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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of MARY and JOHN  
JOSEPH WHALEN.

B249767

(Los Angeles County  
Super. Ct. No. YD055995)

MARY KAY WHALEN,

Appellant,

v.

JOHN JOSEPH WHALEN,

Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Glenda Veasey, Judge. Affirmed.

Law Office of John A. Tkach and John A. Tkach for Appellant.

Steven Temko and Dennis Temko for Respondent

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Appellant Mary Kay Whalen (Wife) appeals the spousal support portion of a judgment of dissolution of marriage because the trial court declined to impose an order of future spousal support along the lines of the order affirmed in *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33 (*Ostler & Smith*). We affirm.

### **BACKGROUND**

After nearly 24 years of marriage, Wife and respondent, John Joseph Whalen (Husband), separated on June 1, 2009. There were no minor children and two adult children of the marriage. Wife filed for dissolution of marriage on June 18, 2009, and Husband responded on July 17, 2009. A partial settlement agreement was entered on April 20, 2012.

Prior to dissolution, both Husband and Wife worked but both had variable incomes. For years Husband worked as a commercial real estate and leasing salesman and his income was solely based on commissions. Between 1990 and 2011, his net income averaged \$208,000 per year, with business expenses averaging between 30 percent and 37 percent. But his income declined substantially after 2009 along with the decline of the commercial real estate market; his net income in 2010 was \$96,358 and in 2011 was \$54,058. The parties stipulated that 27 percent of Husband's income would be attributed for business expenses for any amounts above his base salary (as set by the court) up to \$250,000, and 23 percent for business expenses for amounts over \$250,000.

In 2011, Wife and her business partner began a business selling dental practices,<sup>1</sup> and Wife was paid a commission on those sales. For 2011, Wife's

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<sup>1</sup> There is some conflict in the record as to when Wife started her business. In his supplemental briefing on the issue of future support, Husband claimed she started the business in July 2011, which was consistent with bank statements showing the name "DDSProgressive Practice Sales" starting with the July 2011 statement. In closing arguments held on October 2, 2012, Wife stated the business had existed for two years (i.e., October 2010), but in several instances during her May 4, 2012, trial testimony she stated that it had been in business for a little over one year (approximately May 2011). Wife also suggested the business was operating as early

distributions after business expenses totaled \$27,070. The parties did not stipulate to any amounts for Wife's business expenses, although she offered some evidence of expenses in the short period since starting the business. Prior to beginning the dental practice sales business, Wife worked part time and continued to do so after the parties' separation.

After a trial on permanent spousal support, the trial court made the following preliminary findings as relevant to the current appeal. The parties maintained a "very high" marital standard of living of \$522,000 per year, and the monthly support needed for Wife to maintain the marital standard of living was \$14,337. Although both parties were working at their full capacities given their skills, training, and experience, and given the current job market and economic conditions, their current earnings and earning capacities were not sufficient to maintain the marital standard of living. At the time the court issued its findings, Wife had a total monthly income of \$4,641 and Husband had a total monthly income of \$8,198. Based on these numbers, the court ordered Husband to pay Wife \$1,000 per month in base spousal support.

As to the issue of adjustments of support based on future income exceeding the parties' current income, which is the crux of the issue in this appeal, the trial court found both parties had fluctuating incomes, and any additional support based only on Husband's fluctuating income would be inequitable. Instead, the court capped Husband's annual income available for spousal support at \$420,000, the maximum amount he earned during the last five years of marriage. The court ordered additional briefing and argument on the issue of determining and calculating additional support based on changes in income.

In her supplemental brief, Wife cited *Ostler & Smith* and argued the trial court was required to award a percentage of Husband's income over \$7,515 per month

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as January 2011, but under a different name. We will assume she began the business sometime in early to mid-2011 because the exact date has little impact on our opinion.

(\$90,180 per year) up to \$420,000, the annual cap on Husband's income available for support. She submitted a series of charts called "Two-Way Monthly Overtime Wages Report," prepared by her certified public accountant, which used the range of both Husband's and Wife's potential variable incomes to set the amount of support for either party. She further argued the parties should be required to exchange income information on a monthly basis so Husband can pay additional support monthly.

