Filed 5/5/14 Marriage of Bailey and Nation CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of ADRIAN BAILEY and REBECCA NATION.	B246749 (Los Angeles County Super. Ct. No. SD 025781)
ADRIAN BAILEY, Respondent, v. REBECCA NATION, Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Commissioner. Affirmed in part; reversed in part.

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

Morgan, Lewis & Bockius, Robert Jon Hendricks, Roger K. Smith and Taylor C. Day for Respondent.

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The parties Adrian Bailey and Rebecca Nation married in 1999 and divorced in 2007. Since 2007, they have been litigating custody over their son (born in 2004) as well as child and spousal support. This is the third appeal in this court, and their case is currently pending in the Connecticut Supreme Court.

In the current appeal, Nation challenges an order granting Bailey primary physical custody of their son. Overwhelming evidence supported the trial court's custody determination, and we affirm.

Nation also challenges an order requiring her to pay Bailey child support. We reverse the child support order because the court neither complied with mandatory guidelines nor followed the mandatory procedure for departing from the guidelines.

FACTS AND PROCEDURE

1. The Parties' Separation Agreement and Judgment of Dissolution

Prior to their divorce, the parties entered into a separation agreement, which was incorporated by reference into the judgment of dissolution issued by the Connecticut superior court. The parties' separation agreement anticipated that both Nation and Bailey would relocate from Connecticut to California. The separation agreement required Bailey to pay Nation unallocated alimony and child support in the amount of 50 percent of his gross annual compensation from employment, not less than $3,500 a month. According to the terms of the agreement, "Unallocated alimony and child support shall be paid until the death of either party, the Wife's remarriage or cohabitation as defined by Conn. General Statutes §46b-86(b), or until August 1, 2011." With respect to custody the separation agreement provided: "The parties shall have joint legal custody of the minor child whose primary residence shall be with the Wife."

As expected the parties both relocated to California. Their son also relocated to California. On January 28, 2008, Bailey sought to register the out-of-state custody order in California. In April 2008, the parties stipulated to the registration of the Connecticut judgment. "Once registered, the foreign support order 'shall be treated

in the same manner as a support order issued by a court of this state.'" (*In re Marriage of Lurie* (1995) 33 Cal.App.4th 658, 664.)

2. The California Superior Court Orders an Independent Evaluation

In 2010, the court appointed Dr. Nancy Hazeltine to evaluate the parties and their son to assist in determining physical custody of the minor. In her comprehensive 130-page report, Dr. Hazeltine concluded that Nation "deliberately misrepresent[ed] the truth to this evaluator, the police, and others. [¶] Mother has the propensity to act-out in a threatening manner that has served to alienate her from others, including school staff, parents, neighbors, etc. It is of great concern that the Minor will be at risk to be on the receiving end of her displeasure when he is of an age to resist her influence and establish his independence from her. At the very least, his circle of friends will dwindle if Mother continues down this path."

Dr. Hazeltine continued: "Such aspects of Mother's functioning bode poorly for the emotional and psychological well-being of the Minor who has already begun to attempt to manipulate situations through 'fake' crying. It is not believed that the Minor is free to express positive feelings towards Father and Ms. Clark [father's girlfriend] if those sentiments would upset Mother. [¶] It is this evaluator's professional opinion that it is in the Minor's best interest to be in Father's primary care. It is believed that what Father lacks in emotional attunement with the child can be improved. It is not believed that Mother's characteristics, which are more chaotic than Father's will genuinely change without intensive, ongoing psychotherapy."

With respect to visitation, Dr. Hazeltine made the following recommendations: "Mother has a propensity to disparage Father and Father's girlfriend and it is not believed that Mother can contain herself adequately in this area, especially if she were to lose primary custody of the child. Therefore, it will be recommended that Mother's time with the child be monitored until such time as she has enrolled in and completed a minimum of 36 weeks of a 52-week course of anger management counseling, has had a forensic, psychiatric assessment with a board

certified psychiatrist . . . , has complied with that psychiatrist's recommendations, an[d] is attending weekly psychotherapy with the same licensed mental health professional."

Dr. Hazeltine recommended both father and his son attend therapy.

Dr. Hazeltine testified that "if the child remains in mother's primary care, she will continue along the course of alienating the child from father by disparaging father, creating a myth in the child's mind of experiences that happened prior to the child's ability to remember; [¶] that she has a style of interacting with others and getting her way through intimidation and . . . I have some concern about how she approaches representing events truthfully, and I have concerns she will distort events to the child in a way that will make it difficult for him and he will maladapt later in life . . . ."

