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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of TERESA and
REGINALD S. PAGALING.

2d Civil No. B233675
(Super. Ct. No. 1005407)
(Santa Barbara County)

TERESA E. PAGALING,

Respondent,

v.

REGINALD S. PAGALING,

Appellant.

Reginald S. Pagaling (Husband) appeals from the trial court's order denying his motion to modify and/or terminate the \$5,800 in spousal support he pays to his former wife, Teresa Pagaling (Wife) each month. He contends the trial court abused its discretion because he has been paying support for 11 years, after a 15-year marriage. We affirm.

Facts

Husband and Wife were married August 1984 and separated in November 1999. Their two daughters, born in 1987 and 1991, were minors when the parties separated. Both have since reached the age of majority. Husband and Wife are currently in their mid-50s.

Husband is a member of the Santa Ynez Band of Mission Indians. He is not employed. His income consists of monthly distributions and other payments he receives from the tribe. In 2001, Husband estimated his monthly income from the tribe over the previous 12 months to be \$17,529. In December 2002, the parties entered into a stipulated judgment providing that Husband would pay Wife \$200 in child support and \$5,800 per month in spousal support. Their stipulation did not include a date upon which support would be reduced or terminated, nor did it provide a date by which Wife was expected to become self-supporting. The judgment, however, included the standard notice that, "It is the goal of this state that each party shall make reasonable good faith efforts to become self-supporting as provided for in Family Code section 4320. The failure to make reasonable good faith efforts may be one of the factors considered by the court as a basis for modifying or terminating spousal support."

In 2008, Husband moved to reduce spousal support. At the time, he estimated his monthly income from the tribe to be \$41,669. He valued his assets at \$770,000 and claimed monthly expenses of \$23,986. The motion to modify was denied. At that time, the trial court found that the support order had originally been based on the expectation that Wife could and would earn \$68,000 per year. "Had she gone out and actually earned \$68,000 a year, we'd be at exactly the same place we were if she weren't earning it because it's already been imputed in computing her income. [¶] [¶] . . . It works to her benefit at this stage, as far as I can see. I also, you know, see that she has some health problems. [¶] What I intend to do is not modify support" When Husband's counsel asked whether that ruling meant spousal support could never terminate, the court responded, "Well, I'm not saying that. You know, I'm saying right now, in this day and age, that imputed income, with her illness, [it already] more than satisfies the California mandate that she be self-supporting."

Husband filed the instant motion to reduce or terminate spousal support in June 2010. At the time, he claimed a monthly income of \$45,705, assets of

\$770,000 and monthly expenses of \$27,022. He contended that the passage of 11 years from the parties' separation, together with Wife's failure to become self-supporting, justified the termination or reduction of his support obligation.

Wife was employed during the early years of the parties' marriage, but had become a stay-at-home mother by the time they separated. She has not worked full time, outside the home since 1987. Wife has a Bachelors of Science degree in applied behavioral sciences from the University of California at Davis. During the 1980s and 1990, she held a number of short-term jobs with public agencies providing services to Native Americans. These jobs paid between \$18 and \$25 per hour and appear to have been either part time, or of limited duration. Wife has also worked in retail sales. A vocational evaluation conducted in 2002 concluded that Wife could earn at least \$57,000 a year. Wife claims never to have earned anything approximating that amount. In her opposition to the instant motion to modify or terminate spousal support, Wife stated that she has also operated various home-based businesses, including her current floral arranging business, but has never made a living from them. She has a number of medical problems, including hypertension, Graves Disease and a sleep disorder that she believes prevent her from working full time outside her home.

Throughout these proceedings, Wife's primary source of income has been the \$5,800 in spousal support she receives each month from Husband. Her most recent income and expense declaration claimed average monthly income of \$6,290, only \$490 of which were attributable to her floral arranging business and rent she receives on a guest house.

The Trial Court's Ruling

After an evidentiary hearing at which both parties testified, the trial court denied Husband's motion to modify or terminate support. Although it was not persuaded that Wife's medical problems prevented her from working full time, the trial court found there had been no material change of circumstances that would justify a reduction or termination of spousal support. The trial court reasoned that the parties

had made an agreement under which Wife would receive \$5,800 per month in support, with no step-down or termination date. Continued support was "the benefit of the bargain for which she negotiated." It therefore declined to modify or terminate support.

Discussion

Appellant's only contention is that the trial court abused its discretion when it denied the motion to modify or terminate spousal support because 11 years have passed since the original order and Wife has not become self-supporting. Like the trial court, we are not persuaded.

