Moreover, Dutton was unable to produce any documents — e.g., cancelled checks, bank statements, etc.—showing payments prior to 2004, further undercutting his claim that he had made such payments.

This evidence was more than sufficient to support the family court's finding that the December 31, 2013 audit was accurate. Dutton's challenges to this evidence amounts to nothing more than an improper request to reweigh the evidence and to reevaluate the credibility of witnesses. (*Reichardt v. Hoffman*, *supra*, 52 Cal.App.4th at p. 766.)

II. Venue

Dutton contends that venue in Los Angeles County was improper. However, a statement of registration of the support order was filed in September 2004 in Los Angeles Superior Court informing Dutton that he had 20 days after the statement was mailed to petition to cancel/vacate the registration or for other relief. Nothing in the record shows that he objected to the registration or otherwise objected to venue in Los Angeles County. Instead, at the June 2015 hearing, the family court

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[7] Dutton declined to examine the auditor who prepared the December 2013 audit.

asked Dutton if he was challenging the registration. Dutton said he was "challenging it based on [the Department's failure to] comply [with] the rules and all the regulations that pertain to registering a case there for trying to hold me accountable for monies." But he confirmed that he never objected to the registration. Any objection based on venue is therefore forfeited. (See generally *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 121 [except in few cases in which the Constitution makes place of trial jurisdictional or a statute makes local place of trial part of the grant of subject matter jurisdiction, venue is not jurisdictional]; Code Civ. Proc., § 396b, subd. (a) [objections to venue waived if not raised in the underlying litigation].)

III. "False" orders

On August 27, 2013, a contested hearing was held and, four months later, on December 5, 2013, Commissioner Drewry apparently set an arrears amount without prejudice, although any such amount is not in the record on appeal. On January 30, 2014, another contested hearing was held, and the court issued an order dated February 25, 2014 that, it appears, merely continued the matter to the court's long-cause calendar. Dutton refers to August 27, 2013 and January 2014 "orders," but it's unclear what issue he intends to raise about them and whether they are related to the order on appeal. We therefore do not address them.

IV. Judicial notice

Dutton requests that the record either be augmented with or that we take judicial notice of Hilda Navarro's affidavit re: Accounting of Arrears, dated May 27, 2008, and attachments. Because it is unclear whether the affidavit and attachments were

before the family court or otherwise a part of the family court record, we deny the request.

Dutton also requests judicial notice of a criminal complaint dated October 11, 2002. Although we can take judicial notice that the complaint was filed on that day (Evid. Code, § 452, subd. (d)), we cannot take judicial notice that the arrears owed were "nonwelfare."

In any event, consideration of the requests would have no impact on our conclusion herein.

DISPOSITION

The order is affirmed. The parties shall bear their own costs on appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.