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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANDREW H. HARPER, Petitioner and Respondent, v. CARMEL C. HARPER, Appellant.	B271112 (Los Angeles County Super. Ct. No. BD361439)

APPEAL from an order of the Superior Court of Los Angeles County, Patrick A. Cathcart, Judge. Affirmed.

Carmel Celeste Harper, in pro. per., for Appellant.

Law Offices of Shirlee L. Bliss and Shirlee L. Bliss for Petitioner and Respondent.

Carmel C. Harper, in propria persona, appeals from a postjudgment order of the superior court terminating her spousal support from her ex-husband, Andrew Harper.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties married in September 1984 and separated in January 2002, when Andrew filed a petition for dissolution of marriage. They had three children, born in 1984, 1990, and 1992. Under the terms of a November 2003 settlement agreement, the court ordered Andrew to pay Carmel $3,500 per month in spousal support beginning December 1, 2003. According to the stipulation, Andrew's monthly income was $19,750, and Carmel's was $1,100. The amount of spousal support was offset by the payment of child support. Andrew was required to pay Carmel $1,500 to equalize the division of community property assets and obligations. The court reserved jurisdiction to award spousal support to both parties and stated that spousal support would terminate if one party died or if Carmel remarried. The court further issued a warning to Carmel pursuant to *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705 (*Gavron*), admonishing her "that she must make her best efforts to become self supporting and if she fails to do so this fact can be taken into consideration on a petition to the court to

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[1] "As is customary in family law proceedings, we refer to the parties by their first names for purposes of clarity and not out of disrespect. [Citations.]" (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

modify support." The judgment of dissolution of marriage was entered in January 2005.

In April 2005, Andrew applied for an order to reduce spousal support to $1,500 on the grounds that his income had decreased because he was not receiving overtime pay and Carmel's expenses had decreased. Andrew's income and expense declaration submitted in support of his application listed his average monthly salary as $18,549.50, and his average monthly expenses as $9,215. Carmel's average monthly income was listed as $1,933 and her average monthly expenses as $3,531. In her declaration in opposition, Carmel stated that she had been a full-time mother and homemaker during the marriage and that a year-and-a-half was not enough time for her to become self-sustaining. She explained that she dropped out of college when she married Andrew and was therefore attending Santa Monica City College, hoping to obtain a teaching credential. She had worked as an actress and dancer in the 1970's but was unable to continue this work because she suffered from arthritis and needed reconstructive surgery on her knees and ankle. The court found no change in circumstances but reiterated the *Gavron* warning to Carmel.

Andrew again moved for a reduction in spousal support in May 2008, asking to terminate spousal support. He stated in his declaration that Carmel was living with a partner. He was no longer receiving overtime pay and had reduced his standard of living to support two of their children. His income and expense declaration listed his average gross monthly income as $19,000 and his average monthly expenses as $9,035.

Carmel stated in a declaration that she had partial knee replacement surgery in December 2007 and was told she needed shoulder surgery due to an injury. She had stopped attending college because of her disabilities. She explained that the man with whom she was living was not a romantic partner but a friend who was allowing her to stay with him temporarily. Her income and expense declaration indicated an average monthly income of $200 and expenses of $4,576. At a September 2008 hearing, the court ordered Carmel to undergo a vocational evaluation.

A vocational assessment report for Carmel was prepared in June 2009. The vocational counselor stated that Carmel could work in an office position earning approximately $24,000 per year if she obtained computer training, or work as a nursery school teacher earning $20,000 per year if she obtained a certificate for early childhood education. The report concluded that Carmel could earn $25,000 to $30,000 per year in vocations such as administrative assistant, customer service representative, property manager, sales representative, or assistant retail store manager.

The matter was called for hearing in September 2009, but Carmel was incarcerated at the time. The court continued the hearing and suspended spousal support except for $1,000 per month. The court order stated that Carmel's "release from custody will constitute a change of circumstances for her to bring a request to modify spousal support." The court order also checked the box indicating that the "failure to make reasonable good faith efforts [to become self-

supporting] may be one of the factors considered by the court as a basis for modifying or terminating support."

In April 2011, Carmel applied for a modification of spousal support, requesting an increase to $5,000 per month on the ground that she was no longer receiving child support because all three children had reached the age of majority. She asserted that Andrew had a history of abusing her during the marriage. She stated in her declaration that she had become partially disabled due to, among other conditions, scoliosis and osteoarthritis. She also stated that she had tried to become self-sufficient but that she needed to obtain a teaching credential to increase the pay she earned at Berlitz Language Institute.