In his supplemental brief, Husband argued among other points that no further support should be ordered pursuant to *Ostler & Smith* because there was no feasible way to devise an equitable formula based on the parties' widely fluctuating gross income and business expenses. In his view, "it is virtually impossible to arrive at an *Ostler & Smith* formula that accurately accounts for [the parties'] incomes, and that self-adjusts for each party's business expenses. There is no foolproof way to accurately determine either spouse's net income in any particular period and no intelligible formula that could be written that would automatically adjust support in an appropriate fashion." Further, he did not believe additional spousal support should be automatically determined without the opportunity to check the legitimacy of either party's business expenses. Although his business expenses "have been straightforward and within a fairly predictable range for years," Wife's "business is relatively new and her recurring business expenses are unknown." He was concerned Wife "could skew her income by overstating her business expenses as many business owners do," so her "business expenses cannot be assumed." Finally, he requested the court reserve jurisdiction over spousal support because it is possible Wife's income could exceed Husband's, and he urged the court to require the parties to exchange income documentation annually.

In her reply brief, Wife disputed Husband's contentions, claiming the court could enter an *Ostler & Smith* order because the parties had stipulated that Husband's gross income would be reduced by 27 percent for overhead. She requested the court order a "full accounting of their prior monthly income including, but not limited to,

bank statements, internal records from their respective companies, and copies of all checks they have received by way of income.” In his reply brief, Husband reiterated an *Ostler & Smith* order would not work under the circumstances and argued basing an order only on his income would be inequitable. He also claimed Wife’s charts were deficient in various respects.

At the October 2, 2012, hearing on spousal support, the trial court expressed significant reservations with following Wife’s approach. At the outset of the hearing, the court explained its problem with fixing a set formula for future support:

“My problem is I don’t know that we can set a formula that would be accurate, prospectively, in light of the fact that both of these parties -- it really isn’t a bonus issue [(alluding to *Ostler & Smith*, which involved future bonuses)]. It’s an issue of they’re both self-employed, to a large extent, and their incomes vary and fluctuate. And to compound matters as to what their net incomes are, that is always subject to examination and question because of self-employment and because of the need and the propriety of looking at, inspecting, and evaluating whether or not the deductions claimed by -- or deductions from income claimed by both parties are valid or not.

“So how do you prospectively say, okay, if she makes X amount a month more than the base support was made on and he -- and he makes X amount more than the base support was made on, then who and how do you -- do you just take those numbers at face value without looking to see how each of the parties came up with that net number?

“You know, let’s say that one or the other of them claims extremely high meal and entertainment deductions. That the court wouldn’t consider. Or let’s say that one of them is taking depreciation expenses which are usually added back in because they are paper deductions.

“Does the court just accept the numbers presented on each side? Does the other side just accept the numbers presented by each side?

“And while I understand, and I am a big fan of having formulas and tables that let you figure out what are the -- what is the bottom line, aren’t those formulas only

as good as the data put into them? And if it is garbage in, you get garbage out. That is my conundrum here.”

The court recognized some uncertainty had been eliminated because the parties stipulated that Husband’s overhead was 27 percent, but that only got the parties halfway to a formula because they had not agreed on Wife’s business expenses. If they had, the court explained, “I think I would be on a much more solid ground saying, okay, use the 27 percent for him, the whatever percentage for her for overhead, and the -- and their net self-employment income will be determined based on those percentages and it would be just simple math figuring out what numbers to plug in in the two-way bonus table.” But without an agreed overhead percentage for Wife, “there is so much uncertainty. If we had numbers to use on both sides, then . . . I would be on fairly solid ground using a table. But we don’t have it.”

The court was also concerned that it could not ascertain Wife’s average business expenses because her business had not existed long enough to conduct a historic evaluation. Wife’s attorney urged the court to reopen testimony for that purpose, but the court declined because reopening would not “do any good. I remember the testimony going through and I remember looking through the books of the business. It’s [Wife] and her friend. They are running this business. And frankly from my looking, I do have an accounting background, it looks like they were kind of figuring out what to do and loans were going in and out. All of that. [¶] I don’t think there is a set system of how things are being done in their business yet. If I looked at everything they have now, I don’t think I could come up with -- and I would be the one who would have to decide what is -- what is the appropriate overhead.”

