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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of NADIA and GINO AQUINO. (L

B279406 (Los Angeles County Super. Ct. No. MD042736)

NADIA AQUINO,

Appellant,

v.

GINO AQUINO,

Respondent.

APPEAL from an order of the Superior Court of Los
Angeles County, Robert J. Palazzolo, Commissioner. Reversed.
Kostas Law Firm, James S. Kostas; Law Offices of William
A. Koch, William A. Koch, for Appellant.
No appearance for Respondent.

INTRODUCTION

The trial court ordered Nadia Dickinson¹ to pay former spouse Gino Aquino \$15,000 in attorney fees pursuant to Family Code sections 2030 and 2032. The award was not based on Dickinson's income or assets, but on the trial court's assumption she had the ability to borrow the money to make the payment. We reverse.

BACKGROUND

In 2013, the parties entered into a stipulated marital dissolution judgment designed to resolve all issues between them. In 2014, Aquino returned to the trial court to set aside the entire stipulated judgment. The trial court left the stipulated judgment intact,² except for Dickinson's \$34,000 spousal support cash payment and the parties' mutual waiver of spousal support. Both parties appealed. In an unpublished opinion filed June 22, 2017, we reversed the set-aside provisions of the trial court's order and otherwise affirmed. (*In re Marriage of Aquino* (June 22, 2017, B270795) (*Aquino I*).)

In June 2016, while the appeal and cross-appeal in Aquino I were pending, Aquino returned to the trial court asking that Dickinson be ordered to pay \$50,000 for his attorney fees. A

Dickinson's former name was restored in the dissolution proceedings.

For example, the parties stipulated to award Dickinson sole legal and physical custody of the parties' minor child; to relieve Aquino of all child support obligations (but the trial court would retain jurisdiction to award child support in the future); that Dickinson would assume all community debts; and that she would pay \$5,000 towards Aquino's attorney fees.

portion of the requested sum was for fees already incurred to set aside the stipulated judgment. The rest was for anticipated attorney fees for the pending appeal and future trial court proceedings, assuming the trial court's previous order setting aside the spousal support provisions would be affirmed on appeal.

In a declaration in support of the motion, Aquino's attorney stated Aquino already incurred \$25,414.68 in postjudgment attorney fees in the mostly unsuccessful bid to set aside the stipulated judgment, with \$17,271.07 remaining unpaid. Aquino's counsel estimated the pending appeal and cross-appeal would involve an additional 80 hours of attorney time.

Aquino's income and expense declaration in support of the attorney fees motion reflected his employment as a financial advisor with Independent Capitol Management. He began that employment on October 3, 2014, and was paid on a commission basis. Aquino claimed "not to have made any money at Independent Capitol Management due to fees and debt of \$4.507."

Aquino listed other monthly income of \$100 for work as an UBER driver and a one-time \$800 payment for helping with an acting project. A separate declaration included supplemental income from employment as a bar back. Aquino had \$3,892.37 in a deposit account. He lived with an individual who earned \$4,000 per month, but she paid no household expenses.

Aquino pegged his monthly expenses at \$5,540 and claimed \$1,505.27 of that amount was paid by others. He owed \$36,754.48 in loans and an additional \$4,977.56 in credit card obligations.

3

³ In a separate declaration, Aquino stated he made \$550 per month at Independent Capitol Management.

Dickinson's declaration in opposition to the attorney fees motion advised she left her previous employment with Morgan Stanley in September 2014 and opened her own investment firm. Morgan Stanley sued her when she left. Although the matter apparently settled, Dickinson incurred \$78,000 in attorney fees and was "prevented" from pursuing over 30 percent of her client base. She borrowed \$337,500 to cover her firm's start-up costs and estimated her investment firm lost \$38,000 in 2015. Her firm lost \$19,525 in the first six months of 2016.

As part of the stipulated dissolution judgment, Dickinson assumed all marital debt, including a \$416,000 Morgan Stanley note. She then paid down the note to \$240,000 and negotiated a \$150,000 settlement of the balance, provided she paid \$10,000 upfront and the \$140,000 balance by January 2, 2017. If she failed to make the January 2, 2017 payment, Morgan Stanley would be entitled to a stipulated judgment in the amount of \$240,000. Dickinson had been borrowing against credit cards to pay her expenses and would not be able to pay the \$140,000 January payment.

