Filed 2/13/13 Marriage of Kurtz and Taxman CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of GARY KURTZ and STARR F. TAXMAN. _____ GARY KURTZ, Appellant, v. STARR F. TAXMAN, Respondent.	B234162 (Los Angeles County Super. Ct. No. BD510825)

APPEAL from orders of the Superior Court of Los Angeles County, David S. Cunningham, III, Judge. Dismissed in part and affirmed in part.

Gary Kurtz, in pro. per., for Appellant.

Kermisch & Paletz, Lauren M. Lookofsky and William Kermisch for Respondent.

Defendant and appellant Gary Kurtz (husband) appeals two orders pertaining to spousal and child support payable to plaintiff and respondent Starr F. Taxman (wife).

The first order in issue is a temporary support order entered February 5, 2010, ordering support in the amount of $9,935 per month. The temporary support order was operative from the time of pronouncement, and was directly appealable. Therefore, the notice of appeal filed July 1, 2011 is untimely as to said order.

The second order in issue is a June 10, 2011 order denying husband's request to reduce the original support award. The trial court denied the modification request on the ground husband failed to meet his burden of proof. The trial court's ruling was proper. Given husband's failure to provide the court with signed tax returns and failure to document his monthly gross income, the record supports the trial court's denial of husband's modification request. Therefore, the June 10, 2011 order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in 1988 and separated in 2009.[1] There are three minor children of the marriage. On August 17, 2009, wife filed a petition for dissolution of marriage.

On October 2, 2009, wife filed an order to show cause (OSC) regarding custody, visitation, and spousal and child support. The OSC came on for hearing on January 5, 2010. Following said hearing, on February 5, 2010, the trial court issued an interim support order, awarding $5,157 in child support for the three minors, plus $4,778 per month in spousal support, for a total of $9,935 per month. The February 5, 2010 order directed the parties to return to court on March 23, 2010 for a review hearing in connection with said order.

The financial review hearing repeatedly was continued. On September 1, 2010, husband filed an OSC to modify spousal and child support. Ultimately, the financial review hearing, which was combined with husband's OSC to reduce support, came on for

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[1] By definition, this was a marriage of long duration. (Fam. Code, § 4336.)

hearing on June 9 and 10, 2011. At the conclusion of the hearing on June 10, the trial court orally ruled: "The O.S.C. is denied for failure of proof."[2]

On July 1, 2011, husband filed notice of appeal, specifying the original support order made following the January 5, 2010 hearing, and the trial court's refusal on June 10, 2011 to modify the earlier support order.

CONTENTIONS

Husband contends: the trial court abused its discretion in awarding support pendent lite in the amount of $9,945 per month based on its finding he has income available for support in the sum of $25,016 per month; and the trial court abused its discretion in subsequently refusing to reduce the original support order at the financial review hearing.

DISCUSSION

1. *Husband's failure to file a timely notice of appeal from the February 5, 2010 temporary support order requires dismissal of that portion of the appeal.*

a. *Overview.*

Husband contends that in making the initial temporary support order, the trial court erred in adopting wife's proposed Dissomaster report, which was based on the inaccurate conclusion that husband had an income of $25,016 per month. Husband asserts the trial court abused its discretion in utilizing the $25,016 figure to make a support award of $9,945 per month.

As indicated, on February 5, 2010, one month after the January 5, 2010 hearing on the OSC, the trial court entered a written order, awarding $5,157 in child support for the three minors, plus $4,778 per month in spousal support, for a total of $9,935 per month.

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[2] A subsequent minute order, dated June 13, 2011, indicates the June 10, 2011 denial of the OSC was without prejudice. The respondent's brief indicates that on December 14, 2011, the trial court reduced husband's spousal support and child support obligation from $9,935 to $4,458 per month.

Seventeen months later, on July 1, 2011, husband filed notice of appeal. The notice of appeal specified, inter alia, the order made following the January 5, 2010 hearing, that is to say, the February 5, 2010 order.

b. *Appealability of temporary support orders*.

"Historically, [the Supreme C]ourt has looked to the substance of an order pendente lite rather than to chronology or to form, and has held *temporary support orders directly appealable*. [Citations.]" (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368, italics added (*Skelley*).)