The court issued a final judgment on April 24, 2013. It maintained its prior findings on the parties’ incomes and ordered Husband to pay Wife \$1,000 in support each month. The court refused to fix future support, finding “both parties have fluctuating incomes, and the determination of any additional spousal support based solely on [Husband’s] income would be inequitable.” Instead, the court ordered the

parties to exchange corporate and personal income documentation every six months. The court reserved jurisdiction to modify support as the incomes of the parties change. The court also reserved jurisdiction, retroactive to August 1, 2012, on the issue of additional support based on the additional net incomes of both parties, after business expenses and before taxes. Wife timely appealed.

### DISCUSSION

We review a spousal support order for abuse of discretion, which “occurs when, after calm and careful reflection upon the entire matter, it can be fairly said that no judge would reasonably make the same order under the same circumstances.” [Citations.] Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders. [Citation.]” (*Ostler & Smith, supra*, 223 Cal.App.3d at p. 50.)

Family Code section 4320 sets forth a host of factors a trial court must consider in determining the amount of spousal support, including the “ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and *unearned* income, assets, and standard of living.” (Fam. Code, § 4320, subd. (c), italics added.)<sup>2</sup> In *Ostler & Smith*, the court found the trial

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<sup>2</sup> Family Code section 4320 states in full:

“In ordering spousal support under this part, the court shall consider all of the following circumstances:

“(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

“(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

“(2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

court did not abuse its discretion in awarding support based on the husband's fixed salary as well as a percentage of his fluctuating annual bonus. (*Ostler & Smith, supra*, 223 Cal.App.3d at p. 50; see *In re Marriage of Samson* (2011) 197 Cal.App.4th 23, 27 (*Samson*)) ["An *Ostler & Smith* percentage is assessed 'over and

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"(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

"(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

"(d) The needs of each party based on the standard of living established during the marriage.

"(e) The obligations and assets, including the separate property, of each party.

"(f) The duration of the marriage.

"(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

"(h) The age and health of the parties.

"(i) Documented evidence of any history of domestic violence, as defined in [Family Code] Section 6211, between the parties or perpetrated by either party against either party's child, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

"(j) The immediate and specific tax consequences to each party.

"(k) The balance of hardships to each party.

"(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in [Family Code] Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, [Family Code] Section 4336, and the circumstances of the parties.

"(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with [Family Code] Section 4324.5 or 4325.

"(n) Any other factors the court determines are just and equitable."



above guideline support' for 'any discretionary bonus actually received.' [Citation.]").) As the trial court aptly explained in that case, "No future bonus is guaranteed. It would therefore not be appropriate to base a support order on Husband's bonus income and then require him to file motions to modify at such times as the bonus is reduced. It would be more fair to all parties to base the support order on Husband's income from salary and dividends, and to allocate a portion of the future bonus income to the children and to Wife by way of a percentage interest so that future litigation will not be necessary as the bonus income changes.'" (*Ostler & Smith, supra*, at pp. 41-42.)

Unlike the relatively straightforward fixing of support based on a percentage of the husband's bonus income in *Ostler & Smith*, the court here faced factual difficulties based on the parties' variable commission income. First, unlike the husband's future bonus income at issue in *Ostler & Smith*, Wife's variable income was subject to deductions for business expenses, which would fluctuate and could not be ascertained on the current record. Wife's proposed charts were based on the parties' *net* income, which had to be calculated after deducting business expenses. While the parties stipulated to Husband's business overhead expenses, they did not stipulate to Wife's business overhead expenses. Given her business was relatively new, the court was not satisfied that there was enough historic data to determine Wife's recurring business expenses for an *Ostler & Smith* order to be effective. In fact, at trial there was considerable confusion over one of Wife's income and expense reports, and the court ultimately concluded it incorrectly double-counted expenses. The court also noted Wife's business partner appeared to have given loans to the business. Based on this record, the court reasonably concluded Wife and her business partner were "kind of figuring out what to do and loans were going in and out" and it did not appear there was "a set system of how things are being done in their business yet," so the court could not determine the "appropriate overhead" for Wife's business.