3. California Court's Custody Determinations

In January 2011, the California superior court modified the parties' legal and physical custody arrangements. The court ordered Bailey to have sole legal custody of the minor. The parties were ordered to alternate weeks parenting their son, essentially sharing physical custody. Nation was ordered to enroll in a 52-week anger management course and to attend weekly psychotherapy counseling. Bailey was ordered to attend 20 additional individual counseling sessions.

After the 2011-2012 school year, the parties agreed their son could not stay at the private school he had been attending. On June 28, 2012, Nation filed an order to show cause seeking a determination their son attend Webster Elementary School for the 2012-2013 year and that physical custody remain shared. In the alternative, she sought a court order requiring their son to attend a school near her home and live with her during the week and with Bailey the first three weekends of the month. Nation recognized that if their son attended a school near where Bailey lived a change in physical custody was necessary.

Bailey sought to have his son attend a school near his home and sought to have full custody of him. As an exhibit to his declaration, Bailey attached a request for a temporary restraining order filed by Nation's neighbor seeking to restrain her. The temporary restraining order was granted. The neighbor represented that Nation threatened to break his daughter's neck. The neighbor further represented that Nation harassed his children and dog, and when he attempted to speak to her she refused to "engage in any kind of composed dialogue . . . ." The neighbor worried about Nation becoming angry and aggressive without any reasonable provocation.

The court-appointed attorney for the minor, Avery Cooper, recommended that during the school year the child attend the school near Bailey's home and spend his time primarily with Bailey during the school week and the remaining time to be allocated equally. Cooper stated that the child is in the center of an ongoing battle between his parents. Nation refused to take the child to court-ordered therapy. She also refused to pay the therapist fees she was ordered to pay. Cooper worried that if the child attended Webster School, a school between both parents' residences, it would be difficult for him to interact afterschool with the children in his class because the school was far from both Bailey's and Nation's homes. Cooper observed that Bailey helped his son with his homework. In contrast, there were problems with the child completing his homework when he was in Nation's custody. According to Cooper, sharing school responsibilities was not recommended because the "relationship between the Parties is so dysfunctional such that they cannot even get along or agree how to allocate homework, the completion of school projects, etc."

Cooper reviewed Dr. Hazeltine's evaluation and was "concerned that many of Dr. Hazeltine's fears regarding [Nation] have proven to be true." Nation called child protective services without justification. Nation exaggerated her son's medical condition and said that her son was too sick to participate in a school play when she did not want him to perform.

Cooper recognized that the child would be disappointed to spend less time with Nation but nevertheless concluded the readjustment was in the child's best interest. The child was "bonded" to Nation but "much of this 'bonding' results in large part from [Nation's] need to have [her son] with her."

According to the child's therapist, his progress was slow because he was "in the middle of serious and damaging conflicts." The therapist was concerned that Nation refused to bring her son to therapy, refused to pay for his therapy, and refused to discuss her son with his therapist.

Effective August 12, 2012, the court issued the following custody orders. The court ordered Bailey to continue having sole legal custody of the parties' son. The court ordered the child attend school near Bailey's residence and that Bailey have primary physical custody of the child during the school year. During the school year, Nation had custody of the child three weekends each month and Wednesday after school. At the end of the school year, Nation had visitation every other week.

4. Neither Party Is Employed

In December 2009, Nation filed an income and expense declaration indicating that she had training in culinary arts and worked for two weeks as a food and beverage consultant in 2009. Her expenses included $2,800 in rent and totaled $10,078. Since then her income and expense declarations reflect that she has no income. In August 2011, she reported her monthly expenses totaled $6,073.[1] In her March 2012 income and expense declaration, Nation represented that *all* her expenses are unknown. Nation is supported by her mother and owes her mother $230,000 or more in legal fees and $173,000 or more in living expenses.

Bailey also has chosen not to work and relies on his long-term girlfriend for support. Previously, Bailey worked as a computer software developer for over

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[1] Bailey argued that this amount did not reflect Nation's legal expenses or housing expenses.

30 years. In 2010, he identified his monthly income as $1,375. In 2011, he reported no income.

While each party accuses the other, the record indicates that both have abdicated their responsibility to their son. "A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life." (Fam. Code, § 4053, subd. (a).) "Both parents are mutually responsible for the support of their children." (Fam. Code, § 4053, subd. (b).)

