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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of CHARLY and LISA NETEL.	B224954 (Los Angeles County Super. Ct. No. BD419954)
CHARLY NETEL, Appellant, v. LISA NETEL, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, John Sandoz, Judge. Affirmed as modified.

The Armenta Law Firm and M. Cris Armenta for Appellant.

Joel S. Seidel for Respondent.

Appellant Charly Netel (Husband) appeals from part of a dissolution judgment in favor of respondent Lisa Netel (Wife). Husband contends the trial court erred by: 1) admitting the testimony of Wife's expert forensic accountant; 2) valuing Husband's business as of the date of trial; 3) allocating the value of his business solely to community property; 4) failing to impute income to Wife; 5) finding his monthly income is $35,198; 6) finding the parties had an upper middle class standard of living; and 7) setting the length of the child support order. We conclude that Husband failed to object to the testimony of Wife's expert on the grounds urged on appeal. He failed to provide an adequate record to review of the trial court's denial of his request to use an alternate valuation date for his business. Our review of the record shows substantial evidence supports the trial court's findings. Wife concedes that the judgment should be amended to terminate child support in accordance with Family Code section 3901. Therefore, we order the judgment amended as to the termination date of the child support order and affirm in all other respects.

FACTS AND PROCEDURAL BACKGROUND

Husband is a certified public accountant with his own corporation. The parties were married in July 1991. Husband's personal income tax return for 1991 showed an adjusted gross income of negative $132,000. The parties had a daughter born in February 1993 and a son born in June 1994. They lived in a 3800-square-foot, 4-bedroom home in Encino. They had a daily housekeeper, ate at fine restaurants, shopped at expensive stores, stayed at luxury hotels, and attended the theatre. Their children attended a private school that cost approximately $28,000 per student. Husband took a salary of $227,500 for the fiscal year ending June 2003 and $200,000 in 2004. The parties' expenses in 2004 were $321,994. The parties separated in September 2004 after a marriage of 13 years. Husband filed a petition for dissolution of marriage on January 25, 2005.

Husband provided profit and loss statements for his business showing the following gross revenues: $744,845 for the fiscal year ending June 2005; $859,472 for

the year ending June 2006; and $1,115,843 for the year ending June 2007. Husband took a salary of $90,000 for the year ending in June 2005, but no salary for the next two years. The statements showed the corporation's net income after expenses was $127,084 in June 2005; $23,469 in June 2006; and $95,997 in June 2007.

Wife is self-employed as a personal shopper and works approximately 12 to 16 hours per week. She earned $2,584 per month for the year ending December 2008.

Wife propounded special interrogatories requesting additional information about the expenses that Husband claimed were required for the operation of his business. Husband's responses simply stated that the expenses were ordinary and necessary. The trial court granted Wife's motion to compel further responses. Husband provided responses and documents. In February 2008, the court granted Wife's motion to preclude Husband from presenting any evidence at trial that certain business expenses were required for the operation of the business beyond the responses that had been provided in discovery.

Husband's personal income and expense declaration in February 2008 stated that he had a salary of $9,200 per month and monthly expenses of $21,168.

In the fall of 2008, the trial court granted Wife's motion for Husband to provide the corporation's profit and loss statement for the year ending June 2008, as well as documents supporting the income and expenses claimed in the statement. The court specifically noted that Husband was not precluded by the prior evidentiary exclusion order from introducing these documents as evidence at trial. After the deadline for production of documents passed on October 1, 2008, the court granted Husband's ex parte request for a two-week extension. However, Husband never produced the documents.

On October 31, 2008, Husband filed an ex parte request to have his business valued as of the date of separation. No reporter's transcript or settled statement has been provided for the October 31, 2008 hearing. The minute order reflects the trial court denied Husband's motion for an alternate valuation date because it was untimely. The

court also precluded Husband from introducing profit and loss evidence for June 2008 that he had failed to produce in discovery.