In re Marriage of Gruen (2011) 191 Cal.App.4th 627 (*Gruen*) recently reiterated this rule, stating: "A temporary support order is operative from the time of pronouncement, and it is directly appealable. (*In re Marriage of Skelley*[, *supra*,] 18 Cal.3d [at p.] 368.) 'When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citations.] This constitutes a necessary exception to the one final judgment rule. Such a determination is substantially the same as a final judgment in an independent proceeding.' [Citation.] '*If an order is appealable, . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata*.' [Citations.]" (*Gruen, supra*, at pp. 637-638.)

c. *The February 5, 2010 order is no longer reviewable; the time for seeking appellate review has long since expired*.

Husband contends the February 5, 2010 order is reviewable on the appeal from the June 10, 2011 order, "because the January 2010, hearing did not conclude until the Court completed the promised Financial Review Hearing in June 2011." The argument is unpersuasive. As the Supreme Court stated in *Skelley, supra,* 18 Cal.3d at pages 368-369, the temporary support order was operative from the time of pronouncement, and was directly appealable. Therefore, we reject husband's theory that he was entitled to await the June 2011 denial of his OSC to modify support, before seeking appellate review of the temporary support order entered on February 5, 2010.

Pursuant to *Skelley*, the February 5, 2010 temporary support order was operative from the time of pronouncement, and was directly appealable. (*Skelley*, *supra*, 18 Cal.3d at pp. 368-369.) Further, where no notice of entry is served by the clerk or by a party, the outside limit for filing notice of appeal is 180 days after entry of the order. (Cal. Rules of Court, rule 8.104(a).) Therefore, the July 1, 2011 notice of appeal is clearly untimely as to the temporary support order entered on February 5, 2010.

Because the February 5, 2010 order was appealable but no timely appeal was taken therefrom, the issues determined by said order are res judicata. (*Gruen, supra,* 191 Cal.App.4th at p. 638.)

2. *Record supports trial court's June 2011 denial of husband's request to modify support*.

The evidence at the June 2011 hearing included documents prepared by husband's accountant, Fredrick Levine, showing that husband's law practice collected total revenues of $397,808 in 2006 and total revenues of $340,541 in 2010. Based on the 2010 revenues, the trial court stated: "I get $28,376 per month as his gross. Now, that is from his own evidence." Notwithstanding these revenues from the law practice, husband testified "My personal gross is about $11,000 a month."

Husband contends that based on his evidentiary showing at the June 2011 hearing, particularly Levine's testimony, the trial court erred in denying his request to reduce the original support award. Husband asserts the trial court should have made a finding that his income available for support was $13,000 rather than $25,016, based on the allegedly "undisputed" evidence at the hearing.[3]

Husband, who is an attorney appearing in propria persona, has submitted an opening brief which is devoid of a summary of what actually occurred at the two-day evidentiary hearing in June 2011. (Cal. Rules of Court, rule 8.204(a)(2)(C) [appellant's opening brief must provide a summary of the significant facts limited to matters in the record].) With respect to the testimony presented at the hearing, the opening brief simply

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[3] There was no request for a statement of decision. (Code Civ. Proc., § 632.)

states that Levine "testified that [husband's] revenues collected in excess of disbursements paid in 2010 was $135,422," amounting to $11,285 per month, and that husband testified "his personal gross (income from the firm after expenses) was about $11,000 for 2010."

This court has reviewed the transcript of the June 2011 hearing in its entirety. Contrary to husband's selective reference to Levine's testimony, Levine's testimony was of little help to husband and the trial court so found. The trial court stated: "I am deeply troubled by the following testimony. Mr. Levine said in 2009, the U.S. income tax return for the law offices was inadequate. He couldn't determine whether the compensation was correct. He couldn't determine whether the salary and wages were correct. And he said it didn't make sense. [¶] He looked through the corporate tax return for 2010. He got a draft, said it was subject to change, said it wasn't final and it also was inadequate. [¶] He said with respect to the K-1 [tax form] for 2009, he said he only saw a draft. It mirrored what was offered as exhibit 2. But that, too, was inadequate."