5. *Unallocated Support in Connecticut*

On February 21, 2007, the Connecticut court ordered Bailey to pay Nation unallocated support consistent with the separation agreement.

Apparently on May 9, 2011, Bailey filed papers in Connecticut seeking a determination that his unallocated alimony and child support obligation terminated in 2007, when Nation cohabitated with her then fiancé. (A copy of that motion is not included in our record.) On April 17, 2012, the Connecticut superior court issued its decision, which was reversed in a published appellate court decision issued July 23, 2013. The appellate court found the trial court failed to "make findings concerning child support . . . and to enter any necessary orders related thereto." (*Nation-Bailey v. Bailey* (2013) 144 Conn. App. 319, 325 [74 A.3d 433, 436].) The Connecticut Supreme Court subsequently granted review. The Supreme Court is considering the following issue: "Did the Appellate Court correctly determine that the trial court improperly suspended the payment of unallocated alimony and support payments for four months, rather than terminating such payments in accordance with . . . the [parties'] separation agreement?" While the parties vigorously dispute the meaning of the Connecticut appellate court decision, neither party shows that the appellate decision remains binding authority after the grant of review by the Connecticut Supreme Court.

6. Support in California

On July 22, 2010, the California superior court ordered Bailey to pay unallocated alimony and child support consistent with the parties' separation agreement.

On June 6, 2011, Bailey filed an order to show cause to establish a new child support order. He sought child support after August 1, 2011, the date the unallocated support terminated in Connecticut. Nation opposed the motion indicating the issue was before the court in Connecticut but later "based on information and belief" concluded "the Connecticut court will not assume jurisdiction on the issue of current child support and [Nation] does not challenge this Court's authority to make an order." Nation previously had acknowledged: "By the terms of the parties' 2007 judgment, unallocated alimony and child support automatically terminated on August 1, 2011."

On March 15, 2012, the California superior court found that it was the appropriate forum to decide child support and ordered the parties to advise the Connecticut court. In an order dated April 3, 2012, the court found that "[t]he parties agree that child support may be retroactive to August 2011 or possibly earlier depending on the ruling by the Connecticut court," (i.e. whether unallocated support terminated earlier because of Nation's cohabitation).

On October 30, 2012, the California superior court held a hearing and decided that Nation owed Bailey $481 per month from May 2010 to November 2010; Nation owed Bailey $974 per month from December 2010 through August 2012; and Nation owed Bailey $1,251 per month from September 1, 2012, through further order of the court. The court based its findings on Nation's expenses of $9,000 a month and Bailey's expenses of $2,360 a month.

DISCUSSION

Nation challenges the trial court's child support order and custody order. She also argues that the California court lacked jurisdiction to enter a child support order. We conclude that although the California superior court had jurisdiction to enter a child support order, its child support order must be reversed because it did not comply with California's mandatory guidelines or follow the mandatory procedure for departing from those guidelines. The court acted well within its discretion in modifying the parties' physical custody so that the child would live with Bailey during the school week and spend one evening and three weekends a month with Nation. Nation's argument to the contrary summarizes the evidence in the light most favorable to her and ignores the weight of the evidence in the record.

1. The Trial Court Had Jurisdiction to Enter a Child Support Order

In 2007, when the Connecticut court entered the judgment of dissolution, it ordered unallocated spousal and child support, incorporating the terms of the parties' separation agreement. Thereafter, on March 12, 2012, the California superior court found that it was the appropriate forum to decide child support and ordered the parties to advise the Connecticut courts. No party challenged that order on appeal. On October 30, 2012, the California court ordered Nation to pay Bailey child support.[2]

The California superior court had jurisdiction to issue a child support order. Applying the federal statute governing full faith and credit for child support orders requires the conclusion that the California court had jurisdiction to issue a child support order. Title 28 United States Code section 1738B provides that a "State may modify a child support order issued by a court of another State if" "the court of the other State no longer has continuing, exclusive jurisdiction of the child support order

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[2] The court issued the order orally on that date but it was not reduced to writing until December 2012.

because that State no longer is the child's State or the residence of any individual contestant." (28 U.S.C. § 1738B(e)(2)(A).) Under this provision, California had jurisdiction to modify any order issued in Connecticut because Connecticut was no longer the child's residence, Nation's residence, or Bailey's residence. (See *Witowski v. Roosevelt* (Wyo. 2009) 199 P.3d 1072, 1079 [Wyo. court had authority to modify child support order issued by Va. court because parents and child no longer resided in Va.].) Even if Connecticut had issued a child support order after unallocated support terminated (which is not shown in our limited record) the order in the home state of the child – California – must be recognized.
(28 U.S.C. § 1738B (f)(3).)