On November 17, 2008, Husband represented to the trial court that he would not be calling any witnesses or presenting any exhibits at trial.

A bench trial took place over 18 days between March 4, 2009, and September 11, 2009. Expert forensic accountant Laurence Kaufman testified that certain expenses listed for Husband's business were in fact perquisites that should be added back into net income. After adding back various expenses, Kaufman testified that the corporation's net income was $318,414 in 2005, $313,783 in 2006, and $529,428 in 2007. Kaufman concluded Husband's "normalized profitability" for his practice was 43.6 percent of gross income. Considering all three years and giving 2007 the greatest weight, Kaufman opined that Husband's gross income available for support is $35,198 per month. Kaufman opined that the business had a value of $1,340,000 as of June 30, 2007.

Expert witness Roy Braatz is a business broker specializing in the sale of CPA firms, tax, and accounting practices. Braatz testified that accountancy practices usually have net income that is approximately 45 to 55 percent of gross revenue.

On April 27, 2010, the trial court entered judgment on reserved issues and issued a statement of decision. The court found the parties' marital standard of living was upper middle class. The court noted that Husband did not provide any current financial information after June 30, 2007. The court credited Kaufman's testimony about adding back perquisites to determine the amount of Husband's actual income. Based on these amounts, the court found Husband's gross income after deducting necessary expenses for the operation of his business is $35,198 per month. No evidence showed that Wife had the opportunity or ability to earn more than she earned as a personal shopper in 2008. Therefore, the court found Wife's gross monthly income was $2,584 and did not impute additional earnings to Wife, because there was insufficient evidence regarding available employment opportunities. The court noted that Husband became an accountant prior to his marriage and Wife's forensic accountant had sought documentation to enable him to calculate a separate property component to the value of the practice. However, Husband

did not provide any information on the value of the practice prior to the date of marriage to Wife's expert or at trial. The court also noted that Husband's request to value the practice as of the date of separation had been denied, and Husband did not submit any evidence as to the value of his practice at the date of separation or any other date thereafter. The court found the practice had a value of $1,340,000 based on the expert testimony. Husband filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

A judgment of a trial court "is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "The burden of demonstrating error rests on the appellant. [Citation.]" (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

"When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.*, *supra*, 68 Cal.App.4th at p. 632.) In applying the substantial evidence standard of review, "'the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) "The substantial evidence standard applies to both express and implied findings of fact made by the superior court in its statement of decision rendered

after a nonjury trial. [Citation.]" (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.)

"It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630.) In other words, we do not evaluate the credibility of the witnesses or reweigh the evidence. (*Id.* at p. 629.) Rather, "we defer to the trier of fact on issues of credibility. [Citation.]" (*Lenk v. Total–Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

Testimony of Expert Witness

Husband contends the trial court erred by admitting the testimony of expert witness Kaufman, because his opinions had no evidentiary support or were speculative. However, Husband has failed to cite any objection that he made to Kaufman's testimony in the trial court which he claims the trial court ruled on incorrectly.

"'[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.' [Citation.] The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court. (See Evid. Code, § 353, subd. (a) [evidentiary objection must be timely made and articulate specific ground for objection].)" (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649.) "'It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial. [Citations.]' [Citation.]" (*Cabrini Villas Homeowners Assn. v. Haghverdian* (2003) 111 Cal.App.4th 683, 693.)

Husband had ample time to object to Kaufman's testimony as an expert witness. Husband's attorney cross-examined Kaufman extensively. In Husband's briefs on appeal, he cites testimony in which Kaufman admitted that a particular report contained multiple errors, which were revealed during cross-examination and corrected. However,

at no time following Kaufman's admission of errors did Husband object to his testimony or request it to be stricken. Husband has forfeited this contention on appeal. (Evid. Code, § 353, subd. (a).) We allowed the parties to submit additional briefing as to whether Husband made any timely objection in the trial court. In Husband's letter brief, he refers to statements that he made in his closing argument and in response to the trial court's tentative decision which concern the weight and credibility of Wife's evidence. He did not object to the admissibility of the evidence.