In another declaration, Carmel acknowledged that she had been incarcerated for a year due to issues regarding alcohol addiction and stated that the court reduced her spousal support from $4,790 to $1,000 during her incarceration. Citing the court order indicating that her release from custody would constitute a change of circumstances, Carmel stated that she was released from jail on January 4, 2011, and sought an increase in her $1,000 monthly spousal support because she was homeless and wanted to enroll in an alcohol treatment program. She described the 18-month outpatient program she had located and stated that it required a $155 down payment and cost $90 per month. Her income and expense declaration indicated that her average monthly income was zero and her expenses were $1,196. Andrew's income and expense declaration indicated an average monthly income of $18,305 and expenses of $13,392.

On June 22, 2011, the court ordered Andrew to pay $2,500 per month in spousal support until either party died, Carmel remarried, or further court order. In May 2012, Andrew filed a request to terminate the order. He asserted in his declaration that Carmel could work as an interpreter or restaurant manager but had "not sought to do anything." He further stated that Carmel was incarcerated in October 2011 and had been in a rehabilitation facility as of January 2012. His income and expense declaration indicated that he worked 40 hours per week and earned $104.72 per hour (approximately $16,755 per month).[2] In her responsive declaration, Carmel stated that she was enrolled in a program to renew her certification as a personal trainer and had been applying for jobs on Craigslist and through Central Casting.

In December 2012, Carmel filed a request for an order that Andrew pay for her health insurance. She stated in her declaration that she had lost her health insurance when her spousal support was reduced to $1,000 and that her car had been repossessed. She had applied for hospitality and service jobs in restaurants, hotels, and shops, language instruction jobs at Berlitz and Los Angeles Unified School District, and various other positions, but was unsuccessful. She attached exhibits documenting her job application attempts.

The court denied Andrew's request to terminate spousal support but reduced the amount to $2,000 per month, beginning May 1, 2013. The court found that Carmel had tried to find work but might have been prevented from working because of her physical conditions.

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[2] The pages listing his expenses are not in the record.

Nonetheless, citing her alcohol abuse issues, the court found that her "conduct and success" were not reasonable and concluded that "her inabilities are largely of her own making and lack of heeding the admonition to become self-supporting."

In October 2014, Andrew again moved to terminate spousal support. His declaration listed the following in support of his request: Carmel "speaks four languages, has gone to school for interior design and worked in the film industry," although the job market for her skills was unknown; Carmel had been receiving support for 12 years; Andrew raised the children after the separation; Andrew's assets were "nominal" because of Carmel's alcoholism and spousal support payments; Carmel had been arrested "many times" since the separation and was incarcerated at the time; Carmel was 61 years old and her health condition was "[n]ormal" for her age. He asserted that "continued support will only enable [Carmel] to continue not working and being inebriated." Carmel's declaration indicated that she had no monthly income and monthly expenses of $2,720. In January 2015, the court suspended his payment of spousal support retroactive to October 2014 until further court order.

In December 2015, Carmel moved to receive $3,500 in monthly spousal support. She stated in her declaration that she was homeless and needed housing and health insurance. She had been incarcerated from October 2014 to November 2015 for a probation violation due to a disabled ignition device. She continued to suffer from chronic pain due to osteoarthritis and scoliosis and needed hip replacement and knee replacement surgeries. In his declaration in opposition, Andrew

asserted that Carmel had suffered 9 or 10 arrests for driving under the influence since their separation. He stated that Carmel speaks three languages and could teach English as a second language without a degree. He asserted that she had neither attempted to increase her skill set nor made a substantial effort to find a job.

In February 2016, the court denied Carmel's request and granted Andrew's. The court stated that it had considered Carmel's efforts to find a job from the date of separation and noted "numerous *Gavron* warnings in the file." The court further noted that in 2012 it had warned Carmel "that it intended to revisit spousal support in one year and that at some point spousal support 'just ends,'" and that three years had passed since that warning. The court found that Carmel had made "no real effort to seek full-time employment" in 14 years and that she "engaged in conduct that made it difficult or impossible to maintain full-time employment." The court therefore terminated spousal support. Carmel timely appealed.

DISCUSSION[3]

The trial court retains jurisdiction over spousal support in a marriage of long duration–that is, a marriage of over 10 years. (Fam. Code, § 4336, subds. (a)-(b).)[4] The court has "discretion to terminate spousal support in later proceedings on a showing of changed circumstances." (*Id.*, subd. (c).) The legislative goal of the spousal support statutes is "that the supported party . . . be self-supporting within a reasonable period of time." (§ 4320, subd. (l).)

"'Modification of spousal support, even if the prior amount is established by agreement, 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 trial court considering whether to modify a spousal support order considers the same criteria set forth in Family Code section 4320 as it considered in making the initial order.' [Citation.]" (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396 (*Dietz*).)

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[3] We decline respondent's request to strike certain statements in appellant's opening brief. We acknowledge that court rules require a brief to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) Although appellant could have provided more record citations, the citations she provides are adequate to permit a review of her claims.

[4] Unspecified statutory references are to the Family Code.