Once California issued its child support order, it became the state with continuing exclusive jurisdiction.

Under Family Code section 4909, subdivision (a)(1), California remains the state with continuing exclusive jurisdiction because it is the residence of Bailey, Nation, and the child. The parties have not filed written consents for a tribunal of another state to assume continuing exclusive jurisdiction. Jurisdiction cannot be conferred by estoppel. (*Stone v. Davis* (2007) 148 Cal.App.4th 596, 602.) Simply filing a motion in Connecticut would be insufficient to confer jurisdiction on the Connecticut court. (*Ibid*.)

Nation's argument that Connecticut General Statutes section 46b-212h compels a different result is not persuasive. Connecticut General Statutes section 46b-212h provides in pertinent part that "[i]f a tribunal of another state has issued a child support order pursuant to the Uniform Interstate Family Support Act or a law substantially similar to said act, which modifies a child support order of the Family Support Magistrate Division or Superior Court, tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state" (Conn. Gen. Stat. § 46b-212h, subd. (c).) Here, the California child support order, the only order valid after August 1, 2011, was effective October 30, 2012, before any child support

order issued in Connecticut. In short, Nation fails to show a different result is compelled under Connecticut law.

2. The Child Support Order Entered by the Trial Court Fails to Follow Mandatory Guidelines or Expressly Depart from the Mandatory Guidelines

Nation challenges the trial court's child support order. She argues the court erred in making it retroactive to May 2010 and that the amount was improperly based on her expenses. Her contentions are persuasive.

a. Retroactivity

Nation argues that the California superior court could not issue an order retroactive to a date preceding Bailey's motion for support. Her argument is persuasive: an order modifying support may be made retroactive to the date of the filing of the notice of motion . . . or to any subsequent date . . . ." (Fam. Code, § 3653, subd. (a).) The court therefore erred in ordering child support retroactive to May 2010, a date prior to the filing of the motion and Bailey does not argue otherwise.

b. Amount of Order

Nation also demonstrates that the trial court erred in calculating the amount of child support owed to Bailey.

"The standard of review for an order modifying a child support order is well established. '[A] determination regarding a request for modification of a child support order will be affirmed unless the trial court abused its discretion, and it will be reversed only if prejudicial error is found from examining the record below.' [Citations.] Thus, '[t]he ultimate determination of whether the individual facts of the case warrant modification of support is within the discretion of the trial court. [Citation.] The reviewing court will resolve any conflicts in the evidence in favor of the trial court's determination. [Citation.]'" (*In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1233-1234.)

However, "'the trial court has "a duty to exercise an informed and considered discretion with respect to the [parent's child] support obligation . . . ." [Citation.] Furthermore, "in reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [Citations.]" [Citation.] In short, the trial court's discretion is not so broad that it "may ignore or contravene the purposes of the law regarding . . . child support. [Citations.]" [Citation.]' [Citation.]" (*In re Marriage of Williams, supra*, 150 Cal.App.4th at pp. 1234.)

In calculating the amount of child support, the trial court is governed by Family Code section 4050, et seq. "The court shall adhere to the statewide uniform guideline and may depart from the guideline only in the special circumstances set forth in this article." (Fam. Code, § 4052; see also *Brothers v. Kern* (2007) 154 Cal.App.4th 126, 133-134 [application of the statutory guidelines is mandatory].) Under Family Code section 4057, a court may depart from the guideline requirements if "[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case." (Fam. Code, § 4057, subd. (b)(5).) When an amount differs from the guideline formula, "the court shall state, in writing or on the record . . . [¶] (1) The amount of support that would have been ordered under the guideline formula. [¶] (2) The reasons the amount of support ordered differs from the guideline formula amount. [¶] (3) The reasons the amount of support ordered is consistent with the best interests of the children." (§ 4056, subd. (a).)

Here, the court neither applied the guideline formula nor expressly departed from it. The court therefore abused its discretion. On remand, if the court determines that application of the guideline formula would be unjust or inappropriate

due to the special circumstances of this case, it must comply with the requirements of Family Code section 4057 to depart from the guidelines.[3]

3. The Trial Court Acted Well Within Its Discretion in Modifying Custody

Nation argues the trial court abused its discretion in modifying custody to reduce her time with her son. We disagree.