Valuation Date

Husband asserts that he requested numerous times for his business to be valued as of the date of separation. However, the only request in the record is an ex parte motion, which the trial court denied on October 31, 2008. Without a reporter's transcript or settled statement of the October 31, 2008 hearing, the record is inadequate to review Husband's contention that the trial court erred by denying his motion to value the business as of the date of separation, rather than the date of trial.

Family Code section 2552 provides for assets and liabilities to be valued "as near as practicable to the time of trial." (Fam. Code, § 2552, subd. (a).) However, "[u]pon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner." (*Id*., subd. (b).)

"In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P*. (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447,

[trial transcript when attorney fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385–386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713–714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71–73 [transcript of argument to the jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript of settled statement].)

"The reason for this follows from the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented."' (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) '"A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed."' (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) 'Consequently, [appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].' (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–188.)

We cannot review the trial court's ruling on the ex parte motion for an alternative valuation date, because Husband has failed to provide a reporter's transcript or settled statement of the hearing on October 31, 2008.[1] The minute order reflects the trial court's finding that Husband's request to use the date of separation was untimely. On appeal, Husband fails to address the timeliness of his request for an alternate valuation date. In addition, no harm has been shown, because there is no evidence that the value of the business on the date of separation was any different from the value established by the court.

Apportionment

Husband contends the trial court erred by failing to apportion the value of his business between separate and community property. We conclude the trial court's findings are supported by substantial evidence.

In California, property acquired before marriage is separate, whereas property acquired during the marriage is presumed community property. (Fam. Code, §§ 760, 770.) "Income from separate property is separate, the intrinsic increase of separate property is separate, but the fruits of the community's expenditures of time, talent, and labor are community property." (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850; see also § 770.) Appellate review of a trial court's finding that a particular item is separate or community property is limited to whether any substantial evidence supports the finding. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421; *In re Marriage of Dekker*, *supra*, at p. 849.)

It is undisputed that Husband established his business prior to marriage, and therefore, if the business had any value at the time of marriage, that value should be accounted for in the allocation of separate and community property. It is also undisputed

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[1] We gave Husband an opportunity to address this issue through additional briefing. Husband's response was that he does not have a sufficient recollection of the hearing to agree on a settled statement. This is not sufficient to allow review on appeal.

that an increase in the value of Husband's business after the date of separation due to his post-separation efforts would be attributable to his separate property. There was no evidence, however, that the business had any value at the time of the marriage, and no evidence that the value of the business increased after the date of separation. Therefore, the trial court's finding that the entire value of the business should be allocated to the community was supported by the evidence at trial.

In the statement of decision, the trial court acknowledged that a portion of the business was separate property, but noted that there was no evidence to suggest that separate property interest had any value. Husband does not cite any evidence which he contends that the trial court should have used to value his separate property interest in the business. Although Husband argues the trial court could have used a "regression" method to establish the value of the business, there is no evidence of the values that would be obtained under this method. Substantial evidence supports the trial court's findings that Husband failed to show any portion of the value of the business was attributable to his separate property interest.

Imputation of Income

Husband contends the trial court should have imputed additional income to Wife based on her ability to work additional hours. However, the court correctly found that Husband failed to meet his burden of proof on this issue.

The trial court is not limited to a parent's actual income when setting child support. (*In re Marriage of Destein* (2001) 91 Cal .App.4th 1385, 1391.) Family Code section 4058, subdivision (b), provides: "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." Under section 4058, "'Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment;

and (3) an opportunity to work which means an employer who is willing to hire. [Citations.] [¶] . . . When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the standard is inappropriate. . . .'" (*In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 81-82.)

