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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of CAROLINE and ALBERT J. GRAZIOLI.	B237650 (Los Angeles County Super. Ct. No. BD414499)
CAROLINE WILSON GRAZIOLI, Appellant, v. ALBERT J. GRAZIOLI, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Reversed and remanded.

Cuneo & Hoover, J. Nicholas Cuneo, Janina A. Verano for Appellant.

Phillips Jessner, Gregory W. Jessner, Sanaea H. Daruwalla for Respondent.

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Caroline Grazioli appeals from trial court orders denying two motions concerning spousal support, in the family law proceedings arising from the dissolution of her marriage to respondent Albert Grazioli. We reverse.

Facts

The parties were married in 1981, and legally separated in 2004. The marriage was dissolved in March 2006, pursuant to a stipulated judgment.

The judgment provided, inter alia, that Albert[1] would pay Caroline spousal support of $6,900 per month until January 1, 2009. The judgment then set out a formula for calculating support after that time.

Under the formula, Albert's monthly obligation would be 3 percent of his average annual income for a specified time period, offset by 3.3 percent of Caroline's income in the same period. The judgment sets out examples, hypothesizing that Albert's average annual income would be between $175,000 and $250,000, and Caroline's would be between $20,000 and $60,000.

The judgment also set out procedures for an annual exchange of income tax returns and the adjustment of any underpayment or overpayment, based on those returns; a cap on the maximum income which could be attributed to Albert; and other provisions.

In addition, Albert waived any right to spousal support from Caroline. The judgment reads: "The termination concerning spousal support for Albert specified herein is absolute. This Stipulated Judgment cuts off forever the right of [Albert] to ask for spousal support, the power of the Court to order spousal support, and the right of [Albert] to ever seek/receive spousal support. No Court shall have jurisdiction in this matter to order any spousal support to [Albert] and, [Albert] shall have no right to make application therefore."

In March 2010, Albert filed an Order to Show Cause re Modification of Spousal support, seeking an order setting support at a fixed amount of $3,000 a month, and

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[1] For ease of reference, we refer to the parties by their first names.

terminating support in 2019. On November 1, 2010, the court denied the request, finding no material change in circumstances.

In its ruling, the court made some interesting findings: Caroline had some sporadic income during the marriage, but Albert was the breadwinner. The parties had a very high standard of living. Albert had recently lost one source of income, but had obtained other work and had not suffered any real hardship. Caroline was having difficulty making ends meet and was having trouble finding full time employment. Caroline had made little or no effort to become self supporting. The court warned her to take serious efforts to become self supporting.

Albert's motion apparently caused the parties to further discuss the judgment, and on November 5, 2010, the parties signed and the court entered as order a document titled Partial Stipulation Setting Current Support, Clarification of Terms, Attorney Fees.

This Partial Stipulation begins by reciting that the March 2006 judgment requires an annual recalculation of support and annual adjustment payment to correct any under or overpayment in the previous year, then recites that "It is the parties desire to clarify the terms of the Judgment entered March 7, 2006, and therefore stipulate and agree and request the court to order . . ." the terms which follow.

The Partial Stipulation then makes changes in the procedures for exchange of income tax return and the annual adjustment of support after the exchange. Then comes the problem: The Partial Stipulation provides, in paragraph 2(e), that for purposes of calculating support, each party's income would be the amount on line 22 of his or her federal 1040 income tax return.

Line 22 is the sum of several other lines, including wages, taxable interest, and, crucially, alimony. Later, both Caroline and her attorney declared that they did not know this fact.

Six months and one day later,[2] on May 6, 2010, Albert communicated with Caroline, contending that based on the Partial Stipulation, he had overpaid support in 2009, 2010, and 2011, so that Caroline owed him $109,321 in overpayments. Despite the strongly-worded waiver of support in the March 2006 judgment, Albert also claimed that for the calendar year 2010, and beyond, Caroline owed him $346 a month in support.

In response, Caroline wrote that paragraph 2(e) of the Partial Stipulation was clearly a mistake, and asked Albert to agree to modify the Partial Stipulation to correctly calculate Caroline's income. By letter, Albert refused.

On June 7, 2011, Caroline filed an order to show cause to modify spousal support and to set aside and modify a stipulation. The motion states that the relief sought is a modification of the November 2010 order, by deleting paragraph 2(e) and replacing it with the provision that the parties use Total Gross Income in their calculations.

The motion was brought under Family Code[3] section 2122, which concerns motions to set aside a judgment, and provides, inter alia, that a stipulated judgment may be set aside due to mutual or unilateral mistake of law or fact, and that the motion to set aside on that ground "shall be brought within one year after the date of entry of judgment." (§ 2122, subd. (e).)