"Modification of spousal support based on consideration of the section 4320 factors constitutes error where the evidence does not show a material change of circumstances. [Citation.] 'The moving party has the burden of showing a material change of circumstances since the last order was made. [Citation.]' [Citation.]" (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1480.) "'Appellate review of orders modifying spousal support is governed by an abuse of discretion standard, and such an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances.' [Citations.]" (*Dietz*, *supra*, 176 Cal.App.4th at p. 398.)

Andrew's request for modification was based on Carmel's failure to become self-sufficient. A supported spouse's failure to become self-sufficient can constitute changed circumstances for purposes of modifying spousal support. (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1238 (*Shaughnessy*).)

In *Shaughnessy*, the parties married in 1979, and the court entered a judgment dissolving their marital status in 2003. In 2004, the husband moved the court to terminate spousal support or to issue a "jurisdictional step-down order pertaining to spousal support." (*Shaughnessy*, *supra*, 139 Cal.App.4th at p. 1233.) In April 2005, the court entered an order reducing spousal support beginning January 1, 2006, and terminating support on June 30, 2006, unless the wife "demonstrate[d] a compelling reason to extend the period of support." (*Ibid.*) The court's order was based on findings that included the following: the parties were married for 15 years; the husband paid

spousal support for almost 10 years; the wife was warned that she should begin to be self-supporting within seven years; the wife was still "'relatively young at 46 years of age'"; she had "'separate property investments in the amount of $500,000'"; and she received $20,000 per year from her parents. (*Id.* at pp. 1233-1234.) The appellate court affirmed, explaining that "a material change of circumstances warranting a modification of spousal support may stem from unrealized expectations embodied in the previous order. [Citation.] Specifically, changed expectations pertaining to the ability of a supported spouse to become self-supporting may constitute a change of circumstances warranting a modification of spousal support. [Citation.] Thus, if a court's initial spousal support award contemplates that a supported spouse will take some action to decrease the need for spousal support following the issuance of the order and the supported spouse fails to take that action, the court may modify the award on the ground of changed circumstances." (*Id.* at p. 1238.) "There is no requirement that the failure to exercise diligence in seeking gainful employment has been in bad faith. [Citation.]" (*Ibid.*)

Similarly, in *In re Marriage of Sheridan* (1983) 140 Cal.App.3d 742 (*Sheridan*), the wife moved to modify a spousal support provision in an interlocutory judgment of dissolution that reduced her support to zero after five years. The trial court denied spousal support, reasoning that although the husband had the ability to pay support, "in the five years since the interlocutory judgment former wife had done little to prepare herself for or to seek gainful employment." (*Id.* at p. 749.) On appeal, the court affirmed, reasoning that, although it "might have

ordered otherwise," the question whether there had been "unreasonable delay in seeking employment consistent with the party's ability" was "a question addressed peculiarly to the trial court which heard the party's testimony and observed the party's demeanor at trial." (*Ibid.*)

Here, as in *Shaughnessy*, the trial court relied on repeated warnings to Carmel of the need for her to become self-supporting. The 2003 settlement agreement indicates that the court issued a *Gavron* warning, and the warning was reiterated in 2006. A January 2010 order again gave notice that she must make reasonable efforts to become self-supporting. In April 2013, the court again stated that Carmel's employment efforts were not reasonable.

The record supports the trial court's findings that Carmel had been repeatedly warned of the need to become self-supporting and that her own conduct–specifically, her record of arrests and incarceration related to alcohol abuse–had "made it difficult or impossible to maintain full-time employment." In a June 2005 partial judgment regarding child custody issues, the court found that Carmel had "habitually and continuously abused alcohol" within the meaning of section 3011, subdivision (d). Following this 2005 finding, the record indicates that Carmel was incarcerated for alcohol-related issues at the time of the September 2009 hearing, in October 2011, and from October 2014 to November 2015.

In addition to the evidence that Carmel's failure to become self-supporting could be attributed, at least in part, to her alcohol-related issues, the record also contains evidence of her potential to support herself. The June 2009 vocational evaluation concluded that Carmel

could have earned $25,000 to $30,000 per year in administrative or sales positions.

The record of Carmel's repeated incarcerations due to alcohol-related issues supports the trial court's finding that Carmel's failure to become self-sufficient was due to her own conduct. (See *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 812 ["[A] supported spouse cannot make unwise decisions which have the effect of preventing him or her from becoming self-supporting and expect the supporting spouse to pick up the tab."].) Whether there had been "unreasonable delay in seeking employment consistent with [Carmel]'s ability" was a determination within the discretion of the trial court, "which heard [her] testimony and observed [her] demeanor at trial." (*Sheridan*, *supra*, 140 Cal.App.3d at p. 749.) Our review of an order modifying spousal support is for an abuse of discretion, which is established only when "'it can fairly be said that no judge would reasonably make the same order under the same circumstances. [Citation.]' [Citation.]" (*In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 1377.) We find no such abuse of discretion here.

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DISPOSITION

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

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.