The evidence strongly supported the custody order. After extensive research, Dr. Hazeltine recommended Bailey be awarded sole physical custody. Nation alienated school staff, other parents, and neighbors. While Nation argues that Dr. Hazeltine's report was remote and stale, she fails to provide any evidence that she complied with the recommendations including intensive psychotherapy, completing an anger management course, and participating in her son's therapy including paying for her share of it. The court noted that it may have erred in initially rejecting Dr. Hazeltine's recommendation of monitored visitation because Nation repeatedly spoke negatively of Bailey and his girlfriend in front of the child. That the court ordered the child to spend three weekends a month with Nation, was not outside the bounds of its discretion.

Nation argues the court erred in relying solely on Cooper's opinion that Bailey was the "better school parent." While she does not cite to the record to identify the portion she seeks to challenge, we presume she is relying on the following colloquy: The court asked Cooper about whether there was a changed circumstance warranting a change in custody and Cooper responded that "my personal view is that there have been developments over the last year or two," which indicate Bailey "is the better school parent."

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[3] Nation's claim that the court erred in relying on Bailey's estimate of her rent lacks merit. Bailey's order to show cause served on Nation warned that "You should supply the court with information about your finances. Otherwise, the child support order will be based on the information supplied by the other parent." Nation failed to identify any expenses, listing all of them as unknown. Under such circumstances the court acted well within its discretion to rely on other sources for that information.

Contrary to Nation's argument, the trial court did not rely solely on Cooper's opinion. As noted, Dr. Hazeltine recommended Nation have only monitored visits. In addition to Dr. Hazeltine's opinion, the court expressed concern that Nation did not "respect[] the decisions of this court, or . . . follow them." The court found it "telling" that Nation did not pay for court-ordered therapy. The court concluded that it would be easier for the child to live closer to his school. The court expressed concern that Nation tried to damage her son's relationship with Bailey and his girlfriend. The court also found persuasive father's girlfriend Lisa Clark's declaration and found her "most attune to" the child's needs. Even assuming the court erred in allowing Mr. Cooper to present his personal opinion, Nation neither argues nor shows she suffered any prejudice.

Nation argues the court was required to allow additional discovery and the custody hearing should not have been held on an expedited basis. Not only did Nation request an expedited hearing so that a timely determination could be made concerning her son's school, she demonstrates no error on appeal.[4] "[C]ourts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them." (*Rutherford v. Owens-Illinois, Inc*. (1997) 16 Cal.4th 953, 967.) While trial courts cannot issue orders that conflict with a statute or are "'inconsistent with [the] law,'" Nation identifies no such conflict or inconsistency. (*Id*. at p. 967.) With respect to discovery, the critical information, such as her participation in psychotherapy and an anger management class, her

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[4] Nation requested the court consider her son's school for the 2012-2013 year "on shortened notice to allow ample time for the Court to make a ruling prior to school starting." Her attorney's declaration in support of ex parte relief acknowledged that if the child attended the school near Bailey, it would take Nation "almost two hours, if not more . . . to take [the child] to school each morning" and "[t]he only way to avoid this would be a change in physical custody."

ability to refrain from disparaging Bailey, and her ability to attend to her son's needs, was solely within her control and could have been presented in her declaration.[5]

DISPOSITION

The custody order is affirmed. The child support order is reversed, and the case is remanded to the trial court to reconsider child support. Each party to bear his or her own costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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[5] Bailey's motion to strike portions of Nation's reply brief is denied. Bailey's motion to take judicial notice of excerpts of a hearing on March 20, 2012, in Connecticut is denied because the limited excerpt may not accurately portray the entirety of the hearing. Bailey's application to file an unredacted version of respondent's brief under seal is granted. Bailey's request to take judicial notice of California and Connecticut court dockets is denied because judicial notice is requested to show litigation activity Bailey contends is not reflected in Nation's income and expense declarations. Although the matter is subject to judicial notice, the information should have been presented in the trial court in the first instance. Bailey and Nation's requests to take judicial notice of the Connecticut case *Nation-Bailey v. Bailey, supra,* 74 A.3d 433 is granted. (Evid. Code, § 452, subd. (a).) Nation's request to take judicial notice of the Connecticut Supreme Court's order on petition for certification to appeal is granted. (Evid. Code, § 452, subd. (c).) Nation's requests to take judicial notice of Connecticut Rules of Appellate Procedure, rule 84-3 and Connecticut General Statutes section 46b-212h are granted. (Evid. Code, § 452, subd. (a).)