Second, because the parties did not stipulate to a certain percentage for Wife's expenses as they had done for Husband, the court anticipated Wife's business expenses would be challenged. As the court aptly noted, "formulas [are] only as good as the data put into them," so "if it is garbage in, you get garbage out." The court would not be able to determine the accuracy of expense data without examining the actual expenses and assessing which were legitimate deductions from gross income. (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2013) ¶ 6:877.2, p. 6-314.1 (rev. 2012) ["When considering an *Ostler* [ &] *Smith* order for self-employed individuals, make sure the payor's *reasonable business expenses* are taken into account, rather than simply applying the *Ostler* [ &] *Smith* percentage to a gross business receipts figure. And since there is likely to be a difference of opinion as to what constitutes 'reasonable business expenses,' good practice suggests the payor be allowed to deduct a fixed, agreed-upon percentage of the gross income from the gross receipts in determining the amount of the *Ostler* [ &] *Smith* additional support award."].)

Faced with these uncertainties not present in *Ostler & Smith*, the trial court acted within its discretion in refusing to issue a two-way *Ostler & Smith* order and instead ordering the parties to exchange income documentation every six months and reserving jurisdiction to award support based on their fluctuating income.

Wife's arguments do not change our conclusion. She claims the trial court improperly limited *Ostler & Smith* to bonus income and not commissions as in this case, but the record belies her assertion. While the trial court noted the parties' commission income "really isn't a bonus issue," it did not reject Wife's proposed *Ostler & Smith* order for that reason. (Cf. *Samson*, *supra*, 197 Cal.App.4th at p. 27 [noting the trial court imposed an *Ostler & Smith* percentage "aimed at capturing [the husband's] fluctuating monthly sales commissions."].) Instead, the trial court focused on the inadequate record to fix a reasonably certain future award.

Wife also argues that without an *Ostler & Smith* order, Husband would be able to maintain a higher standard of living than she would during the six-month periods

before he is required to report his income. However, the court noted Husband's net commissions for 2012 amounted to \$2,480 a month and he was paying Wife \$1,000 a month in support, suggesting his standard of living would not exceed Wife's in the near term. In any case, the court readily dispatched this argument by noting the Wife's proposed two-way support order exposed both Husband and Wife to the same risk: "That runs both ways. If she makes a big commission on sales of some dental practices, . . . it works that way too."

Relatedly, Wife contends not only would Husband enjoy a higher standard of living during each six-month period, but she would not be entitled to a retroactive support award because the court only has authority to retroactively modify a support order to the date a motion or order to show cause to modify the order is filed. (Fam. Code, §§ 3653, subd. (a) ["An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date," with exceptions not pertinent here], 4333 ["An order for spousal support in a proceeding for dissolution of marriage or for legal separation of the parties may be made retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date."]; see *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 639-640 [reversing retroactive modification of temporary support order].) But here the court reserved jurisdiction to make future awards after the parties exchange information every six months, and by doing so, the court can make support awards covering the prior six-month period without impermissibly imposing a retroactive modification. (See *In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1073-1075 [finding trial court retained jurisdiction to retroactively modify temporary support order because court "expressly reserved jurisdiction to amend its original support awards . . . based on further consideration of evidence pertaining to [the wife's] income"].)

Finally, Wife argues the trial court should have granted her request to reopen testimony so she could recall her accounting expert to provide "facts sufficient to determine an appropriate overhead." But, Wife does not explain what information

her accounting expert might have provided to allay the trial court's concerns about the lack of evidence of her historic recurring business costs. The business was relatively new and it had not yet established a historic basis for business expenses. No amount of expert testimony would have changed those facts. "Trial courts have broad discretion in deciding whether to reopen evidence" (*Rosenfeld v. Cohen* (1987) 191 Cal.App.3d 1035, 1052), and we find no abuse of discretion here.

**DISPOSITION**

The judgment is affirmed. Husband is awarded costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J