" ' "Whether a modification of a spousal support order is warranted depends upon the facts and circumstances of each case, and its propriety rests in the sound discretion of the trial court the exercise of which this court will not disturb unless as a matter of law an abuse of discretion is shown." [Citation.] An abuse of discretion occurs "where, considering all the relevant circumstances, the court has exceeded the bounds of reason or it can fairly be said that no judge would reasonably make the same order under the same circumstances." [Citation.]' (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7 . . .)" (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898-899.)

" ' "Modification of spousal support ... requires a material change of circumstances since the last order. [Citations.] Change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. [Citations.] It includes all factors affecting need and the ability to pay. [Citation.] . . . [A]n abuse [of discretion] occurs when a court modifies a support order without substantial evidence of a material change of circumstances. [Citations.]" [Citations.]' " (*Id.* at p. 899, quoting *In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 936-937.)

In deciding whether to modify spousal support, the trial court considers the same factors it considers when making its original order. (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396.) These criteria are set forth in Family Code section

4320.¹ They include: the extent to which the earning capacity of each party is sufficient to maintain the marital standard of living; the ability of the supporting spouse to pay spousal support; the needs of each party based on the marital standard of living; each party's obligations and assets; the duration of the marriage; the age and health of the parties; the "balance of the hardships to each party[;]" the "goal that the supported party shall be self-supporting within a reasonable period of time[;]" and any other factors the trial court determines "are just and equitable." (§ 4320.)

The spousal support order in this case was based on the parties' stipulation for judgment. This stipulation " 'is a contract between the parties. [Citations.] Where the agreement permits modifications, those modifications require a showing of a change in circumstances. [Citations.] Moreover, in determining what constitutes a change in circumstances the trial court is bound to give effect to the intent and reasonable expectations of the parties as expressed in the agreement,' and thus, 'the trial court's discretion to modify the spousal support order is constrained by the terms of the marital settlement agreement.' " (*In re Marriage of Dietz*, *supra*, 176 Cal.App.4th at p. 398, quoting *In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 238.)

When spousal support was originally calculated in this matter, the parties imputed to Wife an annual income of \$68,000. Thus, the amount of spousal support was intended to allow Wife to maintain the marital standard of living, assuming she also earned \$68,000. Husband's agreement to pay support did not include a step-down or termination date, nor did it include any express agreement that Wife would become self-supporting by a specific date. Wife has never earned the amount of income imputed to her in the original agreement. Husband's ability to pay support has not decreased since the original order. To the contrary, it has increased as his monthly distributions from the tribe have increased. Under these circumstances, the trial court

¹ All statutory references are to the Family Code unless otherwise stated.

was well within its discretion to find there had been no change of circumstances justifying a modification or termination of spousal support.

Neither *In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, nor *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, on which Husband relies, mandates a different result. In *Shaughnessy*, the supported spouse was only 35 years old at the time of the divorce, had no children, and had substantial separate property assets that produced income for her benefit. (*In re Marriage of Shaughnessy, supra*, 139 Cal.App.4th at pp. 1230-1232.) When the original support order was entered, the trial court noted that the supported spouse was expected to "find more lucrative employment[.]" by, among other things, considering "employment retraining options." (*Id.* at p. 1239.) Similarly, in *Schaffer*, the original support order provided that support would decrease after one year and terminate after two years, because the parties expected Wife would then be self-supporting as a marriage and family therapist. (*In re Marriage of Schaffer* 69 Cal.App.4th at p. 803.) Wife, however, never sought work that would have made her self-supporting and, by filing a series of post-judgment motions, extended the two years of spousal support originally order to 15 years. (*Id.*) In our case, by contrast, the agreement to pay spousal support never included a step-down or termination date and the original amount of support ordered assumed that Wife already earned substantial income.

A substantial period of time has elapsed since the parties entered into their stipulation for judgment, and Wife has not become self supporting. Upon change of circumstances, the trial court will always, of course, have discretion to consider those facts in deciding subsequent motions to modify or terminate spousal support.

"However, the mere passage of time is not alone a sufficient basis for modification. (*In re Marriage of Gavron* [(1988)] 203 Cal.App.3d [705,] 710.) With the passage of time, changed circumstances may occur, but it is the change in circumstances and not the passage of time which is material." (*In re Marriage of Heitermann* (1991) 234 Cal.App.3d 1195, 1202,)

At present, however, Husband has failed in his burden to prove a change in circumstances sufficient to justify modifying or terminating spousal support. He continues to have the ability to comfortably pay support. Wife continues to need support. The trial court decided that the balance of hardships falls in her favor. We cannot say that the trial court abused its discretion as a matter of law in denying the motion to modify and/or terminate spousal support.

The judgment is affirmed. Costs to Wife.

NOT FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

James F. Rigali, Judge
Superior Court County of Santa Barbara

Robert R. Walmsley, Marlea F. Jarrette; Jarrette & Walmsley, for
Appellant.

Stephen P. Anderson, for Respondent.