In addition to husband's failure to provide his signed tax returns, husband failed to complete his income and expense declaration properly. (Cal. Rules of Court, former rule 5.128, current rule 5.260; Judicial Council form FL-150.) In this regard, the trial court stated: "He is moving for a modification of child support and . . . spousal support. In order to do that, he has the burden of proof. [¶] At a minimum, he has to fill out this document correctly. He hasn't done it. He still hasn't done it. I have been waiting for two days now to hear the appropriate answer, and you have gone in and out. We have got evidence that establishes if the court wants to make its calculation, that's what I will do."

The trial court reiterated "*we are looking at all gross income . . . and that includes what he has submitted from his law office. He controls that law office.* It is an *In re Marriage of Dick* issue." (Italics added.)[4]

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[4] As stated in *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 159, "[a]bility to pay encompasses far more than the income of the spouse from whom temporary support is sought." There, the trial court found "that husband 'has the ability to pay' based on the

The trial court continued, "I will be more than happy to give you the case law and the statutes . . . . [¶] First off, the definition for income varies for child support than it does for spousal support. The important distinctions between child support and spousal support which must be kept in mind in analyzing the statutes and case law considered income for support. Pursuant to Family Code section [40]53(e), the children's interests are the state's top priority.[5] [¶] Income as defined for purposes of child support means under Family Code section 4058(a), 4058, annual gross income of parents.[6] It doesn't say net. It says annual gross income of parents. Subsection (a), it specifically includes income. And it lays out from every single source in the Code. So I am looking for the gross number, not his opinion of net. Okay? And that is also what the income and expense declaration requires."

At the conclusion of the hearing, the trial court denied husband's request to modify support, ruling that husband had failed to meet his burden of proof.

Given husband's failure to provide the court with signed tax returns, and his failure to document his monthly gross income, the record supports the trial court's denial

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'extensive assets and nonsalary income at his disposal' which 'have been placed by him in the control of others acting for his benefit [and] have a value in excess of $20,000,000.' It was proper for the court to look to assets controlled by husband, other than income, as a basis for the award." (*Id*. at pp. 159-160.)

[5] Family Code section 4053, pertaining to the implementation of statewide child support guidelines, states in pertinent part at subdivision (e): "The guideline seeks to place the interests of children as the state's top priority."

[6] Family Code section 4058 states in pertinent part at subdivision (a): "*The annual gross income of each parent means income from whatever source derived*, except as specified in subdivision (c) *and includes, but is not limited to, the following*: [¶] (1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party to the proceeding to establish a child support order under this article. [¶] (2) *Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business*." (Italics added.)

of husband's modification request. The trial court was not required to credit husband's self-serving testimony that his "personal gross" was $11,000 per month.

3. *No merit to husband's contention the trial court erred in failing to impute income to wife*.

Husband contends the trial court abused its discretion in refusing to impute income to wife, who has an MBA degree and substantial premarital work experience. [7] The argument is meritless.

Wife's testimony at the June 2011 hearing showed the following:

She was last employed over 20 years ago. Between January and June of 2010, she had sent out over 250 resumes and had registered on five or six websites for jobseekers. In addition, she had created a business plan and had been speaking to potential investors. In recent months she had been on 20 to 25 job interviews. She received one job offer, at a salary of $10 per hour. She declined that position because it would have required her to work until 6:00 p.m. or later and she needs to pick up her children after school.

In sum, the record reflects that wife had diligently, but unsuccessfully, sought gainful employment. Accordingly, we perceive no abuse of discretion in the trial court's refusal to impute income to her.

4. *No issue of retroactive reduction of husband's support obligation*.

Because the trial court properly denied husband's OSC to reduce support, it is unnecessary to address husband's argument that a reduction of his support obligation should relate back to September 1, 2010, the date he filed his OSC to modify support.

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[7] The trial court may impute income to a payee spouse, based on her earning capacity, for purposes of determining spousal support as well as child support. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 308; Fam. Code, § 4058, subd. (b) [child support]; Fam. Code, § 4320, subd. (a) [spousal support].)

DISPOSITION

The purported appeal from the February 5, 2010 order is dismissed. The June 10, 2011 order is affirmed. Wife shall recover her costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.