In her opposing income and expense declaration, Dickinson stated she worked about 60 hours per week as an investment advisor and had \$25,118 in a deposit account. By the time of the hearing on Aquino's attorney fees motion the following month, however, Dickinson testified that sum was gone, having been paid to meet payroll and expenses. Dickinson received the parties' former marital home with its \$805,000 mortgage in the dissolution; the monthly payment was \$2,526.

Dickinson's total monthly living expenses, including the mortgage, were \$11,499.33. She had more than \$60,000 in credit card debt, owed \$67,000 on her car, and another \$68,000 for a

personal loan from Walter Dickinson. At the time she signed her income and expense declaration, she was current on her attorney fee obligations.

At the beginning of the hearing on Aquino's attorney fees motion, the trial court indicated a tentative decision to award Aquino \$15,000 pending the outcome of *Aquino I.*⁴ Aquino's counsel argued for an immediate award of \$50,000, or at least \$25,000 while awaiting this court's opinion in *Aquino I*. Dickinson's attorney argued she had no income stream at the present time and the "money is nowhere to be had except basically if she can possibly come up with the credit in order to do so." Dickinson also testified briefly.

The trial court advised it "balanced the need of [Aquino] and what I perceived is the limited ability of [Dickinson] to pay [¶] I have taken into consideration the fact that [Aquino] has little or no income . . . [and Dickinson] has apparently zero income . . . [and] monthly expenses close to \$12,000" The following colloquy then ensued:

"[The Court]: . . . I am assuming that [Dickinson] is borrowing money, has the ability to borrow money in order to pay her ongoing monthly living expenses and whatever attorney fees she's been paying in the past. [¶] I do think the court has the authority to grant attorney fees under Family Code section 2030 for costs of appeal.

"[Dickinson's Counsel]: Isn't it based on income?

The trial court also indicated it would defer ruling on Aquino's companion discovery request concerning spousal support until $Aquino\ I$ was decided. That ruling is not challenged in this appeal.

"[The Court]: Well, not just. It's need and ability to pay. It could be based on credit.

"[Dickinson's Counsel]: On her ability to —

" $[\P]$... $[\P]$ "

"[Dickinson's Counsel]: On her ability to borrow to pay the fees?

"[The Court]: Yes."

The trial court then ordered Dickinson to pay \$15,000 towards Aquino's legal fees at the rate of \$1,500 per month, but if two payments were more than 10 days late, the entire sum would become immediately due.

DISCUSSION

I. Applicable Law

Under Family Code sections 2030⁵ and 2032,⁶ a trial court may order one party in dissolution proceedings to pay the

⁵ All statutory citations are to the Family Code.

Section 2030, subdivision (a)(2) provides, "When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward."

other party's attorney fees and costs. The decision to award attorney fees and the amount of the award are to be "just and reasonable under the relative circumstances of the respective parties." (Mooney v. Superior Court of Santa Cruz County (2016) 245 Cal.App.4th 523, 536 (Mooney).) "The parties' circumstances include assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties." (In re Marriage of Winternitz (2015) 235 Cal.App.4th 644, 657 (Winternitz); In re Marriage of Duncan (2001) 90 Cal.App.4th 617, 630; see also § 4320.) "In addition to assessing need and ability to pay, the family court may consider the other party's trial tactics." (Winternitz, supra, 235 Cal.App.4th at p. 657.) We review the trial court's award of attorney fees under the abuse of discretion standard. (Ibid.)

⁶ Section 2032, subdivision (a) provides that the attorney fees award is to be "just and reasonable under the relative circumstances of the respective parties." Subdivision (b) explains the determination of "what is just and reasonable under the relative circumstances" must involve "consideration [of] the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately [T]hat the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." Finally, subdivision (c) explains, "The court may order payment of an award of attorney's fees and costs from any type of property, whether community or separate, principal or income."