"The 'opportunity to work' exists when there is substantial evidence of a reasonable "likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income.' [Citation.] 'Figures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation.' [Citation.] 'To calculate support based on the hypothetical procurement of a job which the evidence showed was not available to [the parent] would effectively write the "opportunity" element of earning capacity out of existence.' [Citation.]" (*In re Marriage of Smith, supra,* 90 Cal.App.4th at p. 82.) The party seeking the imputation of income to the nonworking parent bears the burden of offering competent evidence of the nonworking parent's qualifications, earnable salary, and job opportunities. (*In re Marriage of Henry* (2005) 126 Cal.App.4th 111, 120.)

Husband failed to present evidence that Wife had additional work available to her as a personal shopper or that other job opportunities existed for which she was qualified. In the absence of specific evidence concerning job opportunities, the trial court correctly declined to impute income to Wife.

Husband's Monthly Income

Husband contends the trial court's finding that his monthly income is $35,198 is not supported by substantial evidence. This is incorrect.

Kaufman testified that after adding back certain perquisites, the net income of the business in 2005 was $318,414; in 2006 was $313,783; and in 2007 was $529,428. For these three years, Kaufman concluded Husband's "normalized profitability" for his practice was 43.6 percent of gross income. Considering all three years and giving 2007 the greatest weight, Kaufman opined that Husband's gross income available for support

was $35,198 per month. Braatz testified that accountancy practices usually have net income that is approximately 45 to 55 percent of gross revenue. This evidence was sufficient to support the trial court's finding that Husband's monthly income is $35,198.

Husband argues for the first time in his reply brief that particular expenses should not have been added back to the net income of the business. It is a well-settled rule that appellate courts will not consider an argument made for the first time in a reply brief, unless good reason is shown for the failure to present it before. (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022.) Husband could have made his arguments about specific expenses in his opening brief, which would have given Wife an opportunity to respond as to whether each of the expenses was correctly added back to net income. In his reply brief, Husband also makes contentions for the first time about Wife's expenses. The contentions have been forfeited for failure to raise them in the opening brief. In addition, we do not reweigh the evidence or the credibility of witnesses on appeal.

Upper Middle Class Standard of Living

Husband contends the finding that the parties had an upper middle class standard of living was not supported by substantial evidence. We disagree.

The evidence showed that the parties' personal expenses in 2004 were $321,994. During the marriage, they lived in a 3800-square-foot, 4-bedroom home in Encino. Their children attended a private school that cost approximately $28,000 per student. The parties had three vehicles at their disposal: a Mercedes station wagon, a Jeep, and a Mercedes convertible. Wife testified that they had a daily housekeeper, ate at fine restaurants, shopped at expensive stores, stayed at luxury hotels, and attended the theatre. This evidence, in addition to the evidence of Husband's income, was more than sufficient to support the finding that the parties lived an upper middle class lifestyle.

Since we have determined the trial court's findings were supported by substantial evidence, there is no issue as to the amounts of the spousal and child support orders based on the findings.

Termination of Child Support

Husband contends, and Wife concedes, that the termination dates for child support stated in the judgment are ambiguous.

Family Code section 3901 provides that a parent's duty to support his or her child "continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first."

The judgment in this case awards child support as follows: "[Husband] shall pay to [Wife] as in for child support the sum of $4,997 per month, to wit: $1,866 per month for [son] and $3,130 per month for [daughter] . . . continuing until further order of Court or as to each child until said child reaches the age of 19, reaches the age of 18 and is not a full-time high school student and is self-supporting or said child marries, dies or is otherwise emancipated."

The parties agree that the child support order should be amended to provide that Husband's child support obligation continues as to each child until the child reaches the age of 19, reaches the age of 18 and is not a full-time high school student or is self-supporting, or the child marries, dies or is otherwise emancipated, whichever occurs first.

DISPOSITION

The judgment is amended to provide that Husband's obligation to pay child support continues "until further order of Court or as to each child until said child reaches the age of 19, reaches the age of 18 and is not a full-time high school student or is self-supporting, or said child marries, dies or is otherwise emancipated, whichever occurs

first." As amended, the judgment is affirmed. Respondent Lisa Netel is awarded her costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.