Declarations from Caroline and her attorney accompanied the motion. Caroline declared that "At the time I entered into the stipulation I did not know that line 22 of the 1040 tax form included spousal support I received from [Albert]. This produces the absurd result that spousal support received is included in my income in calculating my

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[2] Under Code of Civil Procedure section 473, subdivision (b), "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

[3] All further statutory references are to the Family Code unless otherwise indicated.

spousal support! Of course, I did not intend this consequence when I executed the stipulation."

Caroline's lawyer declared that "At the time I executed the [Partial Stipulation] I was unaware that line 22 of the Federal 1040 tax form included [Caroline's] receipt of spousal support as a component of income."

Caroline's and Albert's 2010 income tax returns are attached, too. Albert's shows $153,163 in total income on line 22, composed of wages, interest income, and business income, and Caroline's shows $43,266, composed of $45,905 in alimony and a $3,103 business loss.

Albert's response contended, inter alia, that the motion was not one to set aside a judgment, but one to set aside a support order, and was governed by section 3691, which does not include mistake as basis for setting aside an order. He also argued that under basic contract principles, Caroline was bound by the document she signed.

Caroline's reply papers contended, inter alia, that under basic contract principles, the stipulation could be set aside based on unilateral mistake of fact.

On July 12, 2011, the court denied the request, finding that the issue was purely one of law, not of equity; that the order sought to be modified was not the March 2006 judgment but the November 2010 stipulation, that the motion was brought under section 2122, which refers to a motion to set aside a judgment, that the stipulation was not a judgment, and that "under the plain meaning of the statute that is at issue, the relief request is denied. The court is not going to look into whether there was a mistake, whether the provisions make sense. The court must look at the statutory basis for relief alleged in the moving papers and not in the reply papers. The court does not believe it's a proper use of reply papers to create a new statutory basis for relief."

Caroline then moved for modification of the support order based on changed circumstance, citing the mistake in the Partial Stipulation, the disparity between the parties' incomes, the effect of the Partial Stipulation, which meant that she was receiving no support, and Albert's demand for support. She requested an order that Albert pay

$4,000 a month, and also requested attorney fees. The motion was also addressed to the equitable powers of the court.

Caroline's accompanying declaration included the information about the case's history, and also included extensive information about her employment, her attempts to generate additional income, and her dire financial situation. She also declared that she had not received any support since March 2011.

On September 28, 2011, the court denied the motion, finding that the Partial Stipulation had led to "an absurd result," but that a stipulation modifying a judgment was not a change in circumstances under the Family Code, that the parties had knowingly and voluntarily agreed to the Partial Stipulation which led to the absurd result, and that "[t]he court . . . is not to modify a judgment because the parties subsequently entered into a stipulation which may have an unintended effect," and that the unintended effect was not a material change in circumstances.

Discussion

Caroline first argues that the Partial Stipulation is not a support order, but a modification of a judgment, so that it falls under section 2122, and was timely. We agree. The Partial Stipulation modified, and became part of, the judgment. The motion was properly brought under section 2122.

In re Marriage of Zimmerman (2010) 183 Cal.App.4th 900, cited by Albert, does not compel a different result. In that case, there had been several child support orders and hearings on modifications of child support orders. The orders we considered on the appeal were manifestly child support orders, and not a judgment. The petitioner's claim that the one-year statute of limitations found in section 2122 applied was thus unavailing. The case really has no relevance here.

We thus remand this matter so that the trial court can rule on the motion, on the merits.

Caroline's second motion, for modification of support based on changed circumstances, may be rendered moot by the trial court ruling, on remand, on her first

motion. It may not, however, so we reach that issue and find that there was a change in circumstances. The change was that a supported spouse was no longer supported, without any finding or stipulation that her need for support, or her former spouse's ability to pay support, had changed, or that such a result would be "just and reasonable," which is what a support order is supposed to be. (§ 4330, subd. (a); *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 481; *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.)

Albert argues that a modification of a support order cannot constitute a change of circumstances, because if it did, there would be a change of circumstances in every case. We say only that under the very particular and peculiar facts of this case, it is.

Once again, we reverse so that the trial court may consider the motion on its merits.

"Family law cases are 'equitable proceedings in which the court must have the ability to exercise discretion to achieve fairness and equity.' [Citation.]" (*In re Marriage of Egedi* (2001) 88 Cal.App.4th 17, 22-23.) Under that rule alone, the court should have considered the merits of both of Caroline's motions.

"'Equity . . . assert[s] itself . . . where right and justice would be defeated but for its intervention.' [Citation.]" (*In re Marriage of Egedi, supra*, 88 Cal.App.4th at pp. 22-23.) As the trial court acknowledged when it found that the Partial Stipulation led to an absurd result, this is such a situation.

Disposition

The appealed-from orders are reversed, and the matter remanded to the trial court for further proceedings consistent with this opinion. Appellant to recover costs on appeal.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J. KRIEGLER, J.