Dickinson has not cited, and our independent research has not uncovered, a published appellate decision where an award of attorney fees under section 2030 was based on the paying party's assumed ability to obtain loans and then affirmed on appeal. In *In re Marriage of Hofer* (2012) 208 Cal.App.4th 454 (*Hofer*), it was "undisputed that [the husband had] substantial income and assets derived from his family's business." (*Id.* at p. 456.) He defied trial court discovery orders and refused to disclose "how substantial" his income and assets were. (*Ibid.*) At that point in the proceedings, he had paid his attorneys \$300,000; and the trial court ordered him to pay \$200,000 of the wife's attorney fees, most of which were incurred in futile and frustrated discovery efforts. On appeal, the husband argued the evidence was "uncontradicted . . . that he [would] be forced to borrow money [to pay the attorney fees award]." (*Id.* at p. 460.)

The Court of Appeal first rejected his argument⁸ and then rejected his appeal, dismissing it based on the disentitlement doctrine. (*Hofer, supra,* 208 Cal.App.4th at p. 461.) In a section of the opinion titled "Some Dicta," the Court of Appeal noted, "Neither [section 2032, subdivision (c)] nor any other authority prohibits the trial court from making orders that require [one] party to borrow money under appropriate circumstances [to pay

Aquino did not file a respondent's brief in this appeal.

[&]quot;He points to his own declaration to that effect. But [the husband] confuses uncontradicted evidence with credible evidence. The trier of fact may reject even uncontradicted evidence as not credible. . . . Indeed, in light of [the husband's] refusal to respond to discovery demands, there is little reason for the trial court to find anything he says about his finances credible." (*Hofer, supra*, 208 Cal.App.4th at p. 460.)

the other party's attorney fees]." (*Id.* at p. 460.) The attorney fees award stood, but it was not affirmed on appeal.

The appellant husband in *In re Marriage of Dick* (1993) 15 Cal.App.4th 144 also complained the trial court based its "spousal support and attorney fees awards . . . on his ability to borrow" (*Id.* at p. 160.) But the Court of Appeal characterized that argument as "deceptive": While the husband testified he would have to borrow funds to pay any such awards, it was "clear that the trial court utterly disbelieved him." (*Ibid.*) The attorney fees award was affirmed.

The husband in *In re Marriage of Keech* (1999) 75 Cal.App.4th 860 was also ordered to pay the wife's attorney fees at the rate of \$500 per month. Although the husband had a positive monthly income, the Court of Appeal reversed: "Thus, after payment of child and spousal support, taxes, and rent, husband had \$1,093 a month remaining. From this, the court ordered husband to pay wife's . . . attorney fees [at the rate of] 500 per month. . . . [¶] [W]hile it could perhaps be argued that leaving husband \$593 a month after court-ordered obligations, taxes and rent *might* be equitable under the parties' strained circumstances, the record does not sufficiently reflect, for example, any consideration of the husband's needs to pay his *own* outstanding legal fees during that period. Yet the court in making the order was required to 'take into consideration the need for the award to enable *each* party, to the extent practical, to have sufficient financial resources to present the party's case adequately." (Id. at pp. 867-868.)

II. Analysis

The trial court acknowledged Dickinson's credibility and "limited ability" to pay, finding she had "zero income" and substantial monthly expenses. Dickinson also had sole legal and physical custody of the parties' child and did not receive child support. Nothing in the record suggests the trial court disputed that Dickinson had more than \$1 million in debt. And nothing in the record supports the assumption that, having such debt, Dickinson still would have the ability to incur more.

The record does not reflect the trial court considered and determined whether there was a "disparity in access and ability to pay." (§ 2030, subd. (a)(2)). Aquino had "little or no income," but he lived with another adult who did have an income. Nor does it appear the trial court considered whether the attorney fees, incurred when Aquino challenged the stipulated judgment he entered into while represented by counsel, were "just and reasonable under the relative circumstances of the respective parties." (*Mooney, supra*, 245 Cal.App.4th at p. 536; Winternitz, supra, 235 Cal.App.4th at p. 657.)

This case does not present the *Hofer, supra*, 208 Cal.App.4th 454 "appropriate circumstances" that might justify an award of attorney fees based on one party's need to obtain a loan rather than on "any type of property" the party ordered to pay may own (§ 2032, subd. (c)). The attorney fees award was an abuse of discretion.

DISPOSITION

The order is reversed. Dickinson is awarded her costs on appeal.

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	DUNNING, J.*
We concur:	
KRIEGLER, Acting P. J.	
BAKER, J.	

^{*} Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.